



Neutral Citation Number: [2021] EWHC 1968 (Ch)

Case No: IL-2020-000091

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

Remotely at:  
The Royal Courts of Justice  
7 Rolls Buildings  
Fetter Lane  
London, EC4A 1NL  
Date: 14 July 2021

Before :

**DEPUTY MASTER RAEBURN**

Between:

**MARLA INTERNATIONAL LIMITED**

**Claimant**

- and -

**READY4S LIMITED**

**Defendant**

Jonathan Moss (instructed by Ince Gordon Dadds LLP) for the Claimant  
Oliver Caplan (instructed by McHale & Co) for the Defendant

Hearing date: 26 February 2021

**APPROVED JUDGMENT**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 14 July 2021 at 2 pm.

## **Deputy Master Raeburn:**

### **Introduction**

1. This is my decision on the Defendant's application to set aside an order for judgment in default entered on 10 November 2020 with respect to liability for breach of contract and misrepresentation. The application has been made pursuant to CPR 13.2 or, in the alternative, CPR 13.3.
2. The Claimant is a company that sells computer software for accounting purposes. It pleads in its Particulars of Claim (and it is not open to serious doubt) that its relationship with the Defendant came about in 2018 in connection with the UK Government's plan to introduce the "Making Tax Digital" ("MTD") regime under which certain private companies were permitted to develop and market software for use by end-users to file their tax returns with HMRC via a digital portal.
3. The Defendant is a software development company which the Claimant engaged in order to produce alternative versions of existing software applications entitled "EasyBooks" and "EasyInvoices" which were originally compatible with Apple, Inc operating systems. The Defendant was engaged to produce new versions of those software applications which would be compatible with the Android operating system. There is a dispute as to the nature and terms of the contract between the parties, but it appears to be common ground that there was some form of "Development Agreement" entered into between the parties.
4. At the hearing before me, Counsel for the Defendant sought to make an additional oral application (without notice) to withdraw admissions that had

been made in its instructing solicitors' witness statement dated 17 November 2020. That witness statement was made by Mr. Paul Fitton of McHale & Co in support of the Defendant's earlier application to vary the order for judgment in default, the relevant paragraph of which stated:

*"The Defendant does not content [sic] the Claimant owns the intellectual property in question".*

5. Counsel for the Claimant resisted any hearing of the oral withdrawal application and with agreement from both Counsel I: (i) heard the respective parties' submissions on the set aside application only; (ii) ordered the Defendant to make a formal application for permission to withdraw pursuant to CPR 14.1; and (iii) adjourned both the set aside application and the withdrawal application to a further hearing on the first available date after 8 April 2021.
6. However, the Defendant failed to make any subsequent application to withdraw the admission. I therefore proceed to decide the set aside application and here give reasons for my decision.

### **The Defendant's application to set aside under CPR 13.2**

7. CPR 13.2 requires the Court to set aside a judgment entered under Part 12 if it was wrongly entered. In relation to a judgment entered in default of an acknowledgment of service, that judgment will have been wrongly entered if any of the conditions in CPR 12.3(1) was not satisfied at the time the Claimant obtained judgment. If the Defendant succeeds on this element of the

application then the Court must set aside the order; there is no room for discretion.

8. The Defendant's application on this ground arises from a dispute between the parties as to whether the Claim Form and Particulars of Claim were in fact physically dispatched (and therefore validly served) on the Defendant at its service address.
9. The Claim Form was issued by the Claimant on 21 August 2020 following pre-action correspondence between the parties' solicitors by email. It is accepted by the Defendant that the service address was correct, it being the Defendant's registered company address. That address is endorsed on the certificate of service produced by the Claimant which states that the Claim Form, Particulars of Claim, Response Pack, Notes for Defendant and Defence and Counterclaim form were all sent by first-class post on 24 August 2020. Accordingly, the Claim Form and Particulars of Claim are deemed to have been served on the second working day after posting, 26 August 2020.
10. Counsel for the Defendant submits that although the Claimant relies on its certificate of service evidencing its service of the Claim Form and Particulars of Claim, these were never actually received by the Defendants and contends that the physical envelope containing the Claim Form and Particulars of Claim may not have been dispatched at all.
11. The principal evidence relied upon by the Defendant is in the form of a witness statement dated 1 December 2020 from Mr. Zbigniew Krakowski a director of Cracovia Limited, which shares the same address as the Defendant's registered company address and provides postal forwarding

