APPROVED **[2021] IEHC 554**

THE HIGH COURT

2018 No. 8976 P

BETWEEN

DRM CONTRACT ADMINISTRATION LIMITED

PLAINTIFF

AND

PROTON TECHNOLOGIES AG

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 August 2021

INTRODUCTION

1. This judgment addresses the fallout of a tactical decision made by the defendant not to contest a claim for defamation brought against it. The defendant is a company registered in Switzerland and provides email services. It is alleged that the user of one of its email accounts defamed the plaintiff in two emails sent to third parties.

2. The defendant regards the claim against it as unstateable on the basis that, as a mere conduit for the transmission of data, it is not liable for the defamatory content of any emails sent via its service. The defendant relies in this regard on the exemptions and immunities in favour of intermediary service providers under the Directive on Electronic Commerce (Directive 2000/31/EC).

3. It has been explained on affidavit that the officers of the defendant company, having weighed up the financial cost of engaging legal representation here, made

a decision not to contest the proceedings in this jurisdiction. It is said that in Switzerland the claim for defamation would be rejected by a judge even where it was not contested as the civil court applies the law *ex officio*. It seems to have been assumed that the Irish Courts would adopt a similar proactive approach.

4. Having made this tactical decision, the defendant chose not to enter a formal appearance to the proceedings, notwithstanding that it had received the plenary summons by way of email and tracked post. (As discussed presently, one of the issues to be addressed in this judgment is whether the formal requirements for service had been complied with by the plaintiff).

5. The plaintiff subsequently applied for, and obtained, judgment in default of appearance. Upon learning of this, the defendant issued a motion seeking to set aside the judgment. The plaintiff opposes this motion. The plaintiff has, however, taken the precaution of issuing its own motion seeking to renew the plenary summons. This has been done in an attempt to protect its position in respect of the limitation period in the event that the service of the proceedings is set aside as irregular. The limitation period for defamation proceedings is normally one year.

6. Both motions came on for hearing before me on 20 July 2021. It was agreed between the parties that the motion to set aside the default judgment should be heard first, and that the court should then hear the motion to renew the plenary summons *de bene esse*. This is because, depending on the outcome of the first motion, the second motion might become redundant. Judgment was reserved in respect of both motions until today's date.

PROCEDURAL HISTORY

7. These proceedings relate to two emails alleged to have been sent via the defendant's email service on 10 May 2018, and 25 August 2018, respectively. The emails were sent using the pseudonym "ConcernedTaxPayer11".

8. The content of the two emails has been set out verbatim as an annex to the statement of claim. The gist of the emails is that the managing director of the plaintiff company, Mr. Darragh Quinn, had engaged in fraudulent activities in respect of the N56 Kilkenny to Letterilly road project. The alleged fraudulent activities are said to involve "the extortion of monies (or taking a 'cut')" from sub-contractors and suppliers to the project. It is also alleged that Mr. Quinn has a conflict of interest in respect of the public procurement of road projects.

9. The emails were, seemingly, sent to a number of politicians, to two newspaper groups and to certain members of Donegal County Council.

10. Mr. Quinn has instituted separate defamation proceedings in his own name arising out of these emails (*Quinn v. Proton Technologies AG* High Court 2019 No. 3540 P).

11. Prior to the institution of the within proceedings, the solicitor acting on behalf of the plaintiff had engaged in correspondence with the defendant during the course of September and October 2018. This correspondence called upon the defendant to furnish full details of the author of the emails; to desist from publishing any further defamatory material; to publish an apology; and to make proposals with regard to compensating Mr. Quinn for the damage done to his good name. In subsequent letters in the chain of correspondence, the plaintiff's solicitor stated that "an Irish Defamation Jury will be asked by Counsel to approve exemplary damages against you for 10 million euro".

12. In reply to this correspondence, the defendant explained that, in accordance with Swiss law, it was precluded from divulging the identity of the account user without a formal process. It was suggested, therefore, that the plaintiff should make an international data request through a formal MLA request. The abbreviation "MLA" stands for mutual legal assistance. In the event, however, no such application was made, and, instead, the plaintiff instituted the within proceedings on 15 October 2018.

13. The defendant, in the pre-litigation correspondence, had also invited the plaintiff to report the emails to the defendant's "abuse team". It was explained that the abuse team would investigate whether the content of the emails was in breach of the defendant's terms and conditions. In the event, however, it seems that the user of the email account unilaterally deleted same prior to any investigation by the abuse team.

14. A plenary summons issued out of the Central Office of the High Court on 15 October 2018. The principal relief sought is damages for defamation, including aggravated and exemplary damages.

15. The plenary summons is endorsed for service outside of the jurisdiction and bears the following endorsement.

> "Lugano Convention 2007: The Irish High Court has power under the Jurisdiction of Courts and Enforcements of Judgments (Amendment) Act, 2012 and the Courts Supplementary Provisions Acts, 1961 to hear and determine this claim and no proceedings involving the same cause of action are pending in another Contracting State".

16. Notwithstanding that the defendant company is domiciled outside the jurisdiction in Switzerland, the plaintiff did not follow the procedure prescribed under Order 11E of the Rules of the Superior Courts for the service of documents abroad. Instead, the plenary summons was simply sent to the defendant by email

and by tracked post. It is common case that the plenary summons was actually received by the defendant. The parties are, however, in disagreement as to whether the form of service is irregular, and, if so, as to the legal consequences of same.

17. As appears from the exhibited correspondence, the initial response on the part of the in-house counsel for the defendant had been to attempt to enter a memorandum of appearance in the Central Office of the High Court. Thereafter, the solicitor acting for the plaintiff wrote on 13 November 2018 to explain that as the defendant was a company, rather than a natural person, it could not enter an appearance in its own right. Instead, it would be necessary to do so through a solicitor.

18. The in-house counsel for the defendant has subsequently explained on affidavit that a tactical decision was made at this time not to contest the proceedings. See paragraph 18 of Mr. Marc Loebekken's affidavit of 4 August 2020 as follows.

