



Neutral Citation Number: [2022] EWHC 1054 (Ch)

Case No: BL-2022-000605

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 05/05/2022

Before:

SIR ANTHONY MANN

Between:

Clayton Recruitment Limited	<u>Claimant</u>
- and -	
(1) James Wilson	
(2) Wilson Mannion Recruitment Limited	<u>Defendants</u>

Arnold Ayoo (instructed by **JMW Solicitors LLP**) for the **Claimant**
Paul McGrath (instructed by **Vienna Kang Advocates Ltd**) for the **Defendants**

Hearing dates: 13th & 27th April 2022

Approved Judgment

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. COVID-19 – This judgment was handed down by circulation to the parties and publication on the National Archives and other websites. The date and time of handing down is deemed to be 3.30 pm on Thursday 5th May 2022.

.....
SIR ANTHONY MANN

Sir Anthony Mann :

1. I am asked to make an order for the costs of an interim application in this matter in circumstances in which the parties have agreed all other points in issue in the application, and indeed taken the opportunity of agreeing permanent relief with a stay of the action subject to the possibility of removing the stay to allow for an inquiry as to damages (which both parties think is unlikely to happen).
2. The background is as follows. The business of the claimant is a recruitment agency, finding placement for candidates, and employees for employers, in the legal profession. The defendant, Mr Wilson, was employed by them to deal with candidates and employees, and he progressed through various managerial ranks. On 3rd March 2022 he gave two weeks notice to terminate his employment (as he was entitled to do) and duly left that employment 2 weeks later. He fulfilled his intention to start his own recruitment agency, and incorporated the second defendant shortly thereafter for that purpose.
3. Mr Wilson had a LinkedIn account which he used in the course of his activities. LinkedIn is, in its own words:

“... the world's largest professional network on the internet. You can use LinkedIn to find the right job or internship, connect and strengthen professional relationships, and learn the skills you need to succeed in your career.

In his account he had a large number (about 3,500) of business connections - business individuals with whom he was “connected” even if he did not deal with them all. Some of them were probably purely personal; others (probably most of them) were connections made in the course of his employment. He claims that this was his own account in the sense that he set it up and operated it, and the connections were his, though his company email address was given in his details. He also had access to LinkedIn Recruitment, a database operated by the same provider, which provided enhanced access to far more “connections” than his own, organised and presented so as to facilitate a study of business opportunities. This facility was paid for by the claimant, who could control access, unlike the LinkedIn application itself, to which only Mr Wilson had the password.

4. In the course of his starting his new business Mr Wilson used his LinkedIn account to circulate news of his new venture to his connections, which led the claimants to fear he was misusing confidential information and client contacts. They therefore sent him a letter before action, inviting him to give certain undertakings and provide his LinkedIn password, and when he refused they started this action seeking to restrain misuse of confidential client and candidate information under the general law and under contract and to enforce contractual restraint on working for some clients. They also make an application for interim relief.

