Neutral Citation Number: [2023] EWHC 1813 (KB)

Case No: KB-2023-002435

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**MEDIA & COMMUNICATIONS LIST**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2023

**Before** :

**THE HONOURABLE MRS JUSTICE COLLINS RICE**

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**Between :**

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| **ALAN MCGEE** | **Claimant** |
| **- and –** | |
| **KATIE LEWIS** | **Defendant** |

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**Ms Kate Wilson** (instructed by Russells Solicitors) for the Claimant
The Defendant did not appear and was not represented

Hearing date: 13th July 2023

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# Approved Judgment

This judgment was handed down remotely at 12PM on 17th July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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THE HONOURABLE MRS JUSTICE COLLINS RICE

**Mrs Justice Collins Rice:**

## Introduction

1. This written judgment sets out, principally for the assistance of the Defendant, Ms Lewis, a record of the decisions I made in open court on 13th July 2023 in her absence, and my reasons for doing so.

2. I start by setting out the background briefly. The Claimant, Mr McGee, is a music industry executive. The Defendant, Ms Lewis, is a singer and songwriter. Half a dozen singles recorded by Ms Lewis's band were released on Mr McGee's independent record labels. The parties also had a brief intimate relationship.

3. Their professional and personal relationship became acrimonious from the late summer of 2022. In the spring of 2023, Ms Lewis took to social media, with escalating volume and intensity, accusing Mr McGee of sexual and other misconduct. He vehemently disputes the truth and fairness of these allegations, and says he is being personally and professionally harmed by them.

4. Mr McGee issued a claim against Ms Lewis on 23rd May 2023, alleging harassment, libel and misuse of his private information, citing a large number of her social media posts. He claims damages, costs, and injunctive relief to compel Ms Lewis to desist from her allegations.

5. The law provides clear procedures to enable defendants to have a fair opportunity to challenge claims of this sort, to put their side of the story and make their voices heard before any decision is taken. If Ms Lewis has a case that her conduct and allegations are after all justifiable, she has an opportunity in this way to require Mr McGee to prove his claim. But she has shown no sign of engaging with those procedures or responding to Mr McGee's legal claim.

6. So Mr McGee has now applied for a default judgment on his claim, without trial, under the provisions of Part 12 of the Civil Procedure Rules.

## Procedure

7. This section of my judgment sets out how I went about dealing with Mr McGee's application, and how I came to do so in Ms Lewis's absence.

8. Mr McGee issued his application for a default judgment on 15th June 2023. By Order of the same date, the Honourable Mr Justice Nicklin gave directions for the parties to take steps towards a hearing of the application, and for the preparation of materials by both parties to enable the Court to consider it. Mr McGee complied with those directions. Ms Lewis did not comply, or make any other response.

9. The hearing of the application was listed before me on 13th July 2023. Mr McGee attended the hearing by Counsel. Ms Lewis did not attend and was not represented. Civil Procedure Rule 23.11 states that '*Where the applicant or any respondent fails to attend the hearing of an application, the court may proceed in his absence*'. Ms

Wilson, Counsel for Mr McGee, asked me to exercise my discretion to proceed in Ms Lewis's absence.

10. In considering whether to do so, I addressed myself to section 12 of the Human Rights Act 1998. That limits my discretion in a case such as the present. It states:

> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
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> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
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> (a)that the applicant has taken all practicable steps to notify the respondent; or
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> (b)that there are compelling reasons why the respondent should not be notified.

11. I also looked at what the decided authorities say about how to decide whether it is fair to proceed with applications in the absence of a defendant. Warby J (as he then was) said, in *Pirtek (UK) Limited v Robert Jackson [2017] EWHC 2834 (QB)*, that proceeding in the absence of a defendant:

> [19.] …is permissible in principle, but the court has a discretion: CPR 23.11. The Court must exercise its power to proceed in the absence of a party in a way that is compatible with the overriding objective [of doing justice in the case]. I had to consider this issue in somewhat similar circumstances two years ago, in *Sloutsker v Romanova* [2015] EWHC 545 (QB) [2015] EMLR (July 2015) and again in *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB) [2016] EMLR 2 [14]-[16] (September 2015). Both were applications for default judgment where the defendant was a litigant in person who had failed to appear without giving a reason, and the relief sought fell within the scope of s.12(2) of the Human Rights Act 1998.
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> [20.] I took a two-stage approach, considering (1) whether the defendant had received proper notice of the hearing and the matters to be considered at the hearing; (2) if so, whether the available evidence as to the reasons for the litigant's non-appearance supplied a reason for adjourning the hearing. I considered it necessary to bear in mind that the effect of s.12(2) is to prohibit the Court from granting relief that 'if granted, might affect the exercise of the Convention right to freedom of expression' unless a respondent is present or represented or the Court is satisfied that '(a) the applicant has taken all reasonable steps to notify the respondent; or (b) that there are compelling

> reasons why the respondent should not be notified.' I adopt the same approach in this case.