> "I thought of entering an appearance as Legal Counsel of the company because that is what could be done in Switzerland. Moreover, the Plenary Summons mentioned the possibility of appearing personally as representant of the company. To my surprise, after having attempted to enter an appearance, I was informed that the Irish legal system would not allow for personal representation and the company had to seek an Irish solicitor. I made contact with several different Irish solicitors but they all quoted fees that were beyond the Defendant's ability to pay, given its financial position as a start-up. Moreover, the firms all explained that Proton could only be refunded the legal fees partially (60 to 70%), even in the case of success of the defence. Proton was a relatively small company at that time and didn't have that kind of money. Proton weighed the money factor up beside the fact that the claim seemed unstateable and decided not to contest it."

19. Having next set out the rationale for saying that the claim was unstateable, the affidavit continues as follows at paragraph 20.

> "In Switzerland, this claim would be rejected by a judge even where it was not contested, as the civil court applies the law ex-officio (article 57 of the Swiss Code of Civil Procedure)."

20. It should be emphasised that this tactical decision was not communicated to the solicitor acting on behalf of the plaintiff. Rather, the defendant simply did not engage further in correspondence with the plaintiff's solicitor. Counsel on behalf of the defendant has characterised this approach as his client "going dark". Counsel on behalf of the plaintiff was more blunt, describing the defendant as burying its head in the sand.

21. At all events, for a period of some eighteen months there was no communication from the defendant nor any participation in the proceedings.

22. The solicitor acting on behalf of the plaintiff had written to the defendant requesting that a memorandum of appearance in proper form be entered. No response was received. Thereafter, a motion was issued on behalf of the plaintiff seeking an order directing the defendant to identify the persons behind the email user account. A disclosure order of this type is commonly referred to as a "*Norwich Pharmacal* order", named for the decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133. Again, there was no engagement by the defendant. The disclosure order was made by the High Court (O'Hanlon J.) on 21 January 2019.

23. Some months later, the plaintiff pursued an application for judgment in default of appearance. The motion issued on 20 March 2019. Having been struck out and reinstated, the motion was ultimately heard on 2 July 2020. The High Court (Meenan J.) made an order on that date, the operative part of which reads as follows:

> "IT IS ORDERED AND ADJUDGED that the Plaintiff do recover against the Defendant such amount as the Court may

> assess in respect of the Plaintiff's claim herein for damages and the cost of suit such costs to include the costs of this Motion and of the assessment when adjudicated and thus such assessment be had before a Judge without a jury and to be set down for hearing accordingly with liberty to apply for the purpose of fixing a date for assessment."

24. It seems that it was only upon receipt of this order that the defendant was finally moved to take steps to participate in the proceedings.

25. The defendant issued a motion, pursuant to Order 13, rule 11 of the Rules of the Superior Courts, seeking to set aside the judgment in default of appearance. This motion was issued on 12 August 2020. Thereafter, the plaintiff issued its own motion on 4 June 2021 seeking, *inter alia*, an order pursuant to Order 8 of the Rules of the Superior Courts granting leave to renew the plenary summons of 15 October 2018.

PART I

MOTION TO SET ASIDE DEFAULT JUDGMENT

BASIS FOR APPLICATION

26. There was an initial skirmish between the parties as to whether the application to set aside the judgment had been brought pursuant to the correct rule. The notice of motion cites Order 13, rule 11 of the Rules of the Superior Courts. Order 13 addresses default of appearance generally, and rule 11 reads as follows:

> "Where final judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court to set aside or vary such judgment upon such terms as may be just."

27. Counsel on behalf of the plaintiff opened his submission by insisting that the application to set aside should, instead, have been brought pursuant to Order 36, rule 33. This rule addresses the situation where a judgment has been obtained

where one party does not appear at the trial. Counsel cited the judgment in *Danske Bank A.S. v. Macken* [2017] IECA 117. It was further submitted that "final judgment" has not yet been entered against the defendant in circumstances where the assessment of damages has yet to be carried out. It is said that Order 13, rule 11 is therefore not applicable.

28. In answer to a direct question from the court, counsel confirmed that the logical conclusion of his argument is that any application, however formulated, to set aside the default judgment obtained on 2 July 2020 should await the assessment of damages. Counsel estimated that the assessment of damages would necessitate a two-day hearing. This approach would have the practical consequence that the parties would first have to incur the significant additional costs of the assessment hearing, prior to obtaining a ruling from the court on whether the default judgment should be set aside. Were the default judgment to be set aside at that late stage, then the plaintiff might well be liable for those additional costs.

29. Having taken further instructions, counsel for the plaintiff indicated that his client did not now wish to pursue any objection to what counsel described as a "discrepancy" in the form of the application to set aside the default judgment.

30. Given that the objection to the basis of the application has not been pursued, it is not strictly speaking necessary for me to make a ruling upon this procedural objection. Lest the issue is revived in the context of an appeal, however, I set out my findings below.

31. The application to set aside the default judgment has properly been brought pursuant to Order 13, rule 11. Order 13 and Order 36 address different situations. Order 13 is concerned with the position where, as in this case, judgment has been entered in default of appearance. Such a judgment will have been entered without

any consideration of the merits of the case. The only matter remaining outstanding is the assessment of damages, and, at the request of the plaintiff, this is to be done by a judge alone without a jury. The default judgment is still properly characterised as a "final judgment" within the meaning of Order 13, rule 11, notwithstanding that the assessment of damages has not yet been carried out. The judgment is "final" in that the issue of liability has been conclusively determined against the defendant and is no longer amenable to appeal. The judgment on the issue of liability cannot now be set aside other than pursuant to Order 13, rule 11.

32. Order 36, rule 33 is concerned with a different situation, namely where there has been a trial of the action albeit that one of the parties did not appear. The purpose of the rule has been authoritatively addressed by the Court of Appeal in *Danske Bank A.S. v. Macken* [2017] IECA 117. Hogan J., writing for the court, first recalled that the general rule is that where a High Court judge has pronounced judgment in a given matter that judgment is final, and the only remedy open to the disappointed litigant is to appeal. Hogan J. went on then to explain that the set aside jurisdiction under Order 36, rule 33 represents a minor derogation to that general rule (at paragraphs 14 and 15).

