BL-2021-002124

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
[2021] EWHC 3642 (Ch)

Case No. BL-2021-002124

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 3 December 2021

Before:

His Honour Judge Keyser QC
(Sitting as a Judge of the High Court)

Between:

(1) NISSAN MOTOR (GB) LIMITED

(2) NISSAN MOTOR CO., LTD.
(a company incorporated under the laws of Japan) **Claimants**

- and -

RAVINDER PASSI **Defendant**

Mr T. Croxford QC and **Mr T. Mountford** (instructed by **Lewis Silkin LLP**) for the **Claimants**

Mr D. Tatton Brown QC (instructed by **Temple Bright LLP)** for the **Defendant**

J U D G M E N T

JUDGE KEYSER QC:

1 This is my decision on the claimants' application, by a notice dated and issued on 22 November 2021, for interim injunctions against the defendant. The application was before Adam Johnson J on 26 November, when there was insufficient time for it to be considered at length, and he directed that it come back today for a further hearing and made an order by consent to hold the ring in the meantime.

2 The application is supported by the witness statement dated 22 November 2021 of Yukinori Yamamoto, who, among other things, is now Global General Counsel for the second claimant. The defendant has made a witness statement in response dated 25 November 2021.

3 The defendant is as solicitor regulated by the SRA, though not currently practising. In the course of fairly long employment by the first claimant, he was employed from 2012 to 2020 at the second claimant's HQ in Japan and he was assigned to the second claimant, though still employed by the first claimant. His foreign service assignment expired in March 2020 and was not renewed, but he was brought back to work in the UK against his wishes. Disciplinary proceedings were commenced against him by the first claimant in June 2020. Eventually, on 11 November 2020, the decision-maker in the disciplinary grievance procedure decided that his employment should be terminated forthwith on grounds of misconduct and he was given payment in lieu of notice.

4 The claimants say that the defendant was dismissed because he failed to follow lawful instructions and procedures and had destroyed the necessary trust and confidence of the relationship. The defendant says that he had made protected disclosures in respect of matters relating to certain high profile and much publicised arrests and related events and that, in consequence of that, he was victimised by the claimants, peremptorily moved from his settled home in Japan and finally dismissed.

5 This basic dispute has given rise to two sets of proceedings brought by the defendant in the Employment Tribunal. The first was commenced in July 2020 (that is, before the dismissal); by it the defendant seeks declarations that he had been victimised for whistleblowing and compensation in that regard. The second, commenced a week after termination of the employment, seeks declarations of a similar nature, but is primarily a claim for unfair dismissal. The relief sought includes a claim for reinstatement. The background to these matters concerning the whistleblowing, together with the allegations and counter-allegations made in the employment proceedings, is hotly contested as between the parties. Of course, I cannot go into that.

6 On 29 October 2021, the defendant by his solicitors gave disclosure by list in the employment proceedings. The claimants' case in these proceedings and on this application is that a significant number of the documents listed by the defendant constitute or contain confidential information as defined in cl.30 of the defendant's contract of employment and that many of them are subject of the claimants' legal privilege. They contend that, pursuant to cl.19 of his contract of employment, the defendant was obliged to deliver the documents up and destroy any copies he retained upon termination of his employment and that, by cl.22 of his employment contract, he is prohibited from making any use of the confidential information for any purpose, other than the purposes of the claimants. These matters are more particularly set out in the particulars of claim that have now been filed.

7 The circumstances particularly relied on in support of the present application need not be recited in any great detail, but they include these. First, despite being asked repeatedly from March

2020 to return his work laptop and his iPhone upon his repatriation to the UK, the defendant failed to do so, either placing conditions on their return or simply failing to communicate. It is said that, as a result, the claimants were forced to obtain an order for delivery up of the laptop and iPhone from a court in Japan, which is currently holding the devices pending conclusion of the proceedings there. It is also said that the defendant continues, without plausible justification, to withhold consent to delivery up of these items from the court's custody to the claimants. That allegation and the necessity for the original seizure are contested, as are most things in this case.