12. I did the same here. I was shown evidence, which I accepted, that Ms Lewis had been properly served with Mr McGee's claim, with his application for a default judgment, and with the Order of Nicklin J. I was shown further evidence that she had made clear that she had received and was aware of these papers. I accepted that she had had the opportunity provided by the Order to participate in the setting of the hearing date but had not complied with it. I was shown evidence, which again I accepted, that she had been notified of the hearing date by post and email. I was satisfied on this basis that all practicable steps had been taken to notify Ms Lewis of the fact, nature and detail of the hearing.

13. Ms Lewis appeared to be continuing to choose not to engage with these proceedings. She was given an opportunity to make sure beforehand that she would be able to attend the hearing. She had not made any objection to the date or asked for an adjournment. She had given no reason for failing to attend. I was satisfied on the materials before me that she had simply chosen not to be present, and I had been given no reason to think making any further arrangements would secure her attendance. Simple non-engagement is not a fair reason to delay resolving Mr McGee's application. I decided to proceed in Ms Lewis's absence. In doing so I bore in mind her rights under Civil Procedure Rule 13.3, if I decided to grant Mr McGee's application, to ask for that decision to be set aside, including on the basis that there was, after all, a good reason for her non-attendance of which I am unaware. I return to this below.

**The legal framework**

14. This section of my judgment sets out the legal rules I have to follow in deciding whether or not to grant an application for default judgment.

15. According to CPR 12.3, the basic conditions to be satisfied for entering default judgment are that a defendant has not filed acknowledgment of service or defence to a claim, and the time for doing so has expired. These basic conditions are fulfilled in this case. Ms Lewis has filed nothing at court. The deadline for her to file acknowledgement of service of Mr McGee's claim, or a defence to it, or to ask for an extension of time to do so, expired on 14th June 2023.

16. CPR 12.12(1) directs a court considering a default judgment application to '*give such judgment as the claimant is entitled to on the statement of case*': here, the statement of case means Mr McGee's 'particulars of claim'. These have been duly served on Ms Lewis.

17. I have directed myself to the guidance set out in *Glenn v Kline* [2020] EWHC 3182 (QB) at [24]-[27] as to the correct approach to applying this rule in general, and in publication cases in particular. Nicklin J said this:

> [25] Although, under this rule, the Court must consider the judgment to which the claimant is entitled, the effect of default judgment is that the

pleaded facts are treated as established. If those facts support the cause of action, the Court need go no further. The purpose of the requirement for an application is either to enable the court to tailor the precise relief, so that it is appropriate to the cause of action asserted, or otherwise to scrutinise the application in particular circumstances calling for more than a purely administrative response. Within these parameters, the Court must make an assessment of whether the applicant is entitled to the default judgment sought, or to some lesser or different default judgment: *Football Dataco Ltd -v- Smoot Enterprises [2011] 1 WLR 1978* [16]-[19] *per* Briggs J.

[26] Evidence going to the merits is not required. The relief granted will normally be sought and granted on the basis of the claimant's statement of case. That procedure is efficient and proportionate. Such a judgment is final and, to the extent it involves consideration of what relief is justified on the basis of the facts alleged in the statement of case, it does have an element of merits assessment: *QRS -v- Beach [2015] 1 WLR 2701* [53] *per* Warby J.