> "Such is clearly the general rule. But Ord. 36, r. 33 may, however, be regarded as a minor derogation from that rule, designed as it is to deal with the special contingency of where a litigant, whether by reason of oversight or what amounts to *force majeure*, is prevented from actually attending court on the day in question. Every legal practitioner has had experience of where – whether through oversight, listing difficulties, transport failures, sudden indisposition or a medical or family emergency – a litigant went unrepresented and judgment was entered against them in their absence. Order 36, r. 33 is designed to deal with these types of difficulties and to ensure that justice is fairly done as between the parties where events of this kind occur. In particular, it allows the trial judge to set aside the judgment (on terms, if

> needs be) and proceed to determine the matter where both sides are represented without the necessity for an actual appeal.
>
> It is, of course, important to stress that a party who deliberately elects not to participate at a particular hearing may not invoke r. 33, at least in the absence of quite particular extenuating circumstances. […]".

33. The contingency which has arisen in the present case does not fall within the ambit of Order 36, rule 33. Rather, it falls squarely within Order 13 and Order 13A. The judgment had been obtained on the basis that the defendant had not entered an appearance to the proceedings. Order 13, rule 11 provides for the possibility of setting aside such a default judgment. The principles governing the exercise of this jurisdiction are different to those governing Order 36, rule 33. The applicable principles are discussed under the next heading below (at paragraph 35 *et seq*.).

34. For completeness, it should be recorded that neither party has contended that the set aside application should instead have been made pursuant to Order 11E, rule 4. This rule governs, *inter alia*, cases where proceedings had been issued for service pursuant to Lugano Convention and had been transmitted abroad for service under Order 11E. The set aside jurisdiction under Order 11E, rule 4 is broadly similar to that under Order 13, rule 11. The principal distinction is that the court must be satisfied that the defendant has disclosed a *prima facie* defence to the action on the merits, even in cases where the service of proceedings is irregular. As discussed under the next heading, I am satisfied that the defendant has demonstrated that it has a credible defence to the proceedings which has a real chance of success. Thus, even if Order 11E, rule 4 represents the correct basis for the application, its requirements have been satisfied.

PRINCIPLES GOVERNING APPLICATION TO SET ASIDE JUDGMENT

35. Counsel on behalf of the defendant helpfully took the court through the relevant authorities in relation to a motion to set aside a judgment in default. Counsel drew attention, in particular, to the different thresholds to be met according to whether the order in default had been regular or irregular in form.

36. Counsel took me to the following passage from the judgment in *Moore v. Dun Laoghaire Rathdown County Council* [2016] IESC 70; [2017] 3 I.R. 42 (at paragraph 41). Clarke C.J., having referred to the distinction made in respect of a so-called "irregular judgment" and a "regular judgment" in circumstances where a party to civil proceedings obtains a judgment in default of appearance, then stated as follows.

> "[…] As is pointed out between paras. 4–34 and 4–56, at pp. 236 to 242, in Delany and McGrath, *Civil Procedure in the Superior Courts* (3rd ed., Round Hall, Dublin, 2012) very different considerations are applied by the court in an application to set aside depending on whether the judgment was regularly obtained or irregularly obtained. It is clear from the authorities cited that a principal element of the reasoning behind that distinction is that a party which has suffered from an irregular judgment, i.e., one where the party concerned was not properly served at all should not be placed in a worse position by reason of the fact that a judgment was irregularly obtained than it would have been had no judgment been secured in the first place. On the other hand a party against whom a regular judgment has been obtained, who seeks some leeway from the court in having that judgment set aside so that they might defend the proceedings, is in a more difficult position and needs to meet certain criteria, such as, for example, establishing that they have an arguable defence, before the court will set aside the judgment. The underlying principle behind that distinction is that a party who obtains an irregular judgment should not benefit by it and a party who has an irregular judgment entered against it should not be disadvantaged."

37. Counsel also referred me to the judgment of the Court of Appeal in *McGrath v. Godfrey* [2016] IECA 178. There, the principles governing an application to set

aside a judgment in default are set out, with enviable clarity, by Irvine J. as follows. An applicant who seeks to set aside a judgment in default will usually be in a position to demonstrate that there was some sort of irregularity in the proceedings or the procedure whereby the judgment was obtained. Where such an irregularity is established, the court will normally set aside the judgment without enquiring into the merits of the applicant's proposed defence, and will do so without the imposition of any terms. The logic which underpins this approach is that, given that the judgment should never have been obtained in the first place, the parties should rightly be restored to the position they would have enjoyed had judgment not been so obtained.

38. If, conversely, a court is satisfied that judgment had been obtained in an entirely regular manner, then an applicant who seeks to set aside that judgment faces a significantly enhanced burden of proof. First, the applicant must demonstrate that they have a *bona fide* defence to the proceedings. After all, it would be wholly unjust to a plaintiff if a court were to set aside a judgment which they had obtained unless it was satisfied that it was doing so for the purposes of enabling a defendant to mount a credible defence to the proceedings. It is necessary for the applicant to demonstrate that their intended defence has a real chance of success.

39. Secondly, the applicant must convince the court that, having regard to all of the relevant circumstances, and, in particular the interests of each of the parties, the balance of justice would favour the setting aside of the judgment.

40. Often times, in its efforts to strike a balance between the interests of the parties, the court will set aside the default judgment, but impose terms and conditions on the defendant in an effort to provide some type of security for the plaintiff who is likely to be prejudiced by the set aside.

WHETHER SERVICE WAS IRREGULAR

41. The plenary summons had been sent to the defendant's offices by way of tracked post and email. It is readily accepted by the defendant that the plenary summons was actually received. Indeed, the defendant had, initially, attempted to enter an appearance to the proceedings.