services to the Defendant by sending scanned copies of letters that are received at that address and marked for the attention of the Defendant. Mr. Krakowski's evidence is that due to the COVID-19 pandemic, his staff worked from home and attended the office twice a week to fulfil their postal forwarding obligations. He says that due to the pandemic, postal deliveries are left in a reception on designated shelves, which has "*led to some confusion and delays as some post has been incorrectly placed on the wrong shelf*". He confirms however that his company did not receive several copies of correspondence from the Claimant's solicitors, other than two letters dated 3 November 2020 and 12 November 2020.

12. In support of this submission, Counsel for the Defendant says the following factors are "telling", which I understand to mean that he says they are indicative of some form of foul-play or error on the part of the Claimant, their solicitors, or some other third party: (i) the Defendant had substantially engaged with the Claimant's solicitors by email (and not by post) until May / June 2020, which then ceased; (ii) the Claimant was aware that the Defendant's business operations were substantially based in Poland and no email from the Claimant or its solicitors advising that the documents had been served at the service address had been sent; (iii) the Claimant would have known that physical presence at the Defendant's commercial premises would be substantially reduced due to the COVID-19 pandemic; and (iv) the Defendant did however receive a bundle on 7 November 2020, some days before the hearing for judgment in default and that it was unusual to have received that successfully but not the Claim Form and Particulars on the earlier dates if they had in fact been sent.

13. The Claimant's position in essence, is that the Defendant's allegations are made without evidential or legal basis and that the submissions advanced by Counsel for the Defendant effectively contend that the certificate of service in question is false, which is tantamount to an allegation of fraud.
14. In my judgment, the Defendant has failed to make out a conceivable basis upon which judgment in default was wrongly entered pursuant to CPR 13.2. The evidence before the Court is that service was duly effected upon the Defendant. I remind myself that in the context of an application for default judgment CPR PD 12, para 4.1(1) provides that a certificate of service on the Court file will be "*sufficient evidence*" that the Particulars of Claim have been served on the Defendant.
15. I am satisfied that the certificate of service is compliant; it is in form N215 and states the category of address at which the Claimant believes the claim form has been served; CPR 6.17(3)(a). The box is ticked stating that the documents were sent by first class post or other service which provides for delivery on the next business day and states the date on which the documents were posted, 24 August 2020; CPR 6.17(3)(b). Importantly, it contains a statement of truth verifying the facts stated, which has been signed by the Claimant's solicitor.
16. The evidence to which I have referred supports the conclusion that that the Claim Form and Particulars of Claim were posted to the Defendant's registered company address. There is no intimation from the Claimant that the documents had not been successfully delivered. I find it to be more likely than not that the Claim Form and Particulars of Claim were in fact received at the Defendant's registered company address.

17. In this context, the Civil Procedure Rules do not require the Claimant to prove that documents are received by the Defendant. The issue is whether they were validly served, which based on the evidence, I find that they were. Accordingly, the conditions in CPR 12.3(1) were satisfied and the application on this ground must fail.
18. For the reasons given, I therefore dismiss the Defendant's application made pursuant to CPR 13.2.

### **The Defendant's application to set aside pursuant to CPR 13.3**

19. I turn to the second basis for the Defendant's application pursuant to CPR 13.3, which provides that the Court may set aside or vary a judgment entered under Part 12 if: (i) the Defendant has a real prospect of successfully defending the claim or, alternatively; (ii) where it appears to the Court that there is some other good reason why judgment should be set aside or varied, or why the Defendant should be allowed to defend the claim.
20. It is well known that the Court's discretion to set aside judgment in default is a broad one which must be exercised in furtherance of the overriding objective. It is not however to be exercised lightly as its effect is to deprive the Claimant of a regular judgment which has otherwise been validly obtained.

### *Promptness*

21. CPR 13.3(2) requires the Court to take into account whether the Defendant made their application promptly. I am satisfied that it did. The order for judgment in default was granted on 10 November 2020 and an application to vary that order to extend certain deadlines and for directions on the proposed

application was made by the Defendants on 17 November 2020. At the hearing of that application, the Defendant was ordered to make the present application by 1 December 2020, which it complied with.

