Neutral Citation Number: [2023] EWHC 3038 (KB)

Case No: KB-2023-002134

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2023

Before :

MR JUSTICE LANE

- -

Between :

PAYONE GMBH	**Claimant**
- and -	
JERRY KOFI LOGO	**Defendant**

- -
- -

Mr L Davidson (instructed by **Orrick, Herrington & Sutcliffe (UK) LLP**) for the **claimant**
The defendant appeared in person

Hearing date: 14 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 30 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....

MR JUSTICE LANE

Judgment Approved by the court for handing down.

Mr Justice Lane:

1. The claimant applies to strike out a document known as a witness statement, which the defendant contends is to be treated as a defence and counterclaim.

2. At the hearing on 14 November 2023, the claimant was represented by Mr Davidson. The defendant appeared in person via video link. The defendant had requested to appear in this manner, for reasons of health and due to his caring responsibilities. There were no technical problems with the video link.

3. I am satisfied that the defendant and Mr Davidson had access to all the documentation in connection with the hearing. I had regard to the fact that the defendant is a litigant in person and endeavoured to ensure both that he understood the case being put on behalf of the claimant and that he was able to put his own case. In the event, the defendant made his submissions with clarity and skill. I am grateful to him and to Mr Davidson for their respective oral and written submissions.

4. The defendant was employed by the claimant (and, before that, by the claimant's predecessor company) pursuant to a contract of employment dated 20 October 2016. The defendant resigned, having given one month's notice, which expired on 4 March 2021. After the defendant left that employment, the claimant discovered that, since 2018, the defendant had sent around 150 emails from his work email to one or more of his personal accounts. Further, on 5 and 7 January 2021, the defendant had double-deleted sent items from the claimant's email server. During 2022, the claimant came to understand that the defendant had possession of large quantities of documents, some of which the defendant had created using personal photography and audio recording. Some of the documentation was said to include confidential information and personal data concerning the claimant's customers.

5. The defendant sent some of this material to regulators in Germany and the United Kingdom, as well as to the press email address of a charity. The defendant also made what he characterised as whistleblowing disclosures to the claimant itself, threatening to go to the press with them. The defendant established an online magazine, which he used to publish information regarding matters between him and the claimant.

THE ORDER OF LINDEN J

6. On 19 May 2023, Linden J granted the claimant an interim injunction, restraining the defendant from using the claimant's confidential information. Paragraph 6 of the order contains a number of exemptions, one of which has the effect that the defendant can disclose confidential information (as defined in the order) to *inter alia* one or more of the regulators listed in Schedule G. The list includes the Financial Conduct Authority, the Payments Systems Regulator, the Health and Safety Executive and the (German) Federal Financial Supervision Authority ("BaFin").

7. In his written reasons of 6 June 2023, Linden J noted at paragraph 6 that the defendant "said that he had made all of the disclosures to the regulators which he wished to make but that he wished to be able to assist any regulators who wanted further information from him."

8. Paragraphs 7 and 8 of Linden J's order required the delivery up/deletion of relevant material, save for trial bundles prepared in connection with certain proceedings involving the claimant and the defendant (listed in Schedule C). Paragraph 9 of the order required the

claimant to provide the defendant with copies of certain documents disclosed to the claimant by the defendant in two sets of employment tribunal proceedings and in certain county court proceedings, solely for the purposes of those proceedings.

9. Explaining his reasons for including paragraphs 7 and 8 of the order, Linden J said at paragraph 9 of his reasons that it was "to ensure that this did not place an onerous burden on the Defendant and did not interfere with his position in the ongoing litigation with the Claimant. My view was that the regulators had been sent the documents which the Defendant considered they needed. There was no evidence that they were particularly concerned about the matters raised by the Defendant, but if they wanted more information there were various ways in which they could obtain it from the Claimant."

10. In making the order, Linden J "was satisfied that there were serious issues to be tried in contract and conversion as well as breach of confidence…" (paragraph 7). At paragraph 8, he cited case law, most recently Nissan Motors (GB) Limited v Passi [2021] EWHC 3642, "all of which illustrate the reluctance of the courts to sanction employees helping themselves to, or retaining, their employer's documents for the purposes of future litigation, or anticipated regulatory issues or protected disclosures, and even for the purposes of taking legal advice."