[27] In *Brett Wilson LLP -v- Person(s) Unknown [2016] 4 WLR 69*, Warby J explained:

> [18] The claimant's entitlement on such an application is to "such judgment as it appears to the court that the claimant is entitled to on his statement of case": CPR r 12.11(1) [*CPR 12.12(1)*]. I accept Mr Wilson's submission that I should interpret and apply those words in the same way as I did in *Sloutsker -v- Romanova [2015] EWHC 2053 (QB)* [84]:
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> > "This rule enables the court to proceed on the basis of the claimant's unchallenged particulars of claim. There is no need to adduce evidence or for findings of fact to be made in cases where the defendant has not disputed the claimant's allegations. That in my judgment will normally be the right approach for the court to take. Examination of the merits will usually involve unnecessary expenditure of time and resources and hence [be] contrary to the overriding objective. It also runs the risk of needlessly complicating matters if an application is later made to set aside the default judgment: see *QRS -v- Beach [2015] 1 WLR 2701* esp at [53]-[56]."
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> [19] As I said in the same judgment at para 86:
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> > "the general approach outlined above could need modification in an appropriate case, for instance if the court concluded that the claimant's interpretation of the words complained of was wildly extravagant and impossible, or that the words were clearly not defamatory in their tendency."
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> Those instances of circumstances which might require departure from the general rule are not exhaustive, but only examples. I have considered whether there is any feature of the present case that might require me to consider evidence, rather than the claimant's pleaded

> case, verified by a statement of truth and uncontradicted by the defendants. I do not think there is any such feature. I have therefore proceeded on the basis of the pleaded case, both in my introductory description of the facts above, and in reaching the conclusion that the claimant has established its right to recover damages for libel, and to appropriate injunctions to ensure that the libel is not further published by the defendants.

18. HHJ Lewis in *Rafique & anor v ACORN Ltd & anor* [2022] EWHC 414 (QB) took an equivalent approach to a harassment claim at [28]:

> An equivalent approach needs to be taken in respect of the harassment claim. Examples of situations where the general approach might need modification include where there is no obvious course of conduct, or where it would be unreal to characterise the events relied upon as unreasonable and oppressive conduct, likely to cause the recipient alarm, fear and distress.

## Consideration

19. The starting point on any application for a default judgment is that a defendant who does not wish to concede a claim, or to comply with what a claimant says they are entitled in law to ask a defendant to do, is expected to challenge it by defending it and/or applying for a terminating ruling, such as strike-out. As I have said, fair procedures are provided to enable that. But failure to respond to or challenge a claim has consequences. Ignoring a claim does not make it go away. It triggers the CPR Part 12 procedure, which is designed to ensure that some resolution of the matter is achieved, and as fairly as possible.

20. The role of a court being asked to give judgment on an undefended case is on any basis limited. It is a fully judicial not a merely administrative exercise: default judgment is not automatic. A court has to '*give such judgment as the claimant is entitled to on the statement of case*' and that requires a searching look at the pleaded claim. But it is not an exercise in evaluating the full merits or strength of a claimant's case. A court's principal job is to test whether the claim is in full working order, and can properly be given effect to, *on its own terms*. If a claim is soundly set out, then it is right and proper to expect a defendant to answer it or face being compelled to accept it.

21. Whether a claim is in proper working order is a matter in the first place of checking that all the constituent parts of the torts – the wrongs alleged – are properly set out, and the corresponding claimed facts identified. The exercise is not mechanical or uncritical, but it is limited. It is not an exercise in finding the claim *proved on the evidence*, it is an exercise in concluding that, since a defendant has not taken steps to put the claim to proof, a claimant need take no further steps to do so to establish their entitlement.

22. Three torts are alleged in Mr McGee's particulars of claim, and I looked at each carefully.

23. First, there is 'misuse of private information'. This relates to a small number of sexually explicit text exchanges between the parties said to have been made during their brief intimate relationship. The tort is pleaded by reference to (a) Mr McGee's assertion of a reasonable expectation of privacy in this material as being highly intimate in nature and as arising in the context of a (consensual) intimate relationship and freely invited and participated in by Ms Lewis; (b) alleged misuse of that material by publishing it, and by doing so in a context suggesting that the relationship was not freely consensual; and (c) the predominance in those circumstances of his own rights to privacy over her rights to free expression. I was satisfied that this tort is correctly pleaded in law, and, having looked at the relevant exchanges, that the alleged facts particularised are properly capable of establishing it on an undefended basis.