*Real prospect of successfully defending the claim*

22. In order to succeed in its application under CPR 13.3(1)(a), the Defendant must have a real prospect of successfully defending the claim. Counsel for the Defendant referred to Swain v Hillman [2001] 1 All E.R. 91, in support of the proposition that a real prospect of success is one which is not fanciful. It is also clear from Swain v Hillman that where there are significant differences between the parties so far as factual issues are concerned, the Court is in no position to conduct a mini-trial. The Court must consider whether the Defendant has a "realistic" defence, which is one which carries some degree of conviction and is more than merely arguable; E D & F Man Liquid Products v Patel [2003] EWCA Civ 472. In reaching its conclusion the Court must take into account not only the evidence before it, but also that which can be reasonably be expected to be available at trial; Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 and Mellor v Partridge [2013] EWCA Civ 477.

23. Broadly, Counsel for the Defendant makes two submissions. First, he relies upon the contents of the Defendant's Draft Defence as disclosing a real prospect of successfully defending the claim. Second, he says the relief granted in the form of a publicity order should only rarely be granted by this Court and was inappropriate in the context of this case. I will deal with these in turn.



24. Counsel for the Defendant says that it is clear from the parties' respective statements of case that they fundamentally disagree as to the nature of the Development Agreement, the construction of its terms, whether it was varied and/or replaced and whether there has been adequate compliance by either party with their respective obligations. Accordingly, he submits that given there is a "genuine dispute at the heart of the matter", the order for judgment in default should be set aside.
25. For the sake of brevity, I summarise key parts of the defences briefly as follows:
- i) In defence to the Claimant's claims for seven specific breaches of the Development Agreement, the Defendant:
    - a) denies failing to provide a minimum viable product of Android EasyBooks, the Rewritten Apple EasyBooks and the EasyBooks Web Application to the Claimant;
    - b) denies that it failed to deliver the "Application" to the Claimant in time for the MTD regime and avers that it was not at any time an express term of the Development Agreement that EasyBooks products or part of them, were to be provided in complete form by the dates averred by the Claimant. The Defendant further pleads that any slippage of time for delivery of the products occurred as a consequence of the Claimant's own extended scope of the Development Agreement, which it says was accepted upon the Claimant's own evidence;

- c) denies the claim for failing to accurately record time and puts the Claimant to proof that any overbilling took place;
- d) denies that it failed to properly staff and resource the project, although it admits staff were "switched" from the project which contributed to some delay, but that the main cause of significant delays were in fact as a consequence of the Claimant's requested increase in the scope of the project and replacement / variation of the same;
- e) denies failing to properly document code and asserts that the Claimant failed to request the Defendant to update or maintain the underlying technical guides as necessary;
- f) denies failing to assign intellectual property rights in the development work to the Claimant in breach of the Development Agreement; it says all IP rights in the development works under the agreement are owned by the Defendant subject to payment of its incurred costs;
- g) denies that the Defendant's threats to disseminate code forming part of the development work constituted a breach of the Development Agreement and avers that the Claimant remained indebted to the Defendant and in the absence of payment, the Defendant was entitled to retain part of the code relevant to that liability.

ii) In defence to the Claimant's claims for misrepresentation, the Defendant:

a) denies that it was an express term of the Development Agreement that EasyBooks products would be completed by April 2019 (and avers that in any event, the Development Agreement was replaced and in the alternative varied). It denies that it gave any assurances by representation or otherwise to this effect; and

b) admits that it represented to the Claimant that it had the requisite ability to deliver the re-written Apple and Android EasyBooks products, but that these were not completed as a result of the Claimant's unlawful termination of the Development Agreement.

26. The Claimant's position is that the Draft Defence is weak, contains very little by way of positive defence and is in effect, an attempt to re-write history. In addition, Counsel for the Claimant contends that the Defendants have insufficient evidence upon which they can rely in order to establish the "real prospect" test.