11. At paragraph 13 of his reasons, Linden J explained why he was persuaded that his order should be varied so that the defendant was no longer required to delete documents attached to emails sent after the termination of his employment. This recognised the difficulties that had arisen, "in large part from the Claimant's delay in coming to court." The delay issue was addressed at paragraphs 4 and 5 of the reasons. Among other things, the defendant had been concerned about coming to court when the defendant was setting himself out as a whistleblower. The claimant had hoped that "a consensual approach would work but the Defendant's behaviour in disseminating information relating to the Claimant and its clients, including their personal data, had escalated over a period of months." As a result of the delay, the defendant had made disclosures to regulators, involving "personal data including copies of passports made for the purposes of money laundering checks".

THE DEFENDANT'S WITNESS STATEMENTS

12. The document which the claimant seeks to have struck out is a "Witness Statement of Jerry Kofi Logo", dated 7 July 2023. Shortly after filing it, the defendant produced an amended version. The claimant's application focusses on the original version, on the basis that, if this falls to be struck out, the amended document can have no role to play, since the amendments do not "cure" what are said to be the deficiencies of the original version.

13. The witness statement gives an account of the defendant's employment with the claimant, as well as his previous employment history. Reference is made to the regulatory regime under which the claimant operated, as a German company. Under the heading "The Public Interest", the witness statement asserts that "it is crucial to address any allegations of misconduct to safeguard the public interest and ensure compliance with UK regulations" (paragraph 15). It is said that the defendant's dialogue with regulators has been "ongoing" (paragraph 16).

14. The witness statement then details the defendant's earlier employment history, contending this "not only provided me with a solid understanding of compliance practices but also sparked my interest and curiosity in this realm" (paragraph 17). Both his own and his family's backgrounds have "reinforced my commitment to upholding the highest standards of

professionalism and prioritising the public interest in my professional endeavours" (paragraph 21).

15. Under the heading "The delay", the witness statement contends that the delay referred to by Linden J makes further relief unlikely. Reference is then made to a "Polkey remedy" in the Employment Tribunal, which appears to be said in whole or part to constitute a case of res judicata (paragraph 24). Paragraph 26 asserts that the defendant has a right under the Public Interest Disclosure Act 1998 to have "possession and freedom to interact with the documents and with the regulators, even after disclosure, [which] would allow me to ventilate the investigations with unrestrained context and deeper dive exchanges" (paragraph 26).

16. Under the heading "Claimant's ulterior motives", the witness statement says that it is clear from the facts that the claimant's actions and motives warrant close scrutiny and that the relief sought may be excessive and disproportionate. The defendant considers that the desire for delivery up and/or destruction of property and confidential information "may be driven by ulterior motives rather than a genuine concern for protection" (paragraph 32).

17. The witness statement then proceeds under the heading "Defence-addressing the specific allegations". This section begins by attempting to cast doubt on the status of the employment contract, in the light of the merger of B+S Card Service GmbH with the claimant. The defendant contends that if he sent emails as alleged, there were legitimate reasons for doing so, as the claimant had insisted that the defendant use his personal UK mobile telephone for business activities. He says it may, therefore, have been necessary for the defendant to transfer work-related documents from his work email to his personal email. The defendant says the claimant specifically asked the defendant to use his mobile phone and his personal Apple account for work activities. The defendant says the claimant had no policies or guidelines concerning these issues. The defendant contends that he had an entitlement under the contract of employment to be provided with a UK mobile phone, rather than just a German one. He says this left him with no alternative but to use his own phone.

18. The defendant says that these failures of the claimant undermined its ability to enforce the confidentiality clauses in the employment contract. The claimant's decision, after the defendant left its employment, to impose a general ban on the use of personal WhatsApp accounts is "testament to the validity of my defence" (paragraph 53), as well as underscoring that the practice raised data protection and confidentiality concerns.

19. The defendant takes issue with the FTI Consulting report, which the claimant relies upon for the identification of the 150 or so emails sent by the defendant from his work email account to his personal email account. The claimant's allegations in this regard are said to be speculative.

20. The defendant says that, during a period of exceptional personal difficulty in 2020, he "resorted to recording some key telephone calls to ensure I could effectively perform my job duties …" (paragraph 80). The defendant contends that such recordings were not deemed problematic by the claimant. As a result, the assertion that the audio recordings the defendant made constitute company records and contain confidential information is said by the defendant to be misleading. He says the claimant has sought a "Polkey" remedy in respect of this issue.