42. Notwithstanding this factual background, it is now submitted on behalf of the defendant that the form of service was deficient. Counsel submits that the plaintiff failed to distinguish between (i) the requirements of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("***Lugano Convention***"), which govern substantive jurisdiction; and (ii) those of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("***Hague Convention***"), which govern the procedural requirements applicable to the service of proceedings. Counsel accepts that the Irish Courts have substantive jurisdiction to entertain the defamation proceedings under the Lugano Convention. It is said, however, that the service of the proceedings was irregular in that there was a failure to comply with the Hague Convention, as given effect to under Order 11E of the Rules of the Superior Courts.

43. It is further submitted, by reference to *Cameron v. Liverpool Victoria Insurance Co Ltd* [2019] 1 W.L.R. 1471, that it is the *service* of the summons—rather than the *issuance* of a summons—which is the act by which a defendant is subjected to the court's jurisdiction.

44. Counsel also makes the point that service is irregular on the separate ground that the plenary summons itself, rather than notice of the summons, has been served.

This represents a breach of Order 11A, rule 6 which provides that where a defendant is not a citizen of Ireland, notice of summons and not the summons itself shall be served upon him. Reliance is placed on §3-60 of *Delany and McGrath on Civil Procedure* (Round Hall, 4th ed., 2018) and the case law cited there for the proposition that if the summons, rather than notice of the summons, is incorrectly served, then the service will be ineffective.

45. It is said that the breach in this regard is no mere technicality in that the reason that plenary summonses are not served on non-citizens is to respect the sovereignty of the State in which the defendant is domiciled.

46. In response, counsel for the plaintiff submits that the service of the plenary summons did, in fact, comply with the requirements of the Hague Convention. In particular, it is said that the defendant accepted delivery of the plenary summons voluntarily, and that that brings the case within Article 5 of the Hague Convention. No specific submission was made in respect of the breach of Order 11A, rule 6.

Findings of the court

47. In truth, the ambit of the dispute between the parties in respect of service is very narrow. The plaintiff does not challenge the contention that the proceedings should have been served in accordance with the requirements of Order 11E.

48. In brief, Order 11E envisages that where service of a summons requires to be effected out of the jurisdiction and in a Convention Country, the summons is to be transmitted to the Central Authority of the State in which service is to be effected. The Central Authority will then either serve the document itself or arrange to have it served by an appropriate agency. A "Convention Country" is defined, for the purpose of Order 11E, as meaning a country which is party to the

Hague Convention, but excludes a country which is a Member State of the European Union in which Regulation (EC) No 1393/2007 is in force.

49. As a necessary first step to transmission, a request must be lodged with the Master of the High Court, who is the Central Authority for Ireland. The outcome of the request differs depending on whether it is made by a private party to proceedings or by a practising solicitor. In the case of the former, the Master will, if satisfied that the requirements have been met, forward the request and all accompanying documentation to the Central Authority of the State in which service is to be effected. In the case of the latter, the Master will, if satisfied, certify that he has authorised the transmission of the request. The practising solicitor can then transmit the request for service directly to the Central Authority of the State addressed.

50. It is common case that the plaintiff did not observe the requirements of Order 11E. Instead, the plaintiff's solicitor by-passed the Central Authority channel entirely and purported to serve the plenary summons directly on the defendant.

51. The only justification offered on behalf of the plaintiff for having adopted this approach to service is to assert that it is authorised under Article 5 of the Hague Convention.

52. To properly understand this assertion, it is necessary to set out the text of Article 5 in full as follows:

> "Article 5
>
> The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –
>
> *a)* by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

> *b)* by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.
>
> Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.
>
> If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.
>
> That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document."

53. Counsel for the plaintiff submits that service is always valid if the relevant document is served by delivery to an addressee who accepts it voluntarily.

54. With respect, this submission is not well founded. Article 5 is concerned solely with circumstances where the Central Authority in the requested State has either served the document itself or has arranged to have it served by an appropriate agency. Accordingly, the reference in Article 5 to a party accepting delivery voluntarily can only be understood as referring to delivery by or on behalf of the Central Authority, i.e. it refers to a scenario where, notwithstanding non-compliance with formal requirements (such as, for example, the requirement for translation), an addressee nevertheless accepts informal delivery from the Central Authority or an appropriate agency. The interpretation put forward on behalf of the plaintiff is incorrect, and it involves reading the phrase "delivery to an addressee who accepts it voluntarily" in isolation from what has gone before. This is inconsistent with the "text in context" approach to interpretation.

55. Article 5 must also be read in the context of Article 6 which provides for the Central Authority of the requested State to complete a certificate which states that the document has been served (and shall include the method, the place and the

date of service and the person to whom the document was delivered). This reiterates that Article 5 is concerned with service by the Central Authority or an appropriate agency.

56. The plaintiff has not sought to rely on any provision of the Hague Convention other than Article 5, and, in particular, has not sought to rely on Article 10 (postal channels). Nor has the plaintiff made any argument based on Order 11E, rule 2(2) of the Rules of the Superior Courts to the effect that the form of service employed is permissible.

57. On the basis of the limited arguments advanced to the court on behalf of the plaintiff, I have concluded that the service of the proceedings was irregular.

58. For the sake of completeness, I should record that even if—contrary to the finding above—the summons had been properly served in accordance with Order 11E, the proceedings would have been irregular on the separate ground that the summons itself should have been served. Where a defendant is not a citizen of Ireland, notice of summons, and not the summons itself, should be served on the defendant. See §3-60 of *Delany and McGrath on Civil Procedure* (Round Hall, 4th ed., 2018) and the case law cited there.

59. The next question which arises is whether the acknowledged fact that the defendant received the summons, albeit not in the form prescribed, precludes an application to set aside a judgment in default of appearance.

60. The position initially adopted by the defendant to these proceedings is deeply unattractive. In effect, the defendant decided not to participate in the proceedings on the incorrect understanding that the High Court exercises an *ex officio* jurisdiction. This should not have happened and was disrespectful to the process in this jurisdiction.