27. Counsel for the Claimant also relies, amongst others, upon the following examples within the Defendant's Draft Defence (and in the Defendant's evidence in support of its set aside application) as supporting its submissions that the Defendant has no real prospect of successfully defending the claim:

- i) In relation to the defence that it was not a term of the Development Agreement that the works were to be created before the MTD regime came into effect, the Claimant refers to the deficiencies in the Defendant's evidence filed in support of its set aside application; specifically the witness statement dated 23 February 2021 from Mr. Tomasz Tybon, a consultant engaged by the Defendant. Mr. Tybon states that "*it was never a term of the Development Agreement that the instructed works would be completed by or before the coming into force of the MTD regime*". Counsel for the Claimant submits that it is unclear how Mr. Tybon has knowledge of the Defendant's intentions in connection with the Development Agreement, given he is not employed by the Defendant and provides no indication in his evidence as to how he has such knowledge.
- ii) Counsel for the Claimant also says that the Draft Defence is inconsistent. The Defendant's deny that the Android Easybooks were to be made in time for the MTD regime coming into effect on the basis that the time for the completion of the works was subject to "continual review". However the Draft Defence then admits the paragraphs of the Particulars of Claim which plead that there was a fixed number of development hours agreed for the creation of Android EasyBooks – namely 1,402.
- iii) As to the Defendant's defence to claims for failure to assign intellectual property rights in the development work to the Claimant, Counsel for the Claimant submits that the Defendant advances a defence which is

wholly inconsistent with the available evidence. Referring to Mr. Tybon's witness statement, the Claimant says that this again contains statements that simply deny that it was an agreed term of the Development Agreement that the Claimant would acquire the intellectual property rights that vested in the development works. It also denies that Mr. Olaf Lesniak (who at all material times was the Defendant's Business Development Manager) had the requisite authority to enter into an agreement with the Claimant in relation to the terms of ownership of intellectual property at all. Counsel for the Claimant submits that this denial / argument cannot be advanced because:

- a) there is contemporaneous evidence in which Mr. Lesniak of the Defendant responds to a request from the Claimant for confirmation from the Claimant that it will own all intellectual property rights in the works created under the Development Agreement and Mr. Lesniak states: "*Yes you will own all the Intellectual Property rights*";
- b) there is an admission in the Defendant's solicitors' witness statement dated 7 November 2020 which states that there is no dispute between the parties as to the ownership of intellectual property in the relevant works; and
- c) the Defence admits that Mr. Lesniak was, at all material times, the Defendant's Business Development Manager and was the person that entered into email correspondence with the

Claimant in connection with the proposed engagement. It is submitted that any argument that Mr. Lesniak did not have the requisite authority is a fabrication and no document or evidence has been adduced to support this averment.

28. Whilst I accept the Claimant's submission that the Draft Defence contains little by way of positive defence, I am not able to say that the Defendant has no real prospect of successfully defending each and every one of the claims made against them, some of which, in my view will require further investigation and assessment of evidence which would be reasonably expected to be available at trial.
29. I cannot therefore resolve the conflict between the parties' respective cases on this application to the extent that I can say that the Defendant has no real prospect of successfully defending each and every one of them. I now turn to each of the seven claimed breaches of contract:
30. *Failure to provide a minimum viable product:* As indicated above, it is claimed that the Defendant failed to provide a minimum viable product to the Claimant under the Development Agreement, such that the quality of the EasyBooks applications fell significantly short of that which would enable it to go to market. It is said that the Defendant erroneously considered that a minimum viable product of the Android EasyBooks application was provided to the Claimant which was then released on the Google Play Store on 16 September 2019 and subsequently removed on 17 December 2019 because the product was fundamentally unusable.

31. The Claimant lists a number of "unavoidable problems" in the Schedule to its Particulars of Claim, which include a list of faults and examples of how the Defendant deviated from standard and accepted practice. Examples of such faults include the following:

<u><i>Nature of fault</i></u>	<u><i>Examples of how Defendant deviated from standard accepted practice</i></u>
<i>Bugs and quality of coding</i>	<p><i>Much higher than normal bug count, constant revisions of software code</i></p> <p><i>Inability to properly prioritise the resolution of bugs</i></p> <p><i>No automated testing or proper QA process or test cases</i></p>
<i>App not fit for sale, Cannot be used by more than a few customers with normal amounts of data</i>	<p><i>No caching of data for performance (non - viable solution at scale)</i></p> <p><i>No search capability</i></p> <p><i>No paging (non- viable solution at scale)</i></p>