8 The claimants say that, upon termination of his employment, the defendant was expressly reminded (as indeed he was) of his obligation to deliver up the claimants' property, including documents. In a response on 16 November 2020, the defendant indicated that he believed that he had already delivered up everything, either by leaving it at the claimants' premises or because it was on the laptop that had been seized in May 2020, but he asked for further time to compete his searches to ensure that he had not missed anything. The claimants say that he made no further response, despite reminders of his obligations in February and March 2021.

9 The claimants rely on the fact that disclosure in the employment proceedings now shows that the defendant had retained more than 100 confidential documents, including privileged documents. It is said that more may have been retained because the disclosure list related only to documents said to be relevant to the employment proceedings and, therefore, is not exhaustive of all retained documents.

10 The claimants say that the documents contain sensitive industrial and legal materials and that unquantifiable damage would be caused if the documents and the information came into the public domain. There is, it is said, credible independent evidence—which indeed is to a large extent admitted—that the defendant has passed information and (so the claimants say) copy documents belonging to them to a particular journalist who has been running articles concerning the arrests and affairs that led to the alleged whistleblowing.

11 In a letter dated 11 November 2021 from his solicitors, the defendant has admitted that he removed documents, gave them to his solicitors and retained them for himself. He says that this was for the purpose of taking legal advice. The claimants say that that justification is implausible as a matter of fact and, anyway, inadequate as a matter of law. In a letter of 17 November 2021, a limited admission of sharing further documents with the journalist in question has been made. The defendant deals with a number of these matters, at least to some extent, in his witness statement, but certain points are clear and I will mention those in a minute.

12 The present application is for interim injunctions. The basic principles applicable are those in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. It is suggested by Mr Tatton Brown QC on behalf of the defendant that the relief sought is, at least in part, in the nature of final relief. That is very far from being clear to me, given the terms of the injunctions that are sought. Although it is far from clear to me that this is really so, I shall bear in mind that, in some respects, the relief now sought might, to a lesser or greater extent, prove to be definitive.

13 The first question is whether there is a serious issue to be tried. It is clear that the defendant has retained documents in respect of which there is at least a triable issue that they are the property of the claimants, that they contain confidential information and that at least some of them are privileged. If and insofar as the grant of an interim injunction would be tantamount to final, or at least practically definitive, relief, it would be appropriate to require more than simply a serious issue to be tried, but rather a strong *prima facie* case. At present, it seems to

me that the claimants' case in this regard and with regard to the question whether the defendant was entitled to remove or retain documents is extremely strong. The defendant says that he had justification for removing or retaining some of these documents and passing them to his solicitors for the purposes of obtaining legal advice; as I understand it, he also says that, having done this, he is able to defeat the proprietary claims of those who would otherwise be the owners of the documents, namely the claimants. I confess that I do not begin to understand this. Nothing that I have seen shows to me any seriously arguable case that the defendant had any right to use for the purposes of his own personal legal advice and without the permission of the owners of the documents their confidential documents. Nothing indicates to me any arguable case that, having done that, he could have grounds for defeating a proprietary, contractual and/or equitable claim for the delivery up of the documents. Of course, I am not deciding these points. But it seems to me that there is a triable issue and that the claimants have a strong case that is likely to succeed.

14 The remaining parts of the test for the grant of an injunction concern what may be described as the balance of a risk of injustice. Would the mistaken grant of an injunction or the mistaken withholding of an injunction give rise to a greater risk of injustice (where to talk of a "mistaken" decision is to an interim decision that is shown ultimately not to be in accordance with the parties' rights)? Strictly, this balance is to be struck by a twofold test. First, one must decide whether damages would be an adequate remedy for the wrong done to either party. The answer to that question is capable of being determinative. I proceed on the basis that damages would not be an adequate remedy for either party. The second part of the test is the balance of convenience.

15 All of that having been said, before me there is a large measure of agreement. The parties and those who advise them have worked constructively, both before Adam Johnson J and during the last week, to come reasonably close to agreeing on the measures that would be appropriate for the purpose of holding the ring before trial. In doing so, they have helpfully identified the issues that remain.

