

Neutral Citation No: [2026] NIKB 23

Ref: HUM13054

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 19/05/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

NEIL SANDS
and
DONNA SANDS

Plaintiffs/Respondents

and

SEBASTIAN BOND
YUZU ZEST LIMITED
and
KUMQUAT TREE LIMITED

Defendants/Applicants

Gavin Millar KC & Peter Girvan (instructed by Arthur Cox) for the
Plaintiffs/Respondents

Tony McGleenan KC & David Mitchell (instructed by Mills Selig) for the first and third
Defendants/Applicants

RULING ON COSTS, LEAVE TO APPEAL AND STAY OF THE COURT ORDER

Humphreys J

Introduction

[1] Following my judgment handed down on 5 May 2026 (reported at [2026] NIKB 20), the parties have agreed the terms of the court order, save for the basis upon which costs are ordered to be taxed.

[2] The plaintiffs seek leave to appeal against the order and, whether leave is granted or not, a stay on the operation of the court order.

The order for costs

[3] It is uncontentioned that the plaintiffs be ordered to pay the first and third defendants' costs of the various applications before the court. However, these defendants contend that the plaintiffs ought to be ordered to pay costs on the indemnity rather than the standard basis.

[4] Order 62 rule 3(4) of the Rules of the Court of Judicature (NI) 1980 provides:

“The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis... unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis.”

[5] In *Craven v Giambrone* [2013] NIQB 61, Weatherup J adopted the “unexceptionable propositions” of Aikenhead J in *London Borough of Southwark v IBM UK* [2011] EWHC 653 (TCC):

- “(a) An award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable;
- (b) Indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted;
- (c) The court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm;
- (d) The conduct must be unreasonable to a high degree. ‘Unreasonable’ in this context does not mean merely wrong or misguided in hindsight;
- (e) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order;
- (f) There is no injustice to a claimant in denying it the benefit of an assessment on a proportionate basis when the claimant showed no interest in proportionality in casting its claim

disproportionately widely and requiring the defendant to meet such a claim;

- (g) If one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis;
- (h) Rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order;
- (i) Rejection of two reasonable offers can of itself justify an order for indemnity costs."

[6] The court has found that the plaintiffs in this action failed in their duties of disclosure. As I stated at para [145]:

"... the breaches of the obligation to make full and frank disclosure in this case were egregious, repeated and carried on for a period of two years across an array of ex parte applications."

[7] The first and third defendants only incurred legal costs from June 2025 onwards since, on their evidence, they were not aware of the proceedings until that time. Since then the defendants have applied to vary the terms of the freezing order, to strike out the case as an abuse of process and to set aside previous orders made in the litigation. They have also resisted applications brought by the plaintiffs to deem service good and to have subpoenae issued.

[8] The plaintiffs successfully resisted the abuse of process application and whilst they were unsuccessful in relation to the other matters, no criticism can be levelled in relation to the manner in which these were approached. It is noteworthy that the plaintiffs agreed to provide discovery of certain documents relating to their state of knowledge and to their interaction with Nardello. This approach had much to commend it. Arguments could have been made to resist the production of this documentation which would have occupied considerable court time.

[9] There is nothing in the conduct of the plaintiffs in relation to these applications which could be characterised as "out of the norm". I have therefore determined that it is appropriate for the defendants' costs to be taxed on the standard basis.

Leave to appeal

[10] Section 35(2) of the Judicature (Northern Ireland) Act 1978 states:

“No appeal to the Court of Appeal shall lie –

- (g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases namely: ...
- (ii) where an injunction or the appointment of a receiver is granted or refused...”

[11] The question of whether a particular order is interlocutory or final in nature can be problematic. As the Court of Appeal explained in *Patterson & Anor v Rathfriland Farmers Co Operative Society Ltd (Judgment No. 2: Leave to Appeal and Time Issues)* [2025] NICA 20, at paras [10] to [13], an order is only final if the application itself would have been determinative of the action however it were decided.

[12] In this case, each of the subject applications was capable of determination in a manner which would have entailed the continuance of the proceedings. As a result, they are properly characterised as interlocutory in nature. It is arguable that at least one of the applications involved the grant or refusal of an injunction but the plaintiffs sensibly accept that they ought to seek the leave of the court to pursue their appeal, without prejudice to any argument which may be advanced before the Court of Appeal.

[13] In *Re McNamee’s and McDonnell’s Application* [2010] NIQB 29, McCloskey J commented:

“In cases where leave to appeal to any appellate court is a pre-requisite, the court below will almost invariably require to be satisfied that the point to be canvassed before the appellate court is of sufficient importance to justify the grant of permission. The first instance court acts as a filter and, clearly, the legislative intention is that there is a threshold to be overcome. The grant of leave to appeal will never be a formality.” (para [39])

[14] Where the proposed appeal relates to an area of discretionary or evaluative decision making, the Court of Appeal stated in *Flynn v Chief Constable of the PSNI* [2018] NICA 3:

“[19] We accept that leave to appeal should only be granted in a case where the applicant demonstrates an arguable case with a reasonable prospect of success that the trial judge had gone plainly wrong. The first ground pursued by the applicant was that the learned trial judge had been wrong to conclude that there had been no attempt to comply with the orders made by the Master over many years. This is a submission which challenges an inference of fact made by the learned trial judge on the basis of the evidence as a whole. The issue for this court is whether it was permissible for the learned trial judge to reach that conclusion. There is no dispute about the fact that the conclusion was material to his decision to refuse to extend time for compliance with the discovery order.