61. Nevertheless, this does not automatically disentitle the defendant to the relief sought in the set aside application. The requirements of constitutional justice require that, save where there are countervailing interests, a judgment should ordinarily only be entered against a party where the merits of the case have been considered by the court. This principle has, of course, to yield to the principle that litigation should be dealt with expeditiously and that there should be finality to litigation. If a party, who has properly been served with proceedings, fails to participate in the proceedings, then there must be a mechanism whereby the plaintiff can pursue their claim nonetheless.

62. This is expressly provided for under Order 13. This allows for judgment to be entered against a party where it fails to answer proceedings by entering an appearance. Additional procedural safeguards are prescribed in the case of proceedings which have been issued and served outside the jurisdiction. Insofar as proceedings predicated on the Lugano Convention are concerned, these safeguards are to be found primarily under Order 11E and Order 13A. Judgment in default of appearance may only be entered with leave of the court, i.e. it cannot be entered in the Central Office. It must be established to the satisfaction of the court that:

    (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

    (b) the document was actually delivered to the defendant or to his residence by another method provided for by the Convention

    and that in either case the service or delivery was effected in sufficient time to enable the defendant to defend.

63. Given that the entry of judgment against a party without there being a hearing on the merits is the exception, it is essential that there be full compliance with the procedural requirements in relation to service. It is only where the court is satisfied that the defendant has been given a proper opportunity to appear and defend the proceedings, and has failed to do so, that judgment will be entered against them in default.

64. It is for this reason then that the authorities are clear that there must be scrupulous compliance with the rules of court before an application for judgment in default of appearance will be successful. See, for example, *McGrath v. Godfrey* [2016] IECA 178 (at paragraph 22) as follows:

> "It is important in this context to note that the Court will demand proof of strict compliance with the Rules of Court by a party who seeks to stand over a judgment obtained in default of appearance. This, in my view, is extremely important having regard to the potential grave consequences for any defendant against whom judgment is obtained […]."

65. On the facts of the present case, there was no such compliance. This is not changed by the happenstance that the defendant had been notified of the proceedings in an irregular manner.

ALTERNATIVE BASIS FOR SETTING ASIDE

66. Lest I be incorrect in my finding above that the service of the proceedings was irregular and is not cured by the informal receipt of the plenary summons, I propose to consider the alternative basis for setting aside the default judgment. As appears from the case law discussed at paragraphs 35 to 40 above, the threshold to be met on this type of application is higher. The defendant must demonstrate that they have a credible defence to the proceedings, which has a real chance of success. The defendant must also convince the court that, having regard

to all of the relevant circumstances, the balance of justice would favour the setting aside of the default judgment.

67. The principal relief claimed against the defendant in these proceedings is for damages. Perhaps surprisingly, the claim includes a claim for exemplary damages. The plaintiff through its solicitors has quantified the damages in the sum of 10 million euro.

68. Counsel on behalf of the defendant submits that there is a credible defence to the proceedings under the Directive on Electronic Commerce (Directive 2000/31/EC). The Directive on Electronic Commerce has been transposed into domestic law by the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003) ("***the domestic e-commerce regulations***").

69. Reliance is placed, in particular, on the exemptions and immunities provided for intermediary service providers. An intermediary service provider can benefit from the exemptions for "mere conduit" and for "caching" when it is in no way involved with the information transmitted. This requires among other things that the provider does not modify the information that it transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

70. The "mere conduit" exemption is provided for under the domestic e-commerce regulations as follows (at reg. 16):

> "(1) An intermediary service provider shall not be liable for information transmitted by him or her in a communication network if –
>
> (a) the information has been provided to him or her by a recipient of a relevant service provided by him or her (being a service consisting of the transmission in a communication network of that information), or

(b) a relevant service provided by him or her consists of the provision of access to a communication network,

and, in either case, the following conditions are complied with –

(i) the intermediary service provider did not initiate the transmission,

(ii) the intermediary service provider did not select the receiver of the transmission, and

(iii) the intermediary service provider did not select or modify the information contained in the transmission.

(2) References in paragraph (1) to an act of transmission and of provision of access include references to the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communications network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

(3) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights."

71. An exemption is provided in respect of "caching" under the domestic e-commerce regulations (at reg. 17) as follows:

"(1) An intermediary service provider shall not be liable for the automatic intermediate and temporary storage of information which is performed for the sole purpose of making more efficient that information's onward transmission to other users of the service upon their request, if –

(a) that storage is done in the context of the provision of a relevant service by the relevant service provider consisting of the transmission in a communication network of information provided by a recipient of that service, and

(b) the following conditions are complied with –

(i) the intermediary service provider does not modify the information,

(ii) the intermediary service provider complies with conditions relating to access to the information,

(iii) the intermediary service provider complies with any rules regarding the updating of the information that have been specified in a manner widely recognised and used by industry,

(iv) the intermediary service provider does not interfere with the lawful use of technology, widely recognised and used by industry to obtain data on the use of the information, and

(v) the intermediary service provider acts expeditiously to remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

(2) This Regulation shall not affect the power of any court to make an order against an intermediary service provider requiring the provider not to infringe, or to cease to infringe, any legal rights."

72. Critically, the concept of "liability" is defined for the purpose of the domestic e-commerce regulations as exempting an intermediary service provider from having to pay damages. See regulation 15 as follows:

"A provision of Regulation 16, 17 or 18 providing that a relevant service provider shall not be liable for a particular act shall be construed as a provision to the effect that the provider shall not –

(a) be liable in damages or, unless otherwise provided, be liable to be the subject of an order providing for any other form of relief, for infringing, by reason of that act, the legal rights of any natural or legal person or, by reason of that act, for breaching any duty, or

(b) be liable to be subject to any proceedings (whether civil or criminal) by reason of that act constituting a contravention of any enactment or an infringement of any rule of law."

73. Reference is made to the judgment in *Mulvaney v. Sporting Exchange Ltd* [2009] IEHC 133; [2011] 1 I.R. 85. There, Clarke J. (as he then was) agreed with the broad interpretation given to the definition of "intermediary service providers" in *Bunt v. Tilley* [2006] EWHC 407; [2007] 1 W.L.R. 1243.