21. Although the defendant accepts that under ordinary circumstances, company records, property and confidential information should be returned upon termination of employment,

he says that "it is crucial to consider the wider context of this case, specifically the lack of English training and clear English policies regarding data protection and confidentiality" (paragraph 91). Thus, the defendant's "inadvertent retention of company records and confidential information should be viewed within the broader context of the company's failures in training, policy implementation, and responsiveness" (paragraph 93).

22. The witness statement appears at paragraph 95 to take issue with the fact that the claimant reported the defendant's unjustified retention of documents to the Information Commissioner, on the basis that any breach was the responsibility of the claimant. The defendant likens this to what is said to be the claimant's breach of UK pensions legislation, as highlighted by the Employment Tribunal.

23. The defendant contends that he alerted various regulators in the public interest, highlighting the refusal by the Employment Tribunal to accept that the defendant did not have a reasonable and genuine belief at the time of making the disclosure that it was in the public interest (paragraph 105). Documents that he supplied were, the defendant says, essential in providing evidence of alleged breaches by the claimant. Conversely, the claimant's refusal to disclose documents between it and regulators "is concerning and raises suspicion" (paragraph 136). The witness statement then seeks to describe the pre-action correspondence, from the defendant's perspective.

24. The witness statement characterises the defendant's actions in setting up his personal blog, Loopline, as a therapeutic outlet for him during a period of upheaval and mental health difficulties (paragraph 150). The defendant denies that Loopline is a mouthpiece for his personal disputes.

25. The claim in conversion is said to be met by the claimant's separate application for a "Polkey" remedy. The defendant also firmly believes that his unintentional retention of material belonging to the claimant "does not meet the threshold for conversion" (paragraph 161) and that the absence of clear policies and guidance and the lack of data protection policies and training are critical factors that need to be considered when assessing the allegations and the validity of the confidentiality clauses.

26. The witness statement asserts that the claim should be dismissed owing to the delay on the part of the claimant in bringing the claim. This is said to be supported by Linden J's decision to vary his order, as described in paragraph 13 of his written reasons. At paragraph 172, the defendant says that "The claimant, having already obtained an injunction to protect confidential information, may perceive that they already have obtained sufficient protection. It is reasonable to conclude that their delay in making the application has resulted in the proliferation of documents and attachments, making the complete deletion of such materials impractical and further relief unlikely".

27. The witness statement then turns to what are described as counterclaims. The defendant contends that the employment contract should be invalidated, owing to the claimant's breaches, misrepresentations and failures. He then says the following. The claimant compelled the defendant to use his person UK mobile phone. The claimant requested the defendant to use his personal Apple ID for work purposes, asking for his password for the same, thereby violating the defendant's data protection rights as well as breaching the contract's confidentiality clauses. The defendant felt compelled to comply with this request.

28. In June 2021, the defendant says the claimant sent the defendant's special category payroll data to the wrong address, causing the documents to be lost. The defendant was, he says, compelled to bring a claim for damages in the Central London County Court. In January 2022, the claimant is said to have sent material incorrectly to the Workers Pension Trust, resulting in further loss.

29. The defendant contends that the claimant repeatedly breached data protection regulations by compelling him to send data to third party websites for translation purposes, thereby forcing the defendant to be in breach of contract. The defendant says he was led to believe that he would be supplied with a UK mobile phone, to avoid such breaches.

30. An employee of the claimant is said by the defendant to have taken a photograph of the defendant during a Microsoft Teams call on or around 9 December 2020, in violation of data protection laws and in breach of the duty of care owed to the defendant by the claimant.

31. The defendant's case is that the claimant breached the employment contract by failing to enrol the defendant in a pension scheme, as required by UK legislation.

32. The claimant is also said to have breached the employment contract by refusing to recognise "the UK grievance process" (paragraph 184). The employment contract stated that a grievance process would be in place.

33. The witness statement also says the claimant failed to provide employers' liability insurance in respect of the defendant, contrary to law, causing the defendant significant distress.

34. The claimant failed to provide the defendant with "an English platform through which I could be reimbursed for my expenses", in alleged breach of clause 11 of the employment contract, which required the claimant to reimburse the defendant all expenses reasonably incurred in relation to the performance of his duties (paragraph 188).

35. The claimant is said to have failed to provide the defendant with payslips on time, in breach of section 8 of the Employment Rights Act 1996, causing the defendant distress, uncertainty and financial difficulties.