	<p><i>Failure to implement various other development standard features such as dark mode screen, screen rotation, attachments, free trial sign up, credit notes and refunds function.</i></p>
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32. In short, the Draft Defence denies the claim and asserts that it is defective for want of particularity. The Defendant has not however adduced detailed evidence in support of its defence that the minimum viable product threshold was in fact met; it simply reserves the right to plead further and relies on what it says was evidence from the Claimant of an expression of satisfaction with the quality of the work undertaken by the Defendant.
33. The evidence relied on by the Defendant is in the form of an email dated 7 November 2019 from the Claimant to the Defendant in which it sought to terminate the Development Agreement and included the following statement, *"I would like to thank all of the hard working developers at R4S who have worked on our project, this is in no way a reflection on their work."*
34. The burden of this application lies with the Defendant to effectively establish why, (despite the pleaded case and the judgment entered against it) it has a real prospect of successfully defending this claim.
35. As pleaded, there is a case against the Defendant that it failed to provide a product of a sufficient standard to allow the Claimant to commercialise the software application in the manner intended. Whilst the technical nature of the



pleaded defects to which I have referred are not extensively detailed at this stage (absent disclosure and potential expert evidence), that does not necessarily indicate the full extent of the Claimant's case were it to proceed to trial.

36. The Draft Defence advanced by the Defendant does little more than to refute the claim, assert that it is defective for want of particularity and put the Claimant to proof. The proposed Defence does not directly engage with the claim made against it. It would appear the Defendant's case is to rely on what it says is evidence of satisfaction from the Claimant as to the nature of the work completed by the Defendant which in my view, provides an insufficient basis for the Defendant to aver that the Claimant accepted, or was otherwise satisfied with the nature of the product provided by the Defendant to the Claimant under the Development Agreement.
37. Although the standard of proof required of the Defendant is not high on an application of this nature, the Defendant's case must carry some degree of conviction. Against the pleaded allegations and the background to which I have referred the Defendant has not produced a defence which carries any degree of conviction and in my judgment therefore has no real prospect of successfully defending this claim.
38. *Failure to deliver in time for the MTD regime:* The Defendant essentially avers that the dates adopted by the Claimant were only ever aspirational and not therefore enforceable as a term of the Development Agreement. The Defendant goes further to aver that the Claimant expressly admitted that a minimum viable product of the applications would not be completed by April

2019 as a consequence of its own increase of scope, relying on an email from Mr. Lisburn of the Claimant dated 25 February 2019, which states:

*"We are not going to meet this deadline, for a number of reasons. We have increased the scope of the project by about a 2:1 ratio, and also the complexity of the project has increased, [by] about the same 2:1 ratio. These things have meant that there is a possibility about 4X the amount of work involved as initially thought, by all of us."*

39. In my view, without the benefit of exploring further evidence which is likely to be available at trial, including further witness evidence from the parties as to nature of scope changes and their purported effect (or lack thereof) on the timeline for the delivery of the project, I am unable to say that the factual basis for the defence is fanciful, in that it is entirely without substance. In the circumstances, it is not fanciful for the Defendant to argue that it is not, (or is not wholly) responsible for the failure to deliver on time. I am therefore persuaded that this is a matter that would require further investigation.
40. My conclusion also applies to the following three additional claims for breach of contract, namely: failure to accurately record time, failure to properly staff and resource the project and failure to properly document code; for which in my judgment, there is insufficient evidence before the Court to conclude now that the Defendant has no real prospect of defending those claims. It would appear that there is a real possibility of evidence emerging from disclosure and witness evidence and cross-examination which will have a significant bearing on these claims.