74. Counsel submits that the "mere conduit" exemption and/or the "caching" exemption provide the defendant, as an intermediary service provider, with a full defence to the claim on the merits. A possible draft of the formal defence to be delivered, in the event that the default judgment were to be set aside, has helpfully been shown to the court. Counsel further submits that the defence is so strong as to justify the making of an application to have the proceedings struck out as frivolous and vexatious.

Findings of the court

75. I am satisfied that the defendant has demonstrated that it has a credible defence to the proceedings which has a real chance of success (within the meaning of *McGrath v. Godfrey* [2016] IECA 178). More specifically, there are strong grounds for saying that the defendant represents an "intermediary service provider" within the meaning of the domestic regulations which transpose the Directive on Electronic Commerce (Directive 2000/31/EC). If the defendant can establish this at trial, then it would be in a position to assert the exemptions or immunities prescribed for the transmission of information in a communication network ("mere conduit") or the automatic intermediate and temporary storage of information ("caching").

76. In its response to the set aside application, the plaintiff has chosen not to engage with the detail of the Directive on Electronic Commerce. This does not, of course, preclude it from doing so in the event that the proceedings go to full hearing. As matters currently stand, however, nothing has been urged on behalf of the plaintiff which suggests that there is not a credible defence to the claim for defamation. In particular, no argument has been advanced to the court as to how the pursuit of a claim for damages for defamation in the order of 10 million euro is consistent

with the exemptions provided for under the domestic regulations (set out earlier). As appears, an "intermediary service provider" will not normally be liable in damages.

77. It should be emphasised that a claim for damages is different from an application for a disclosure order. It is a separate issue as to whether the provider of an email service is amenable to a disclosure order, requiring it to identify the individuals behind a particular email account. Such orders are often granted under the *Norwich Pharmacal* jurisdiction: see, for example, *Portakabin Ltd v. Google Ireland Ltd* [2021] IEHC 446.

78. The only authority relied upon by counsel for the plaintiff in respect of the merits of these proceedings is the judgment of the European Court of Human Rights ("***ECtHR***") in *Delfi v. Estonia* (Application No 64569/09) (2015) 62 EHRR 199; 39 BHRC 151. This judgment concerned defamatory material published in the "comments section" of an article published on an internet news portal. The internet news portal was owned and operated by the applicant company, Delfi AS. The applicant company had sought, unsuccessfully, to defend defamation proceedings taken against it on the basis, *inter alia*, that it was merely an intermediary service provider. The domestic courts rejected this defence on the basis that the activities of the applicant company in publishing the comments were not merely of a technical, automatic and passive nature. The domestic courts held that the fact that the applicant company was not the author of the comments did not mean that it had no control over the comments section.

79. The ECtHR agreed with the domestic courts' assessment. In particular, the ECtHR noted the domestic courts' finding that the applicant company was a professionally managed internet news portal, run on a commercial basis, which

sought to attract a large number of comments on news articles published by it. The applicant company had an economic interest in the posting of comments. The ECtHR expressly agreed with the domestic courts' finding that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal.

80. With respect, the nature of the activities of the defendant in the present proceedings are entirely distinguishable from those of the applicant company in *Delfi v. Estonia*. There is no allegation that the defendant had been aware of the content of the emails before same was brought to their attention by the plaintiff's solicitors in September 2018. Thereafter, the defendant outlined the procedure to report the content of the emails to their "abuse team". The defendant also explained that, in accordance with Swiss law, it was precluded from divulging the identity of the account user without a formal process.

81. In summary, I am satisfied—on the basis of the limited arguments made to the court by the plaintiff to date—that the defendant has demonstrated a credible defence which has a real chance of success. It is next necessary to consider whether the balance of justice is in favour of setting aside the default judgment.

82. The weightiest factor *against* setting aside the default judgment is, of course, the litigation conduct of the defendant. As appears from the affidavit evidence, the defendant made a tactical decision not to contest the proceedings. This was done in the expectation that the Irish Courts would exercise an *ex officio* jurisdiction to dismiss the claim. It seems that the Swiss Courts adopt a more proactive role in proceedings and will raise legal issues of their own motion.

83. The defendant's approach to the proceedings is to be deprecated. The Irish Courts have substantive jurisdiction over the defamation claim pursuant to the Lugano

Convention. It was disrespectful of the defendant to ignore the proceedings. The proper course to be followed by a party who is convinced that proceedings taken against it are unstateable is to bring a preliminary application to have the proceedings dismissed as frivolous and vexatious or as an abuse of process. If such an application is successful, then the party would normally be entitled to an order for costs in its favour in accordance with the principles prescribed under Part 11 of the Legal Services Regulation Act 2015.

84. A party who makes a deliberate and conscious decision simply to disregard proceedings has no right to expect to be shown indulgence if judgment is entered against them in default of appearance.

85. There are, however, a number of countervailing factors which tilt the scales towards setting aside the default judgment. The first of these is the strength of the intended defence. On the basis of the arguments to date, the intended defence not only meets the minimum threshold for an application to set aside, but represents a very strong defence. The defence is predicated largely on matters of law, rather than of fact, and thus the court is in a position even at this interlocutory stage to make some assessment of the probable outcome of the case. See, by analogy, the approach taken to interlocutory injunctions in *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Ltd* [2019] IESC 65.

86. The potential prejudice to the defendant of allowing the default judgment to stand is far greater than any prejudice to the plaintiff in setting it aside. The claim for damages is enormous: the plaintiff has sought aggravated and exemplary damages and has mooted a sum of 10 million euro. The plaintiff has expressly pleaded in its statement of claim that this figure represents the reputational loss to the company which, it is further pleaded, competes on a daily basis for multimillion

euro road construction projects and is now prejudiced in its legitimate business affairs as a direct consequence of the defendant's negligent role in hosting and protecting their rogue client's defamatory publications.

87. If the default judgment stands, then the defendant is at risk of having to pay a significant sum by way of damages in circumstances where it says it has a full answer to the proceedings under the Directive on Electronic Commerce.