[20] In order to succeed in that submission the applicant had to identify a mistake in the judge’s evaluation of the evidence that was sufficiently material to undermine the conclusion (see *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21). Reticence on the part of an appellate court is appropriate even in those cases where the issue has been determined on the affidavits rather than oral evidence (see *DB v Chief Constable of PSNI* [2017] UKSC 7).”

[15] Where the appeal raises an error of law, the question is whether it is reasonably arguable that the judge has fallen into such error.

[16] The proposed grounds of appeal are as follows:

- (i) The first defendant’s failure to establish by direct evidence of his own that he did not know about the substituted service order (“SSO”) (and default judgment) was fatal to his application to set aside these orders;
- (ii) The decision as to the sanction for the material non-disclosure, setting aside the SSO, was plainly wrong;
- (iii) The court misdirected itself when it held that the writ and statement of claim were not served; and
- (iv) The dismissal of the deeming application was plainly wrong.

[17] The plaintiffs now accept both that there was material non-disclosure and that the application to enter judgment in default of defence was not properly served. No appeal is pursued in relation to either of these findings.

[18] The appeal is therefore grounded, firstly, on the decision to set aside the SSO in terms of the knowledge point (ground (i)) and the sanction point (ground (ii)).

[19] The plaintiffs say that the court erred in law in failing to have regard to the principles set out by Lord Sumption in *Sans Souci Ltd v SRL Services Ltd* [2012] UKPC 6 at [23]. He stressed the importance of finality in litigation and held that where an order has been perfected the court has an inherent jurisdiction to hear a party on an application to set it aside but it will only do so where the party can demonstrate that the order can be attributed to a miscarriage of justice. There must be “special circumstances in which the process itself has been corrupted.”

[20] This does not speak to the situation where ex parte orders have been obtained in circumstances where there has been admitted breach of the duty of full and frank disclosure. In this situation, there is no need to show “special circumstances” as the principles set out in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) make clear:

“Immediate discharge (without renewal) is likely to be the court’s starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged.” (para [7(x)]).

[21] The plaintiffs also place reliance on a judgment of Brooke LJ in *Wisniewski v Central Manchester HA* [1998] EWCA Civ 598 where the learned judge discussed the drawing of adverse inferences from the silence of a witness who may have had material evidence to give relating to an issue in an action. This was in the context of the failure of a treating doctor to give evidence in the plenary trial of a clinical negligence action.

[22] This is, of course, an interlocutory application where a court will be much more reticent to draw an adverse inference than it may be in the context of a full fact finding trial. Interlocutory applications are usually conducted without evidence from every material witness and in the absence of complete disclosure. There is, in any event, no mandatory rule that a particular witness must give evidence on any particular issue. The absence of any evidence from Mr Bond directly was a factor taken into account in the overall evidential analysis but it was not determinative of the question under consideration.

[23] Properly analysed, grounds (i) and (ii) do not allege an error of law but seek to impugn the court’s evaluation of the evidence and the determination that setting aside the SSO was the proportionate remedy.

[24] I am not satisfied that the plaintiffs have demonstrated an arguable case that this decision was plainly wrong.

[25] Ground (iii), the plaintiffs contend, raises an error of law. This was, as the judgment describes, a subsidiary issue. It was inextricably linked to the failures by the plaintiffs to comply with their disclosure obligations. The plaintiffs have never sought to deny that they had the means of knowledge that the documents were never downloaded but failed to inform the court. This renders the situation quite different from the envelope which remains unopened. I am not persuaded that any arguable case has made out that this finding resulted from an error of law.

[26] Ground (iv) is effectively a restatement of the arguments underpinning grounds (i) and (ii). It is significant that there is no appeal against the finding that the application to mark judgment in default was never properly served. Instead, the plaintiffs say that the court ought now to deem service good and cure this irregularity. This is a challenge to the court's evaluation and does not give rise to an arguable case that the refusal to deem service good was plainly wrong.

[27] I have concluded that none of the grounds raise an arguable case with reasonable prospects of success. Leave to appeal is therefore refused.

Stay of the order

[28] The plaintiffs seek a stay of the order of the court and preservation of the Worldwide Freezing Order ("WFO") pending determination of their appeal.

[29] Order 59 rule 13 provides:

- "(1) Except so far as the court below or the Court of Appeal may otherwise direct-
- (a) an appeal shall not operate as a stay of enforcement or of proceedings under the decision of the court below."

[30] It is contended that if the WFO is set aside with immediate effect it would create a real and obvious risk that assets will be dissipated and put beyond the reach of the plaintiffs which would, in turn, render any appeal nugatory.

[31] As against that, the court has found serious and material breaches of the disclosure duties by the plaintiffs and held, in all the circumstances, that the judgment and the WFO should be set aside.

[32] This was an issue with which Judge Pelling QC wrestled in *Abu Dhabi Commercial Bank v Shetty* [2022] EWHC 1020 (Comm). He found:

"I accept that I have jurisdiction to delay the discharge of the worldwide freezing order to the extent I have. I accept, however, that this is a rather tension ridden jurisdiction,

because it involves continuing a potentially onerous order for a significant period of time after a decision has been taken that the order ought, as a consequence of the other decisions taken, be discharged. In those circumstances, it seems to me that the appropriate course is for the claimant to seek the relief it seeks under para 12 of its draft order from the Court of Appeal in its application for permission to appeal.” (para [19])

[33] I have not found that the plaintiffs have established an arguable case which would give rise to an entitlement to leave to appeal and, in such circumstances, I intend to follow Judge Pelling’s approach and refuse the application for a stay which can be renewed to the Court of Appeal.

Conclusion

[34] For the reasons set out, I order:

- (i) Costs are to be taxed on the standard basis;
- (ii) Leave to appeal is refused; and
- (iii) The application for a stay is refused.