16 The first issue, I think, concerns what should be done with the documents disclosed by the defendant. He is content to deliver them up, but he says that he ought to be permitted to retain copies of them. Mr Tatton Brown submits that, given the protection offered by the defendant by way of undertaking or consensual injunction, the claimants are sufficiently protected and the balance of convenience does not favour depriving the defendant of the copies of the documents that he has already disclosed. He submits that to do so would constitute an interference by this court with the disclosure processes in the Employment Tribunal and with the principles of equality of arms and a level playing-field in that forum. The point is made that the employment of the defendant ended more than a year ago and that the claimants have known for at least that long that the defendant had retained some documents, albeit not the extent of those documents, because this became apparent at an interim hearing before the Employment Tribunal. It is said that, if the defendant has not made use of the documents in the meantime, there is no good reason to suppose that he will make use of them now, especially if an injunction is in force.

17 In this regard, I do not think it proper to ignore the strength of the claimants' position regarding ownership and entitlement to the documents. The defendant seems to me to have barely a case, if any, for asserting an entitlement possession of the documents or any copies of them. The claimants seek relief because it is apparent that the defendant has retained documents and that he did so without informing the claimants, despite the fact that he had been asked to return them, and indeed after he purported to have returned everything that he had. Further, the defendant has admittedly imparted information to at least one journalist, who has made public

use of it. In those circumstances, there is a strong reason why the injunctive relief ought to be such as to remove from the possession of the defendant documents that provide a means of arguably wrongful disclosures.

18 I do not accept at all that this involves any interference with the processes of the Employment Tribunal. The position there, as in other courts, is that disclosure is an obligation on respective parties in accordance with the rules and orders of the court in question. The disclosure obligations rest upon the party in or entitled to possession of the documents. This is a point that has been made repeatedly in connection with such orders as search orders and capture orders. It is not for a party that gains access to another party's documents to decide unilaterally on the appropriate scope of disclosure of the other party's documents. In the Employment Tribunal, the claimants, as the parties in possession of the documents, will be under obligation to make full and proper disclosure of them, including disclosing privileged documents and asserting any claim to privilege from inspection. As in all litigation, it is open to a party that believes that the disclosing party has failed to make disclosure or has made a wrongful claim to privilege to make an application in that regard. But that does not mean that the party without the rights and obligations of disclosure is entitled to pre-empt the decision that, in this case, properly lies with the claimants and their solicitors.

19 Therefore, on the first issue, I am of the view that the documents should be delivered up and any copies that have been retained (I have in mind particularly electronic copies) should be destroyed.

20 The second issue, perhaps less important, concerns the effect of what happened in the course of the interim proceedings in the Employment Tribunal. It is said that documents were read or referred to in open court and that their confidentiality has been lost. With reference to the form of the competing draft orders that have been circulating, I think that the only qualification that needs to be incorporated is that there shall not be included in "Relevant Documents" any documents read or referred to in open court or referred to in skeleton arguments at the hearing of the defendant's interim relief application. I do not think that any further qualification is required. First, simple reference to what has been read is impossible because one does not know what the Tribunal will did in fact read. Second, simple pre-reading of documents does not seem to me to engage any relevant principle. Third, in any event, the question of the effects of open justice on the confidentiality of information are a matter within the overall control of the court. I do not consider that there is any immutable principle that the mere mention of or reference to a document in open court means that its confidentiality is necessarily lost. In the circumstances, I consider that, if a document was read out or referred to in open court or expressly referred to in skeleton arguments, it can conveniently be excluded from the scope of "Relevant Documents". Beyond that I would not go.

21 The third issue is the one that has caused me the greatest concern. It relates to the definition of "Confidential Information". A number of principles are engaged. One is that an injunction with a penal notice must specify clearly what can and cannot be done. Another is that one has a right to use what might be termed confidential information if it has become, so to speak, part of one's internal toolkit; thus, for example, people who change jobs are allowed to make use of that personal knowledge and experience that they have acquired. See for example the judgment of Leggatt J in *Marathon Asset Management LLP v Seddon* [2017] EWHC 300 (Comm), [2017] ICR 791 at [116].