88. If, conversely, the judgment is set aside, then the plaintiff suffers the prejudice of losing the benefit of the default judgment. In assessing this prejudice, regard must be had to the chronology of the proceedings. Although these proceedings were instituted in October 2018, there was delay on the part of the plaintiff in pursuing its application for judgment in default of appearance. Judgment was only entered on 2 July 2020. The motion seeking to set aside the judgment issued some five weeks later on 12 August 2020. It follows, therefore, that the plaintiff had only had the benefit of the default judgment for a very short period of time. Moreover, the judgment had not been capable of immediate execution in that damages remained to be assessed.

89. Any prejudice to the plaintiff can be ameliorated by the making of an appropriate costs order. The plaintiff's position in respect of the limitation period for defamation proceedings can be safeguarded by granting leave to renew the plenary summons. This is addressed under the next heading.

90. Finally, in reaching this conclusion I have had regard to the judgment of the High Court (Binchy J.) in *Grovit v. Jan Jansen* [2018] IEHC 22 (which was opened by counsel on behalf of the defendant). This judgment also involved a case where a defendant to defamation proceedings, who had notice of proceedings, took a tactical decision to ignore the proceedings. The defendant in that case also

applied to set aside a default judgment on the grounds, *inter alia*, that the service of the proceedings had been irregular. The High Court set aside the default judgment on the basis, first, that there had been irregularities in the manner in which judgment was obtained; and, secondly, that the defendant had a defence which had a good prospect of success.

91. Whereas each application to set aside a default judgment must be decided on its own specific facts, it is to be noted that the High Court in *Grovit v. Jan Jansen* was prepared to set aside the judgment notwithstanding the defendant's initial decision to ignore the proceedings.

PART II

MOTION SEEKING TO RENEW SUMMONS

DISCUSSION

92. The default position is that a plenary summons should be served within twelve months of the date of the issuance of the proceedings. The summons does not become a "nullity" after that date, but it would not be in force for the purpose of service after that date *unless* renewed by leave of the court (see, by analogy, *Baulk v. Irish National Insurance Company Ltd* [1969] I.R. 66 at 71).

93. The limitation period generally applicable to defamation proceedings under the Statute of Limitations has been reduced to one year by the Defamation Act 2009. This period may be extended to two years in the interests of justice. If the service of the proceedings in the present case is set aside, it would be too late now for the plaintiff to issue fresh proceedings within the limitation period. This is because the emails complained of were published in 2018. The claim for defamation

against the defendant would be statute barred, unless the plenary summons in the present proceedings is renewed.

94. Order 8, rule 1(4) of the Rules of the Superior Courts provides that a court may order a renewal of the original summons if satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the court's order.

95. The Court of Appeal, in *Murphy v. Health Service Executive* [2021] IECA 3 (at paragraphs 69 to 78), has explained the nature of the test under Order 8, rule 1(4) as follows:

(i). A single test is to be applied, namely, whether there are special circumstances which justify an extension. This test governs the grant of leave to renew. There is no separate requirement to satisfy the court there is "good reason" to extend time for the making of an application for leave to renew.

(ii). There is not a second tier or limb to the test. The need for the court to consider the interests of justice, prejudice and the balancing of hardship is encompassed by the phrase "special circumstances [which] justify extension". Thus, there may be special circumstances which might normally justify a renewal, but there may be countervailing circumstances, such as material prejudice in defending proceedings, that when weighed in the balance would lead a court to decide not to renew. The High Court should consider and weigh in the balance all such matters in coming to a just decision.

(iii). The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice

or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused.

96. In the present proceedings, the plaintiff has brought, as a fall back, an application for leave to renew the summons. The logic of this application is that, in the event that the initial service of the proceedings were found to be irregular, the plaintiff wishes an opportunity to serve a renewed summons on the defendant.

97. Given the fact that this application is a fall back only, the affidavit in support of same is not, perhaps, as full as one might otherwise expect. Nevertheless, the broad gist of the concerns raised are evident from the supplemental affidavit sworn by the plaintiff's solicitor. In particular, this affidavit explains the potential difficulties which would arise in respect of the Statute of Limitations. The chronology of events in the present case is such that a finding by this court that the proceedings should be set aside as having been irregularly served, would have the consequence that it would be too late thereafter for the plaintiff to issue a fresh set of proceedings.

98. Counsel on behalf of the defendant suggests that any prejudice in this regard is minimised by the fact that there are already, in being, a set of proceedings in the name of the managing director of the plaintiff company, Mr. Quinn. Counsel further submits that the fact that a claim would otherwise be barred under the Statute of Limitations is not normally regarded as a good reason for granting leave to renew a summons.

FINDINGS OF THE COURT ON RENEWAL APPLICATION

99. It seems to me that the same underlying principle which governs the defendant's application to set aside the default judgment is equally relevant to the plaintiff's

application to renew the summons. The principle is that the courts should lean towards deciding cases on their merits where this can be done consistently with the requirement for expedition in litigation and without prejudicing the rights of the other parties. (See, by analogy, *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 330). The consequence of refusing to renew the summons in this case would be that the plaintiff's claim would, in effect, have been shut out without any hearing on the merits. It may be, following either a full trial of the action or an application to strike out the proceedings as frivolous and vexatious (which has been presaged by counsel for the defendant), the claim would ultimately have been dismissed in any event. That is, however, a very different matter from ruling that the claim must be excluded *in limine*.

100. It is correct to say—as counsel for the defendant does—that the fact that proceedings will be barred under the Statute of Limitations is not, in itself, a justification for renewing a summons. The Court of Appeal has, however, explained in *Murphy v. Health Service Executive* [2021] IECA 3 (at paragraphs 110 to 111) that, in determining where the balance of justice or hardship lies, it is appropriate to consider the likely consequences for a plaintiff of a refusal to renew from the point of view of the operation of the Statute of Limitations.