5. The application, and indeed a large part of what would otherwise have been the action going forward, was compromised on the occasion of the first hearing of the application on 13th April 2022. The terms of the consent order appear from the form of order annexed to this judgment. It is not an order intended to operate over until a return date, or until trial. The injunctive relief is apparently intended to be final in the sense that it will not be reconsidered by the court at a future return date or any trial. The action was stayed save for a liberty to apply to restore if an inquiry as to damages was sought, which, as already noted, is thought to be unlikely. In terms of remedy, therefore, the relief is in practice final.
6. However, as appears from paragraph 10 of the order the parties were not able to agree the fate of the costs of the application. At the time I was invited to deal with the costs, but it became apparent that the defendant had some evidence to give on the point so a consideration of the costs was adjourned to today to enable that to be done, and to enable the parties to prepare further submissions in relation to those costs. It is regrettable that there has had to be the additional time and costs associated with that exercise, but since the parties were clear that they had agreed everything else, and had reached a clear compromise of those matters, and had applications to make about costs, it was necessary to have this hearing and to incur the associated costs.
7. The claimant contends it is entitled to its costs of the application because it can be seen that it has been, in effect, victorious because the order gives it everything it was seeking, not only in the application but in the action, because there was nothing left for an action to do (other than a potential inquiry as to damages). The defendant says that there should be no order as to costs because the claimant should not be treated as victorious. The defendant agreed to the terms of the order because that was the economically sensible and thing to do as a matter of practical concession, not by way of conceding that the claimant was correct. It was arguable that the claimant was not entitled to its claim to the password to the LinkedIn application and was not entitled to the deletion of the connections in it (see the terms of the order), but it was not worth the defendant's while to dispute matters which he was willing to concede as a matter of practicality (not as a matter of legal obligation) just to provide a vehicle for a costs determination. He wanted to get on with his new business without the distraction of ongoing litigation, particularly when (as he alleges) he did not intend to breach his contractual terms. His alternative case, if it is appropriate to give the claimant some costs, is that those costs should only be a small amount (a very few thousand pounds).
8. The first question is what the approach of the court should be when faced with an apparent agreement on everything except costs, and when the court is invited to determine the costs without the benefit of a prior determination of the issues to which the costs go. This point was considered by the Court of Appeal in *BCT Software Solutions Ltd v C Brewer and Sons Ltd* [2003] EWCA Civ 939.

“4. The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action, which he has not tried. There are, no doubt, straightforward cases in which it is reasonably clear from the terms of the settlement that there is a winner and a loser in the litigation. In most cases of that description the parties themselves will realistically recognise the result and the costs will be agreed. There will be no need to involve the judge in any decision on costs. If he becomes involved, because the parties cannot agree and ask him to resolve the costs dispute, the decision is not usually a difficult one for him to make.

5. There are, however, more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course, which comes close to conducting a trial of the action that the parties intended to avoid by their compromise. The truth often is that neither side has won or lost. It is also true that a considerable number of cases are settled by the parties in the belief that the terms of settlement represent a victory, or at least a vindication of their position, in the litigation, or in the belief that they have not lost; or, at the very least, in the belief that the other side has not won.

6. In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well."

7. The disposition of a judge to help parties in negotiations for a settlement is understood and applauded. Good intentions are not, however, risk free. If acted upon too readily, commendable judicial intentions can make things far worse than they would have been if the judge had adopted the unpopular stance of requiring the parties to confront the realities of their litigation situation. The judge has a discretion to decline to do what the parties ask him to do. If, on the one hand, the action is for damages, it will be relatively easy for the judge to tell from the size of the settlement sum and from the litigation history (offers, payments in and so on) how the costs should be borne. As I have already said, it would be relatively unusual for the parties themselves not to agree on the costs of such cases. In more complex cases, however, involving a number of issues and claims for discretionary equitable relief, the costs position is much more difficult for the judge to resolve without actually trying the case.” (per Mummery LJ)

.....

“22. The power to make an order as to the costs of civil proceedings is conferred by section 51(1) of the Supreme Court Act 1981. It is in the discretion of the court whether, in any particular case, that power should be exercised. That is made clear by CPR 44.3(1)(a). It finds expression in the opening words of CPR 44.3(2) – *"If the court decides to make an order about costs -"*. The first question for the court – in every case – is whether it is satisfied that it is in a position to make an order about costs at all.

23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party – CPR 44.3(2)(a). But the court may make a different order – CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to "the general rule" - or should make "a different order" (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs.

24. In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether - having regard to all the circumstances (including conduct) as CPR 44.3(4) requires – the order for costs should be limited in one or more of the respects set out in CPR 44.3(6). But where there has been no trial – or no judgment – the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. As the arguments on the present appeal demonstrate, it does the parties no service if the judge – in a laudable attempt to

assist them to resolve their dispute – makes an order about costs which he is not really in a position to make.