22 The terms of the draft order produced by the claimants would restrict the use of "Confidential Information", which is defined in terms of any confidential or privileged information relating

to the activities and affairs of the claimants or any of their group companies. It does seem to me that that creates a real problem. Its meaning seems open-ended. It is easy to envisage all sorts of arguments as to whether or not something falls within that definition. In this regard, I have been referred to the remarks of Balcombe LJ in *Lawrence David Limited v Ashton* [1989] ICR 123 at 132 and the remarks of Stanley Burnton LJ in *Caterpillar Logistics Services (UK) Ltd v de Crean* [2012] ICR 981 at [68].

23 The defendant's proposal in this regard is to achieve specificity by adding the words "which is derived from any Relevant Documents". The justification for that proposal is said to be that it is the defendant's retention and use of Relevant Documents that have precipitated this application; the problem does not lie with what the defendant carries around within his head. This is a serious and, I think, generally helpful attempt to address a real problem with the definition of "Confidential Information". But it is itself problematic. First, it does not actually specify to any greater extent what is Confidential Information, albeit that it does restrict the places where it may be found to "Relevant Documents". Second, and more importantly, it opens up a can of worms: for every piece of use of Confidential Information, the question is liable to be, "Well, was it derived from these documents or was it derived from the fact that the defendant had been Global Counsel General for so-many years and closely involved in the relevant affairs?" To that extent, the proposal seems to me to invite argument and uncertainty; for that reason, the terms of injunction that it proposes are likely to be very difficult to police.

24 I have come to the conclusion that it is preferable to qualify the scope of the injunction by the words (which I acknowledge are not favoured by either counsel), "contained or embodied in any Relevant Documents". This wording specifies at least as accurately as the defendant's own proposal the identity of the Confidential Information in question.

25 Two issues are raised by this solution. First, it is pointed out that, if the defendant is not to be permitted to retain copies of the Relevant Documents, he will not have access to them. That is right, but a similar point could be made about the defendant's own proposal, "which is derived from any Relevant Documents". A second, related point is that the Relevant Documents might contain Confidential Information that would also form part of the defendant's toolkit; in other words, material that he would be generally entitled to use for his own purposes.

26 In considering both of those points, I come back to a point that I raised in the course of argument. The importance of the freedom to use one's general skill, experience and knowledge relates primarily to the situation of someone moving to relevantly similar work in a different sphere, changing employers, setting up in business in competition, or that sort of thing. The principle is that an individual will not be prevented from using, for the purposes of subsequent employment, confidential information that has become part of his general skill, experience and knowledge, because, as noted by Leggatt J in the *Marathon Asset Management* case, such a restriction would unreasonably interfere with his right to work.

27 But this consideration does not arise in the present case. It is not said or suggested that the defendant is seeking to use any confidential information in the exercise of his right to work. In the event that that were to arise—if, for example, the defendant were to seek employment in a context which made this relevant—it might be that the order would require greater specificity. But in the circumstances of this particular case there does not appear to be any actual basis upon which the defendant has or purports to have any reason to be using confidential information at all. In such circumstances, the objection that he might not know whether confidential information that he is using is or is not within the Relevant Documents (of which he will have retained no copy, though he has had them for the last year) does not seem to me to be a matter

of genuine importance. If it ever became important, an application to vary the injunction would be the appropriate forum in which to consider it.

28 Similarly, strictly speaking, an order of the form that I am proposing would involve restraining the defendant from doing some things which he would otherwise have a right to do as a matter of general law: that is, using confidential information which he was entitled to use as part of his general skill, experience and knowledge. But it is well-established that interim injunctions, if necessary on other grounds, may for the purpose of giving them efficacy include restraints upon that which would otherwise be lawful. And, as I have said, the restraint is no more than notional in the present case, because no basis has been indicated for suggesting that the defendant has any legitimate use to make of any confidential information.

29 Those are the main points that have arisen. Further matters are points of detail on the drafts. I shall remove the paragraph concerning undertakings; this will go into the recitals. As regards para.3 of the draft order, concerning the witness statement, I think it appropriate to include the words "at any time since 11 November 2020" in sub-paragraph (a), because the justification for including this requirement concerns the efficacy of the injunction; it is not intended to authorise an inquisition as to wrongdoing. But I would include the word "retained". Perhaps it is unnecessary, because anything that is not being delivered up because it has been destroyed would anyway be covered; but it seems to me that "retained" has a logical place in the order and I do not think it is onerous or oppressive.