24. Second, there is 'defamation'. Three publications (social media posts) are identified and complained of. Defamation is pleaded out in terms of: the 'natural and ordinary meaning' of each, their referability to Mr McGee, the publishees, defamatory tendency, and the causation or likely causation of serious harm. The decided cases do indicate some refinement of the necessary approach of a court in considering default judgment in defamation cases. The natural and ordinary meaning of the words complained of should not be pleaded 'extravagantly' and the allegation of defamatory tendency should not be 'unreal'. Both of these components of the tort would, in a contested case, be determined by a trial court *without* evidence, so a court on a default application is relatively well-placed to look at the pleadings and form a general view, without making findings, about whether the relationship between the words complained of and the pleading of these components is properly functional rather than fanciful.

25. Here, I discussed with Ms Wilson the pleaded meaning of one of the three publications complained of. It is an email linking Mr McGee with Jimmy Savile, and the pleaded meaning is that Mr McGee is being said by Ms Lewis to have sexually abused children. The conclusion I reached was that, while there would have been room for the parties to have disputed this meaning and to have disputed the context of other posts by Ms Lewis within which the meaning of this particular item fell to be determined, I was unable in the end to conclude that the pleading could fairly be described as 'extravagant'. It is a high threshold. The inference invited of defamatory tendency is not 'unreal' in any of the three instances pleaded; they allege conduct of a criminal or crudely racist nature.

26. I was otherwise satisfied that this tort is correctly pleaded in law. 'Serious harm' is pleaded on both an inferential and an actual basis; the alleged facts particularised in relation to both were, in my view, properly capable of establishing the tort on an undefended basis; it is not an 'unreal' case.

27. Third, there is 'harassment'. This is pleaded out by reference to the definition in section 1 of the Protection from Harassment Act 1997 in terms of a course of conduct targeted at Mr McGee amounting to harassment of him and which Ms Lewis knew, or ought to have known, amounted to harassment of him. The decided authorities clarify that to amount to harassment in law, a course of conduct must have the quality of

being oppressive and unreasonable, and to be serious to a degree capable of itself engaging the criminal law.

28. Here, the course of conduct complained of is particularised by reference to the quantity, frequency and content of social media posts in which Ms Lewis makes, expressly or impliedly, serious allegations against Mr McGee, including of serious criminality. It sets out the audiences she addressed her allegations to. It sets out the effects Mr McGee says all this has had on him, personally and professionally. I was satisfied that this tort, also, is correctly pleaded in law, and that the alleged facts particularised are properly capable of establishing it on an undefended basis. It is not an 'unreal' case.

29. I was satisfied therefore, for the reasons given, that Mr McGee's particulars of claim were adequately pleaded, both in technical legal terms and by sufficient identification of the facts alleged to found liability. Following the guidance of the authorities, I made 'at least some' inquiry into the merits of the case he pleads (but no more) and concluded it not to be 'unreal'.

30. I emphasise again: this comes before me as a deliberately undefended case. It is a defendant's prerogative not to try to defend, but that decision has consequences. I have tested the soundness of the pleaded case on its own terms. I have gone as far as I can, and have no clear basis for going further, in considering the merits of this claim. I am conscious of the warnings given in *Sloutsker v Romanova* of the risks to the proper administration of justice of trying to go further. I, and Nicklin J before me, have endeavoured to ensure Ms Lewis has been treated with scrupulous fairness in the matter of this application, but there are limits, including in fairness to Mr McGee, to the extent to which I can go behind her failure to engage or speculate about her position. In these circumstances, and for the reasons given, I was satisfied that Mr McGee is entitled to judgment against Ms Lewis on the liability bases set out in his particulars of claim.

**Remedies and costs**

31. Ms Wilson told me, on instructions, that Mr McGee's main concern is to obtain relief from the matters complained of by constraining Ms Lewis to stop them. He seeks injunctive relief to restrain her from publishing, or continuing to publish, the same or similar allegations to those complained of. I accepted that he was in principle entitled by virtue of the default judgment to restraint of such publications. He is entitled to the protection of his private information, to vindication for having been defamed and the setting right of the record, and to the cessation of harassment. It is plain that money compensation could not by itself be an adequate alternative remedy.

32. I accepted that there was nothing before me on the basis of which I could conclude that Ms Lewis will stop of her own volition and without the intervention of the court. She has not before now engaged at all with this litigation. I noted the breakdown of the relationship between the parties. I was satisfied there is sufficient prospect in these circumstances that she will maintain and repeat the allegations unless restrained, to warrant the granting of injunctive relief.