36. The defendant further states that the claimant failed to carry out health and safety risk assessments in respect of the defendant, in breach of the Health and Safety at Work etc Act 1974 and the Display Screens Equipment Regulations 1992. The claimant confirmed to the Employment Tribunal that it did not have any Health and Safety policy in English. As well as being a breach of its contractual obligations, this "failure to establish such a policy undermines the trust and confidence employees place in their employer's commitment to health and safety" (paragraph 196).

37. The witness statement ends with claims for damages. For "compelled use of personal mobile phone", £5,000 was originally claimed, increased to £15,000 in the amended witness statement (where references are added to "unauthorized access to Apple ID for 3.5 years" and to (*inter alia*) "emotional distress and loss of privacy"). For "use of Personal Apple ID", £10,000 was originally claimed, increased to £22,500, inter alia for "privacy invasion". For "mishandling of special category payroll", £8,000 is claimed, in respect of distress, costs incurred in rectifying the situation and potential harm arising from exposure of personal financial information. For "failure to provide payslips in a timely manner", £5,000 is claimed

for financial harm and inability to "track and manage income, potentially leading to financial losses or penalties".

38. The amended witness statement contains a claim for £28,500 for "failure to auto enrol me into a UK pension scheme"; £26,500 for "damages for breach of contract and harm caused by unauthorized use of third party translation tools and websites", including in respect "stress, anxiety and frustration resulting from the moral dilemma imposed on me by the company…"; £28,000 for "breach of health and safety obligations and failure to provide training", resulting in increased and potential risks, emotional distress and mental strain; and £22,500 for "compelling me to breach the money laundering legislation over a 4 year period".

39. The original total damages claimed by the defendant was £28,000. In the amended version of the witness statement, this has become £93,000.

STRIKE OUT PRINCIPLES

40. CPR 3.4(2) provides that the court may strike out a statement of case (or part thereof) if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim; if the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of proceedings; or there has been a failure to comply with a rule, practice direction or court order.

41. The first two grounds cover statements of case which are unreasonable, vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence.

42. Striking out a statement of case is, in general, a means of last resort. It should not be deployed without consideration of whether there is a viable alternative course of action, which would address the reasonable concerns of the party bringing the application. An application to strike out should not be granted unless the court is certain that the claim (or defence) is bound to fail: Hughes v Colin Richards & Co [2004] EWCA Civ 266. Where a statement of case is found to be defective, the court should consider whether the defect might be cured by amendment. If it can, the court should not strike out unless and until it has given the party concerned an opportunity to make the necessary amendment: Soo Kim v Youg [2011] EWHC 178 (QB).

43. In cases where the statement of case is an abuse or is otherwise likely to obstruct the just disposal of the proceedings, the striking out has to be supportive of the overriding objective. In cases of this kind, the issue of proportionality looms large: Walsham Chalet Park Ltd v Tallington Lakes Ltd [2014] EWCA Civ 1607.

44. The power of strike out is available in order to give effect to the principles of *res judicata,* which includes cause of action estoppel (re-litigating a cause of action held to exist (or not)), issue estoppel (re-litigating an issue decided in earlier proceedings albeit in respect of a different cause of action) and using the present proceedings to raise matters that could have been raised in earlier proceedings.

45. Another form of abuse, which is a subject fit for strike out, is where it can be shown that the benefit attainable by the claimant is of such limited value that "the game is not worth the candle" and where the costs of the litigation would be out of all proportion to the benefit that might be achieved: Jameel v Dow Jones and Co [2005] EWCA Civ 75. At paragraph 54,

Lord Phillips MR observed that an abuse of process is of concern not only to the parties but to the court. The court's function is not to provide a level playing field for whatever game the parties might choose to play on it but is, rather, to ensure that judicial and court resources are appropriately and proportionately used.

DISCUSSION

46. I have followed the above principles, so far as they apply in the present case. I have considered the parties' respective skeleton arguments, the claimant's draft reply and defence to counterclaim and the submissions made orally at the hearing.

47. There can be no doubt that the defendant's witness statement is not in the form required by the CPR. As a general matter, it does not constitute a coherent or comprehensible response to the particulars of claim. There are also serious problems with the witness statement, viewed as a counterclaim. As can be seen from the above summary of the witness statement, it purports to give evidence (which, of course, a witness statement should do but a defence should not). It is frequently difficult or impossible to discern any connection between the claim in respect of the use being made of the claimant's property and the reason advanced for rejecting it.