41. *Failure to assign all IP rights to the Claimant:* I am satisfied on the evidence before the Court and for the reasons submitted by the Claimant above, that the Defendant has no real prospect of successfully defending the claim that it breached the Development Agreement by failing to assign all intellectual property rights in the development works to the Claimant. It is clear from the contemporaneous evidence to which the Claimant refers that this was the case. I find the Defendant's argument that Mr. Lesniak did not have the requisite authority to bind the Defendant by entering into contractual negotiations and agreeing terms on behalf of the Defendant to be improbable and it is unlikely that any evidence at trial would disturb this conclusion.
42. It is not in contention that Mr. Lesniak was the Defendant's Business Development Manager who handled a significant number of communications between the Claimant and the Defendant relating to the proposal. The Draft Defence admits that it was Mr. Lesniak who was informed that the Development Agreement mandate had been granted to the Defendant. I am satisfied that even if the Defendant could show that Mr. Lesniak had no internal explicit authority (although there is no documentary evidence produced by the Defendant to support this position), given that Mr. Lesniak negotiated the entirety of the contractual arrangements between the parties, in my judgment it is likely that apparent or ostensible authority would be found at trial.
43. Further, it is clear from the admission contained within the witness evidence of the Defendant's own solicitors, (see paragraph 4 of this judgment) that the ownership of intellectual property in the works developed by the Defendant

under the Development Agreement was not "in issue" at earlier stages of these proceedings. That earlier witness statement was made by the Defendant's legal advisers and verified by statement of truth. It is inconceivable that given the centrality of the issue to the dispute between the parties that it was not very carefully considered by those legal advisers with the Defendant.

44. The Defendant now seeks to rely on a further witness statement from its solicitors. The witness statement of Mr. Paul Fitton dated 22 February 2021 purports to alter the effect of that earlier admission on the basis that "*the legal and factual position has been clarified upon the Defendant receiving advice*". However, as I have referred above, no formal application has been made by the Defendant to withdraw the admission pursuant to CPR Part 14.

45. Against that background and the evidence before the Court, the Defendant has not demonstrated that it has a real prospect of successfully defending this claim. If this claim were to go to trial it is likely that at the very least, the arrangements between the parties would be construed as either an agreement to assign future legal title to the relevant intellectual property rights developed by the Defendant pursuant to the Development Agreement, or otherwise evincing the intention of the parties that the Claimant would be entitled to the ownership of the relevant intellectual property rights under the terms of the Development Agreement. I therefore dismiss the Defendant's application to set this claim aside.

46. *Threatening to release and disseminate the Claimant's code:* In my judgment, the Defendant has not demonstrated that it has a real prospect of successfully defending this claim. The Defendant admits that Mr. Stanuszek of the

Defendant sought to leverage the assignment of the EasyBooks software application code to the Claimant as a means of obtaining an agreement from the Claimant to continue working with the Defendant through to the end of 2019, save that the Defendant says that the Claimant unlawfully terminated the Development Agreement. The claimed threat relied upon by the Claimant was in an email dated 15 November 2020 from Mr. Stanuszek of the Defendant and sent to Mr. Lisburn of the Claimant which states:

*"Hi Mark,*

*Please answer till Monday 9 AM. No response will start procedure of debt collection.*

*At the same time we are going to consider to:*

*- report to AppStore and Google Play IP issue*

*- sell the source code of the product to cover our costs which I described in previous emails*

*I would like to avoid the above steps. I don't feel comfortable with writing that but I have to inform you about the consequences of no response."*

47. The Draft Defence avers that upon the Claimant's unlawful termination of the Development Agreement, it remained indebted to the Defendant to a sum of \$13,500. It says that in the absence of such payment the Defendant was entitled to retain part of the code relevant to that liability, which was then

subsequently transferred to the Claimant between 4 and 6 December 2019 following payment of the outstanding sum.

48. In light of the evidence above, even if the Development Agreement were construed as meaning that the Claimant's ownership of parts of the code only passed upon payment for the relevant portion, the threats in the evidence to which I referred (which the Defendant admits it made) clearly refer to the whole of the software application, not just portions of code. I do not regard it as likely that any evidence that may be available at trial would disturb this conclusion.
49. *The misrepresentation claims:* The Defendant's case in essence, is that it admits that certain representations were made to the Claimant as to its requisite skill and ability to develop the software applications, but denies representing that the Android EasyBooks application would be completed before April 2019. It avers that at all times the parties knew that the date was aspirational and was affected by scope changes instructed by the Claimant and relies upon the purported admission from the Claimant to which I refer at paragraph 38 above.
50. I find that the misrepresentation claims are incapable of being resolved without conducting an impermissible mini-trial on the documents, absent disclosure and without oral evidence. In light of the factual assertions made by the Defendant I am just satisfied that it has a realistic prospect of successfully defending this claim.