33. The Order giving effect to the default judgment therefore prevents the continued or future publication of the small number of private, sexually explicit messages from Mr

McGee, and the three defamatory posts. In each case, the offending existing material is clearly identified, so that Ms Lewis knows exactly what she has to do to comply with her legal obligations.

34. This is also a case of harassment by speech in the form of voluminous and persistent social media activity. The form of Order I have made here is not exactly what Mr McGee originally asked for. I have, in the first place, narrowed its scope so that it does not restrain the less serious and damaging end of the spectrum of observations or allegations Ms Lewis has in the past made about Mr McGee: it focuses on the serious matters which form the core of the pleaded case of harassment.

35. Then Ms Wilson had also prepared a list of specific and identified posts she said it would be necessary for Ms Lewis to delete in order to comply with the general (and conventional) terms of the injunction restraining Ms Lewis's online activity. I had some concerns as to whether this was a necessary and proportionate measure. Ms Wilson however submitted that (a) the persistence of this critical mass of material in accessible form online would itself amount to continuing harassment contrary to the general provisions of the injunction and (b) it would help Ms Lewis to know exactly what she had to do to be sure of dealing with the principal problem to which the general words of the injunction were addressed.

36. I was in the end persuaded that the scheduled list would help Ms Lewis. But the Order now makes clear that this is intended to crystallise out, rather than add to, the general injunction, and it gives Ms Lewis an opportunity to explain if she thinks any of the material she has been asked to stop publishing – that is, to take down – does not after all properly fall within the terms of the general restraint.

37. Ms Wilson did not ask for further decisions about remedies to be made there and then. The Order provides that, if Mr McGee wishes to pursue financial ('damages'), or other, remedies, he can ask the court to make further directions about that.

38. Ms Wilson did ask for Ms Lewis to be ordered to pay Mr McGee's legal costs of this litigation (to be assessed in detail if not agreed) and for his costs of the default judgment application in particular to awarded and assessed by me on a summary basis. This is an entirely usual procedure. Where someone is a 'successful party' to litigation, the general rule provided for in the Civil Procedure Rules is that the unsuccessful party should be ordered to pay their costs.

39. Obtaining a default judgment makes Mr McGee a successful party in this case. I had no basis before me for departing from the general rule. I have awarded Mr McGee his costs. I summarily assessed the costs of the default judgment application in the sum sought. It is a substantial sum. I was provided with a costs schedule to explain how it had been incurred, and I accepted it was a sum reasonably incurred. It is as high as it is for two main reasons. The first is Ms Lewis's failure to engage with the litigation, and what appear to have been her attempts to resist service, which have required repeated and costly steps to be taken to comply with court rules and Orders and ensure that, at each stage, she has nevertheless been put in a fair and proper position to respond to the claim and the application. The second is that the volume and frequency of the social media activity complained of has made it hard for Mr McGee's lawyers to keep up with the problem and ensure that the case is put fully in a way that enabled Ms Lewis to answer it.

40. If there are reasons Ms Lewis considers she should not or cannot be required to pay this sum, the Order makes provision for her to apply for variation now, and she will have opportunities again at any enforcement stage to put forward financial or other matters she wishes to be taken into account before action is taken.

**Further protections for the Defendant**

41. I have taken care over the terms of the Order because it is an extremely serious matter. It is headed by a 'penal notice'. That makes it a contempt of court for Ms Lewis to ignore it or fail to comply. This is not a formality. It means that, if she breaches the Order and does not do what it directs her to do, she may be arrested, brought forcibly in front of the High Court, and sent to prison. It is only right in these circumstances to repeat the strong advice she has already been given to take this litigation seriously and to get legal help to deal with it.

42. There are further protections for Ms Lewis. The Order makes provision for her to be able to apply to court for the Order to varied or set aside in any relevant respect. And as I mentioned at the outset, there is provision in the Civil Procedure Rules for her to be able to apply to set aside my judgment in whole or in part. Rule 13.3 provides as follows:

> (1) … the court may set aside or vary a judgment entered under Part 12 [a default judgment] if –
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> (a) the defendant has a real prospect of successfully defending the claim; or
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> (b) it appears to the court that there is some other good reason why –
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> (i) the judgment should be set aside or varied; or
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> (ii) the defendant should be allowed to defend the claim.
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> (2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

I draw particular attention in that context of the importance of acting promptly.