48. So much was made plain to the defendant in the letter of 11 July 2023 from the claimant's solicitors, in which the claimant indicated its willingness to give the defendant 28 days in which to provide a CPR-compliant defence. Instead of addressing this proposal, the defendant's email of 11 July took issue with the alleged failure to acknowledge that the defendant had produced an amended witness statement (which he must have appreciated bore the same alleged defects as the original version). Despite the email of 11 July (17:22) from the solicitors, which reiterated the offer, the defendant did not avail himself of the offer; nor did he dispute the necessity of putting either of the witness statements into proper form.

49. I agree with Mr Davidson that, whilst it is necessary for a represented party and the court to give a litigant in person every reasonable assistance in presenting their case, the requirements of the CPR apply to both represented and unrepresented parties alike. Indeed, it seems to me that it was with this in mind that the letter of 11 July was written. At the hearing on 14 November, the defendant continued to invoke the two versions of his witness statement as in some way explaining his inaction. It does not. I am quite satisfied that the defendant understood the point being made about his documentation but decided to ignore it. The general problem with the witness statement is, thus, a matter to which regard needs to be had, in considering the present application; in particular, in deciding whether it would be proportionate in all the circumstances to permit the defendant, at this stage, to file an amended document by way of defence and counterclaim.

50. In considering the issues raised by the defendant in the witness statement (and its proposed replacement), it is important to bear in mind what the claimant is seeking. There is no question of the claimant pursuing the defendant for damages. The sole remedy that is sought in these proceedings is that the interim injunction of Linden J should be made permanent. The claim is, thus, entirely about the safeguarding or destruction of confidential information that belongs to the claimant.

51. As will be apparent, the defendant regards himself as a whistleblower, who has sought, and apparently continues to seek, to draw to the attention of regulators instances of what he considers to be misfeasance by the claimant. The terms of the interim injunction (and the

final remedy sought) include provisions intended to make appropriate provision for the defendant in this regard; namely, paragraph 6 of, and Schedule G to, the order of Linden J. The judge's written reasons make it plain that the defendant informed Linden J that "he had made all the disclosures to the regulators which he wished to make but he wished to be able to assist any regulators who wanted further information from him" (paragraph 6).

52. The matter is therefore clear. Assuming that the defendant is not in breach of the order of Linden J, he will have surrendered or destroyed the relevant confidential material. If he has not, it would be inappropriate for him to rely upon any breach of the order as a reason to resist the making of a final injunction. If material comes into his possession which is not subject to the order, the defendant is entitled to put it before any regulator.

53. Accordingly, it matters not whether BaFin is currently investigating the claimant, wholly or partly as a result of the defendant's submissions to that regulator. Nor is the defendant able to defend the claim by asserting that the claimant cannot be trusted to respond properly to any request for information etc made to it be a regulator. The defendant does not point to any objective evidence which might even arguably support such a grave accusation about a major commercial enterprise. Nor does he contend that the regulators lack statutory powers in this regard. Insofar as the public interest is sought to be advanced by the defendant as a defence (as in paragraphs 14-21, 26, 104-125 and 143-149 of the witness statement), it is not a matter that constitutes a reasonable ground for defending the claim.

54. The claimant and the defendant are currently engaged in litigation in the Employment Tribunal and the County Court. The order (and what is sought on a permanent basis) contains an exception for the defendant to retain and use specific documentation solely for the purposes of those respective proceedings in which the relevant documentation was disclosed. There is thus no justification for the defendant to oppose the application on the ground that he would otherwise be disadvantaged in those proceedings.

55. I turn to the issue of delay. This was addressed by Linden J at paragraphs 4 and 5 of his written reasons. The defendant argues that he should be able to resist the making of a final injunction on the basis that there has been undue delay in making the claim. That is, of course, correct. The court is not formally bound by any finding of Linden J on the issue of delay. The relevant question is, however, whether any defence predicated on delay is one which could realistically succeed, as opposed to being bound to fail. In answering that question, it is plainly relevant that Linden J did not regard delay as constituting a reason to refuse interim relief. He reached that conclusion having been given a full picture of the reasoning of the claimant, which included having regard to the defendant's personal circumstances, including mental health issues. The defendant did not suggest that the considerations which led the claimant to delay bringing the claim were not genuine ones.