*The Publicity Order*

51. The second ground advanced by Counsel for the Defendant is that the relief granted in the default judgment in the form of a publicity order is inappropriate for a case of this nature.
52. The publicity order compels the Defendant to display a notice on the home page of its website declaring that this Court has held that the Defendant breached a software development agreement between the parties, that the Claimant is the owner of intellectual property rights in the EasyBooks accounting software, that the Defendant retained no rights in the software and that it was ordered to pay costs. It is limited in time, requiring the Defendant to display the notice from 18 November 2020 until 10 March 2021.
53. Counsel for the Defendant submits that in this case, the publicity order is tantamount to an order publicising that the Claimant's dealings with the EasyBooks App do not infringe any copyright retained by the Defendant. He referred to Lifestyle Equities C.V. v Sportsdirect.Com Retail Limited [2018] EWHC 962 (Ch) and Samsung Electronics (UK) Limited v Apple Inc [2012] EWCA Civ 1339 as supporting his submission that such orders should only rarely be granted and that in particular should only be granted in cases of non-infringement "*where there is a real need to dispel commercial uncertainty in the marketplace (either with the non-infringer's customers or the public in general)*".
54. I reject these submissions. The Defendant's characterisation of the publicity order in this case is misconceived; issues of non-infringement are not relevant in this case and no declaration of non-infringement has been sought by the Claimant.

55. In this case, judgment in default has been entered for breach of contract and misrepresentation. The injunctive relief granted in the order for judgment includes an order that the Defendant is restrained from communicating to any third parties that the Claimant is not the sole and exclusive owner of the intellectual property rights in and related to the EasyBooks Software (including EasyInvoice) on any platform including Apple, Android or web based. The declaratory relief granted therein in short, states that: (i) the Development Agreement, as amended grants all intellectual property rights to the Claimant for all work carried out by the Defendant for the Claimant in relation to any EasyBooks Software; and (ii) that the Claimant is the sole and exclusive owner of EasyBooks (including any Apple, Android or web based version thereof) and all related materials.

56. The Court's jurisdiction to make a publicity order in this context derives from section 37 of the Senior Courts Act 1981:

*"37(1) The High Court may by order (whether interlocutory or final) grant an injunction....in all cases in which it appears to the court to be just and convenient."*

57. In Samsung Electronics (UK) Limited v Apple Inc, Sir Robin Jacob said at [75] that:

*"A declaration is a discretionary, equitable remedy. The injunction is an adjunct to the declaration."*



58. Of course, the power of this Court to grant declarations and injunctions in a given case is not entirely unfettered but it is clear that the exercise of the jurisdiction may be invoked in order to avoid injustice.
59. I was not referred to any evidence by Counsel for the Defendant as to the adverse effect of the publicity order on the Defendant or whether or not there was a need in this case to dispel commercial uncertainty. Further, no submissions from Counsel for the Defendant on the inherent injustice of the publicity order were advanced other than the broad point that in his submission the order was inappropriate in light of the authorities to which I have referred above.
60. I have held that the Defendant has no real prospect of successfully defending the claims for: (i) breach of contract for failing to assign all IP rights to the Claimant; and (ii) for threatening to release and disseminate the Claimant's code. The publicity order is clearly parasitic upon those particular claims and was granted in exercise of the Court's discretion.
61. In the context of this application to set aside judgment in default, in all the circumstances of this case, I see no reason for this Court to interfere with the publicity order as granted.

*Some other good reason*

62. Counsel for the Defendant also submits that there is "good reason" to set aside judgment under CPR 13.3(1)(b). He advances a number of reasons to support this contention.