101. The facts of the present case are truly exceptional. Given the events of September and October 2018, it had been reasonable for the plaintiff to assume that service of the plenary summons had been effected. No objection had been taken by the defendant at that time as to the form of service. Indeed, the defendant had, initially, attempted to enter an appearance to the proceedings. The service of the summons has since been found to be irregular on technical grounds only.

102. This is not a case where a plaintiff failed to make reasonable efforts to serve the proceedings within the twelve-month period allowed under the Rules of the Superior Courts, with the result that there is now a difficulty under the Statute of Limitations. Rather, these proceedings were issued promptly on 15 October 2018, within a matter of months of the publication of the allegedly defamatory emails. Notwithstanding that the service was irregular, it is a fact that the defendant has been on notice of the defamation proceedings since 18 October 2018 at the latest. This is highly significant. The case law indicates that one of the factors which can be taken into account on a renewal application is that a defendant was on notice of the proceedings, notwithstanding that same had not been formally served. Such informal notice allows a defendant to, for example, preserve such records as may be relevant to the defence of the proceedings, or, in the case of a professional, to notify their insurers.

103. It would be contrary to the interests of justice to deny the plaintiff an opportunity to regularise service now. If the summons is not renewed, then the plaintiff's claim for defamation would be statute barred. This would confer an unjustified windfall on the defendant. In effect, the defendant would be rewarded for having failed to make any objection at the time to the form of service, and for having chosen to ignore the proceedings thereafter. Such an outcome would be an affront to the interests of justice.

104. The application to renew the plenary summons is therefore allowed.

CONCLUSION AND FORM OF ORDER

105. The courts demand proof of strict compliance with the rules of court by a party who seeks to stand over a judgment obtained in default of appearance (*McGrath v. Godfrey* [2016] IECA 178 (at paragraph 22)).

106. On the basis of the limited arguments advanced to the court on behalf of the plaintiff, I have concluded that the service of the proceedings was irregular. First, service was not effected in accordance with Order 11E of the Rules of the Superior Courts. Secondly, the fact that the plenary summons itself, rather than notice of the summons, had been sent to the defendant represents a breach of Order 11A, rule 6 of the Rules of the Superior Courts.

107. Whereas it is common case that the defendant did actually receive the plenary summons, judgment in default of appearance may only be properly entered where there has been scrupulous compliance with all procedural requirements.

108. Even if, contrary to the finding above, service of the plenary summons had been effective, the balance of justice favours the setting aside of the default judgment for the reasons set out at paragraphs 75 to 91 above. The defendant has demonstrated that it has a credible defence to the proceedings, which has a real chance of success. It would be disproportionate to allow the default judgment to stand having regard to (i) the existence of what appears to be a very strong defence under the domestic regulations implementing the Directive on Electronic Commerce (Directive 2000/31/EC); and (ii) the balance of prejudice as between the plaintiff and the defendant.

109. Accordingly, the default judgment entered on 2 July 2020 will be set aside pursuant to Order 13, rule 11 and Order 13A of the Rules of the Superior Courts. Any potential prejudice to the plaintiff will be mitigated by the renewal of the

plenary summons and the making of appropriate costs orders. The *Norwich Pharmacal* order granted on 21 January 2019 should also be set aside in circumstances where the proceedings were not properly served. Moreover, the proofs for a disclosure order, as summarised in *Board of Management of Salesian Secondary School v. Facebook Ireland Ltd* [2021] IEHC 287 (at paragraphs 20 to 24), had not been met.

110. The plaintiff's application to renew the plenary summons pursuant to Order 8 of the Rules of the Superior Courts is allowed. It is in the interests of justice that the plaintiff be afforded an opportunity now to serve the summons in compliance with the Rules of the Superior Courts, and that it retain the benefit of the date of the institution of the proceedings on 15 October 2018 for the purpose of the limitation period. The order of the court will record that the "special circumstances" are those set out at paragraphs 99 to 104 above.

111. Insofar as costs are concerned, it is a condition of the order setting aside the default judgment and the *Norwich Pharmacal* order that the plaintiff should recover as against the defendant the adjudicated costs of the applications on 21 January 2019 and 2 July 2020, respectively. These costs were incurred as a result of the defendant's failure to engage with the proceedings earlier. The costs associated with the drafting of the plenary summons and the statement of claim are not recoverable as part of this costs order. This is because such costs would have had to be incurred even if the defendant had engaged with the proceedings from the outset. Such costs fall to be allocated by the trial judge.

112. Insofar as the costs of the two motions heard on 20 July 2021 are concerned, my *provisional view* as to the appropriate costs order is set out below. The provisional view is predicated on the assumption that the motions are subject to

Part 11 of the Legal Services Regulation Act 2015. Any costs order will be subject to a stay in the event of an appeal, and subject to the proviso that, in default of agreement between the parties, costs are to be adjudicated upon under Part 10 of the Legal Services Regulation Act 2015.

113. The plaintiff would appear to be entitled to the costs of the motion to renew the summons under Order 8 of the Rules of the Superior Courts. This is because the plaintiff has been "entirely successful" in this application notwithstanding the defendant's opposition to same. Further, it is at least arguable that the application to renew would not have been necessary at all "but for" the failure of the defendant to engage with the proceedings.

114. The plaintiff would also appear to be entitled to the costs of the motion to set aside the default judgment. Whereas the plaintiff did not ultimately succeed in its opposition to the motion, it would have been necessary for the defendant to bring the motion before the court even had the plaintiff consented to same. Further, one of the considerations to be taken into account on a costs application is litigation conduct. For the reasons explained earlier, the initial approach of the defendant to these proceedings is to be deprecated. Subject to any submission which the defendant may make, it would seem reasonable to mark the court's disapproval by awarding the costs of the motion against the defendant.

115. If either party wishes to contend for a different form of costs order, short written submissions should be filed by 10 October 2021. I will list the matter before me on 20 October 2021 at 10.30 a.m. for final orders.

Appearances

Sean Corrigan for the plaintiff instructed by Sharon Oakes Solicitor
Anthony Thuillier for the defendant instructed by William Fry Solicitors

Approved