56. Linden J considered the impact of delay. It meant that the defendant had disseminated certain confidential information to regulators. It also meant that confidential information had been prepared etc in connection with the Employment Tribunal and County Court proceedings. But, as I have already indicated, these consequences of delay were addressed in the order, in a manner favourable to the defendant. There has been no further delay on the part of the claimant. Nor has it been shown that there has, even arguably, been any material change in circumstances.

57. Against this background, there is no basis for concluding that the court would be remotely likely to treat the issue of delay as having any negative impact upon the claimant's case.

Paragraphs 22, 23, 30 and 169-174 of the witness statement accordingly disclose no reasonable ground of defence.

58. A "Polkey" remedy allows for a deduction in compensation for unfair dismissal, so as to reflect the probability that there would have been a fair dismissal in any event, having regard to the relevant factual background. On 15 September 2023, the Employment Tribunal gave judgment in case no: 3303093/2021. The defendant's claims were dismissed in their entirety. The Tribunal nevertheless found there was a 100% chance that the defendant would have been dismissed in any event for non-discriminatory reasons.

59. The defendant's reliance upon this issue as a defence to the present claim is misconceived. There is no connection between the Tribunal's *obiter* conclusion and the claimant's desire to protect its confidential information. In the circumstances, it was understandable that the defendant did not effectively pursue this ground at the hearing before me. Paragraphs 24, 25, 28, 61, 79 and 160 of the witness statement accordingly disclose no reasonable ground of defence.

60. There is no realistic or indeed rational reason to doubt that the claimant is for present purposes the (former) employer of the defendant. Paragraph 33 of the witness statement seeks to cast doubt on the transfer of rights and obligations, contending, amongst other things, that the claimant should be put to "strict proof that the mergers and joint ventures did not impact, should not have impacted or omit any relevant provisions within my employment contract". It is, however, necessary for the defendant to explain why such mergers and joint ventures might have a bearing on the apparent contention that the defendant was never in an employment relationship with the claimant, particularly since the existence of that relationship is not only accepted but positively relied on by the defendant at other places in the witness statement. Furthermore, purporting merely to put the claimant to "strict proof" of a matter is not sufficient for the purposes of CPR 16.5. This requires a defendant's defence to state "(b) which allegations <u>they are unable to admit or deny</u>, but which they require the claimant to prove" (my emphasis). Otherwise, the defendant must state "(a) which of the allegations are denied" and "(c) which allegations they admit". The same is true of the attempt to put the claimant to "strict proof" of the allegation in paragraph 20 of the particulars of claim, where it alleged that the defendant sent around 150 emails from his work email account to his personal account; a matter about which the defendant must have had knowledge. Paragraph 33 accordingly discloses no reasonable ground of defence.

61. Paragraphs 38-52, 65, 68, 70 and 80-84 of the witness statement seek to blame the claimant in respect of various matters, including the use of the defendant's UK mobile phone, his Apple ID, the absence of policies, the alleged need for the defendant to photograph his screen and his making of covert audio recordings. The overarching problem with the defendant's stance regarding these matters is, however, that the defendant's witness statement, skeleton argument and oral submissions fail to show why, even if the defendant's contentions are assumed to be correct, the claimant is not entitled to protect its confidential information. There is, in short, no reasonable connection between the complaints and the rights the claimant has as a consequence of the duty of confidence, if not under contract (whether or not the latter may have been wrongfully terminated).

62. In any event, the specific complaints dissolve upon inspection. The emails at pages 147-148 of the bundle show that the defendant was in no sense unwilling to use his UK phone, as well as being keen to continue to use the German mobile provided to him under the contract. Despite what the defendant said in his oral submissions, there is no conceivable reason to

construe the contract as requiring the claimant provide a UK, as opposed to a German phone. Nor is there any basis for his belated contention that he was unable to be paid expenses in respect of the use of the UK phone.

63. In the same vein, the use of the defendant's Apple ID can clearly be seen from the emails at pages 281 and 282 of the bundle to have occurred with the consent of the defendant and without any protest or indeed hesitation. Whilst aware that a strike out application is not the place to conduct a "mini trial" of the action, by reference to evidence that may be incomplete, the defendant simply does not suggest there might be any evidence during the time of his employment which might contradict the claimant's case on this issue. He contends that providing the ID "potentially" gave the claimant access to his private photos and other data (paragraph 43 of the reply) and that this caused him distress. There is, however, nothing to suggest that the claimant did so; or that the defendant expressed any concerns at the relevant times. In his oral submissions, the defendant argued that, by using the Apple ID, the claimant in some way assented to the effective merger of its confidential property with that of the defendant, so as to defeat the claim in conversion. I find this is an instance of the defendant's propensity to say anything that he thinks might keep the current litigation going, regardless of any underlying merits. The assertion is, in any event, negated by the point that the claimant could and did assert its rights in respect of its property, when it sought its return from the defendant after it had discovered the matters described in Linden J's written reasons.