63. Counsel for the Defendant says one of the claims made by the Claimant makes constitutes an allegation of dishonesty. He refers to the Claimant's claim for breach of the Development Agreement by the Defendant failing to provide a minimum viable product of Android EasyBooks, the Rewritten Apple Easybooks and the EasyBooks Web Application to which the Claimant claims:

*"the versions of the software it received contained features or functions that were mocked up or misrepresented to give the misleading impression that progress was further along, and that aspects were working when they were not".*

64. He says that where a claim such as this which concerns very serious allegations of misconduct it is desirable and in the public interest that the allegations should be given as full and fair a hearing as the circumstances permitted, relying on Berezhovsky v Russian Television and Radio Broadcasting Co [2009] EWHC 1733. I do not accept that submission. The allegations in Berezhovsky v Russian Television and Radio Broadcasting Co which led to the Judge exercising his discretion were plainly very different to this case in that they involved grave allegations that an individual had been granted asylum on a false basis and in light of evidence obtained by threats and/or by drugging a relevant witness. I do not regard the claim to which Counsel has referred as so serious as to require the allegations to proceed to a full trial.

65. Counsel for the Defendant also says the value of the Claimant's claim is likely to exceed £1m, which would lead to a substantial windfall for the Claimant and that on this basis, judgment should be set aside. I also reject this

submission. It is clear that the quantum of the claim alone is not a relevant matter under CPR 13.3; Khan v Edgbasten Holdings [2007] EWHC 2444 (QB).

*Denton and Discretion*

66. In light of my conclusions above, CPR 13.3(1) is engaged on the basis that the Defendant has, with respect to certain of the claims identified above, a real prospect of successfully defending them. I must consider the exercise of the Court's discretion in deciding whether to set aside judgment in default in conformity with the overriding objective.
67. There was no dispute between the parties as to the applicable principles and that the well-known criteria in Denton v White [2014] EWCA Civ 906 apply. Under CPR 3.9, delay and the reason for it, is also relevant to the exercise of discretion; in light of my findings above I do not find any allegations of delay to carry weight.
68. Under the three-stage Denton test, Stage 1 requires the Court to identify and assess the seriousness and significance of the failure to comply which engages CPR 3.9(1). It is accepted by Counsel for the Defendant that Stage 1 is satisfied; plainly failure to serve a defence, where it results in judgment in default is serious and significant. Stage 2 requires the Court to consider why the defaults occurred, which I have referred to in paragraphs 8 to 18 above. In my judgment there is no good reason for the default.

69. Stage 3 requires the Court to evaluate all the circumstances of the case, so as to enable the Court to deal justly with the application, which overlaps with the exercise of the Court's discretion pursuant to CPR 13.3(1)(a) and (b).
70. The effect of setting aside the judgment from the Defendant's perspective would be to provide it with the opportunity to defend the claims made against it at trial which, if successful could avoid a potential damages award being entered against it and provide it with an opportunity to attempt to correct any reputational damage the claim may have made.
71. On the other hand, if I were to set aside the judgment entirely, the Claimant would incur significant costs in pursuing its case to trial. There would likely be severe prejudice to the Claimant as it has now had for some time held the benefit of a written assignment from the Defendant of all intellectual property relating to the EasyBooks Software as ordered by the judgment in default and may have engaged an alternative software developer to finalise the project.
72. In considering the exercise of the Court's discretion, I need to take into account the need to act fairly as between the parties and balance their respective positions in accordance with the overriding objective. I also take into account the conclusions I have made above as to each of the respective claims and the limited evidence before the Court at this stage of the proceedings.
73. Having had regard to all of the circumstances of this case, the overriding objective is best obtained by dismissing the application to set aside the order. However, I am persuaded that the nature of this case is such that the

Defendant should be permitted to pursue what I have found to have been more than merely arguable defences identified above.

74. I remind myself of the Court's duty pursuant to CPR 1.4(1) to further the overriding objective by actively managing cases. This includes deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others. If I were to accede to the Defendant's application to simply set aside the default judgment in its entirety then the Court would be failing in its duty of active case management.
75. This is a case in which it is clear that there are certain claims against the Defendant for which it has not been able to establish that it has a real prospect of successfully defending them or that there is some other good reason why the judgment should be set aside or varied or the Defendant should be allowed to defend those claims.
76. For the avoidance of doubt, I make no conclusions as to the merits of the defences themselves beyond my finding that in the context of this application I am satisfied that the Defendant's prospect of successfully defending certain of the claims which I have identified above cannot be said to be fanciful.
77. I therefore propose to vary the default judgment so as to make it judgment in part only. I will hear counsel on the form of order.