64. I agree with the claimant that the contention that there was a lack of what are alleged to be relevant policies has no bearing on the misuse of confidential information. The defendant's invocation of his professional background serves to undermine the claim that he acted as he did as a result of insufficient guidance on the part of the claimant. This includes the defendant's contentions in oral submissions that there should have been policies in place regarding compliance with the General Data Protection Regulation and related legislation.

65. The making by the defendant of a photograph of his screen is said by him to have been necessary for legitimate reasons. The same is true of his making of an audio recording. In determining the likelihood of these contentions succeeding at trial, it is of some relevance (albeit in no sense determinative) to observe that the defendant's similar stance before the Employment Tribunal was firmly rejected at paragraph 475 of its judgment. But, even if the contentions might be accepted, they do not begin to show why the material so obtained is not the property of the claimant and so should be the subject of a final order. Accordingly, the paragraphs of the witness statement mentioned in paragraph 61 above disclose no reasonable grounds of defence.

66. The assertion by the defendant that the employment contract should be invalidated lacks any legal basis. I do not consider that any of the matters alleged, even if made out, would be at all likely to give rise to such a result. In any event, as already explained, the claimant's case for an order does not depend on the contract being unrepudiated.

67. I turn to the provisions of the witness statement that are said to constitute a counterclaim (paragraphs 177-196). For the reasons I have already given, there is no reasonable prospect of the defendant succeeding in respect of the alleged breaches regarding the UK mobile phone and Apple ID.

68. A claim by the defendant in respect of the alleged mishandling by the claimant of his payroll data is before the Central London County Court, with the defendant as claimant. It is therefore an abuse of process to use the present proceedings to bring the same claim. So far as

concerns the Workers Pension Trust, the defendant (who is the claimant in those proceedings) applied in August 2022 to amend the above-mentioned claim in order to add a claim concerning the mis-delivery of data to that Trust. The defendant appeared in his oral submissions to me to accept that the application was still extant. In the circumstances, it is abusive or, at least, wholly disproportionate to permit a claim on this subject to be made by way of counterclaim in these proceedings.

69. The defendant asserts that his use of translation tools to translate material of the claimant concerning personal data from German to English amounted to a breach of data protection law, on the claimant's part, which he was in effect compelled to commit as a result of the claimant's shortcomings, as described above. Even if this could be shown to be so, it does not translate into a coherent head of claim for the defendant to deploy against the claimant. The defendant does not assert that he is being pursued in this regard by a relevant regulator or the owner of the relevant data.

70. The defendant says an unauthorised picture of him was taken during a Microsoft Teams meeting. He does not appear to claim that any loss or damage arose from this action. It is at best a *de minimis* matter and it would be disproportionate to allow it to be raised at this stage of these proceedings by way of a counterclaim.

71. The defendant's assertion that the claimant failed to progress his grievance and failed to have a valid grievance procedure was directly raised by the defendant before, and has been directly addressed by, the Employment Tribunal in case number 3303093/2021. At paragraph 384, the Tribunal held that, whilst inadequate, the claimant's response was not discriminatory. At paragraph 454 of its judgment, the Tribunal held that it was not a repudiatory breach of contract. These findings were made in the context of a claim for constructive unfair dismissal. There is clearly a good deal of overlap between the claim now being made by way of counterclaim in the present proceedings and the claim made before the Employment Tribunal. I consider that the defendant is estopped from making the claim in these proceedings, in that he could and should have raised this issue before the Employment Tribunal. But, if I am wrong about that, the defendant makes no claim for damages in respect of the alleged breach. Accordingly, what I have said at paragraph 69 above applies here also.

72. The claim regarding employers' liability insurance is also devoid of any merit. No contractual term is relied upon; nor is any compensatable loss alleged by way of damages. I agree with the claimant that it is opportunistic and abusive.

73. The defendant alleges that the claimant failed to supply the defendant with an English language translation platform so that he could claim expenses. His assertion that this hindered his ability to claim expenses is entirely vague. It strongly suggests that he was not, in the event, unable to claim expenses or that he suffered no quantifiable loss as a result of delay in paying the expenses.

74. The allegation regarding payslips cannot constitute a valid counterclaim because the relevant legislation (the Employment Rights Act 1996) gives the Employment Tribunal exclusive jurisdiction.

75. The allegation concerning health and safety and workplace assessments and training appears very recently to have morphed from a complaint about failures to conduct assessments and/or have relevant policies in place, into an allegation of some form of personal injury. Paragraph 197(f) of the revised witness statement refers to an alleged

"Failure to conduct a health and safety assessment following my hernia operation in September 2017, exposing me to potential risks and neglecting the duty of care owed to me as an employee". In his oral submissions, I understood the defendant to refer to issues with his hand. It is therefore significant that the claimant says the defendant has issued a letter before action, concerning a personal injury apparently said to be connected with alleged breaches of health and safety legislation. In the circumstances, it is an abuse of process for the defendant to seek to make these allegations the subject of a counterclaim.

76. I agree with the claimant that the allegations regarding misrepresentations said to have been made by its employees to the defendant lack specificity; and that no reliance on them is pleaded. I also regard the sums sought by way of damages (increased and expanded in the revised witness statement) to be yet further indication of the defendant being little concerned with genuine grievances, as opposed to seeking very belatedly to rake over the past and scrape together anything he thinks might prolong the litigation. The fact that the defendant considers he has not been well-used by the claimant is not in doubt; nor that he considers the claimant to be deserving of investigation by regulators. The court, however, must consider the matter objectively. It must not allow itself to be used as a platform for vendettas or crusades.

77. I have deliberately left the issue of pensions until last. I make my findings on this topic in the light of what is recorded above.

78. This head of the defendant's alleged counterclaim is of a different order to the others. The claimant accepts that it did not enrol the defendant in a pension scheme. This is borne out by the findings of the Employment Tribunal in case number 2206197/2022. That was a claim by the defendant of "post termination detriment whistleblowing" (paragraph 1 of the judgment). The Tribunal held that the claim, made by reference to section 47B of the Employment Rights Act 1996, did not succeed. The defendant alleged that his whistleblowing was justified because the claimant failed to enrol him in a pension scheme, whilst making deductions from his salary in respect of a pension. At paragraphs 52 to 57 of the judgment, the Tribunal detailed failings in the way in which the claimant had dealt with this matter. I particularly note that the defendant had been compelled to contact the Pensions Regulator about the matter, and that the Pensions Regulator was said by the claimant to be "satisfied with the actions that PayOne has taken in this regard" (paragraph 35).

79. The claimant says that contributions in excess of the statutory maximum contribution amount for an employer were made to the pension in the defendant's name by 4 August 2022. The claimant is also said to be assessing whether any investment loss would have arisen on amounts paid into the defendant's pension during his employment and that it will compensate the defendant for any such investment loss. As a result, it is said that the defendant has no loss to claim in respect of this allegation.

80. For his part, the defendant maintains that the claimant breached its duties to him in respect of the pension issue. Understandably, in the light of what the claimant said with regard to the issue of investment income, the defendant focussed on that aspect in his oral submissions. In the revised witness statement, the defendant seeks damages, including for loss of 8% employer contribution, loss of tax relief benefits and loss of benefits in pension scheme growth.

81. The claimant did not submit before me that the defendant could not bring a counterclaim in respect of the pension issue because of estoppel or because it would otherwise be abusive

to do so. In particular, it was not contended that, so far as investment loss was concerned, this is something that should be pursued first with the Pensions Regulator or Pensions Ombudsman. As matters stand, therefore, I cannot be satisfied that the defendant's claim in respect of loss arising from the claimant's failures in respect of his workplace pension is bound to fail in every respect; or that allowing the claim to be advanced by way of counterclaim would otherwise be contrary to the principles regarding strike out, which I set out above. In so saying, I have regard to what I have said about the defendant's conduct and my other findings. So far as proportionality is concerned, I also note that Mr Davidson accepts that there would need to be a hearing of the application to make a final order, even if there were to be no defence and counterclaim.

82. I have therefore concluded that the witness statement should be struck out in its entirety; but that the defendant shall be given permission to file and serve, not later than 14 days from the date of the order giving effect to this judgment, a counterclaim solely in the terms of paragraphs 183 and 197(c) of the revised witness statement of July 2023. The claimant has permission to file and serve a defence to that counterclaim, not later than 14 days from the service on it of the counterclaim.