25. It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that, as Lord Justice Mummery has pointed out, the judge will not be asked to decide that question. It will be agreed as one of the terms of compromise.

26. The cases in which the judge will be asked to decide questions of costs - following a compromise of the substantive issues – are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs. As Lord Justice Mummery has put it, the better course may be to require the parties to confront the realities of their litigation situation; to point out to them that, if they have not reached an agreement on costs, they have not settled their dispute and the action must proceed to judgment.

27. I share Lord Justice Mummery's view that this is a case in which the judge could not have been criticised if he had taken that course. For my part, I think he would have been wise to do so. But it is not open to the appellant to complain that the judge set out to do what both parties had asked him to do – that is to say, to make an order about costs and to decide what order to make on the material before him and without determining disputed facts. Nor is it open to the appellant to complain that, in seeking to perform that task, the judge adopted an approach which he, himself, described as "broad brush". It is difficult to see what other approach the judge could have adopted in the circumstances." (per Chadwick LJ)

9. This is not a case like *BCT* where I am asked to deal with the costs at the trial stage. I am invited to consider the costs of the application at the application stage, albeit this is a situation in which substantial parts of the whole action have in effect been agreed between the parties. That is capable of affecting the approach to this matter, because as well as having to consider the overall merits in the dispute, I have to consider to what extent the application was reasonable and, conversely, to what extent the defendant has brought the application upon himself. Mr McGrath for the defendants accepted that the real question was whether the claimant acted in a reasonable manner to protect its interests by bringing these proceedings and this application; that, he said was the core question.
10. I agree with Mr McGrath that his core question is a central one, but there are other factors to be taken into account, some of them related. I should take into account (in Mr Wilson's favour) the extent to which it is likely he was making concessions in order to bring the litigation to an end to the benefit of both parties. The court should not be too ready to jump to conclusions derived from the terms of the settlement and against the defendant in terms of the merits of the case lest defendants be reluctant to make sensible concessions to settle matters for fear of their being perceived to be acknowledging the strength of the claimant's case when they would not wish to be seen to be doing that. On the other hand, if there are matters on which it can be sufficiently plainly seen one side or the other would have been victorious had there been a fully litigated dispute, then that is obviously an important point. I also observe that the now normal order for costs in an interim application, that is to say costs reserved, is inappropriate because it is highly unlikely that there will ever be a trial at which reserved costs can be considered.
11. The first point that I should determine is whether this is one of those cases (referred to in *BCT*) in which it is apparent that the court does not have enough material to be able to decide whether one side or the other should be treated as having won and in which there should therefore be no order as to costs. I do not consider that it is. I consider that there is enough material in this case to enable me to decide, at least on some issues, whether or not the claimant was destined to succeed had the matter fought and whether Mr Wilson was to some extent bowing to the inevitable. I also have sufficient material to be able to judge the extent to which the claimant was justified in taking the steps that it took. And since the parties have invited me to take a view on such matters, it is open to me to conduct the exercise and come to such conclusions as I can (see paragraph 27 of the judgment of Chadwick LJ), bearing in mind all the caveats referred to by the Court of Appeal.
12. The dispute has to be approached in the light of the contractual provisions which the parties had agreed. The relevant provisions govern confidentiality and Mr Wilson's obligations after leaving employment. Clause 11 of his contract of employment contains a standard provision protecting, in general terms, the confidential information of the claimant. I accept that that information will include its client and candidate details in its CRM database, and elsewhere. The confidentiality of the CRM contents

is not disputed. Clause 12.2 bars Mr Wilson for a period of 6 months after termination from dealing with any clients or candidates with whom he has dealt in the previous 6 months. This bar is encapsulated in paragraph 5 of the order. Clause 15.1 provides:

“ 15.1. For the purposes of developing the business of the Company, we may encourage you to use a range of formal and informal networking activities. Any activity by you on, or using, any online networking site or formal or informal networking forum using any medium which involves recruitment services shall be subject to the terms and conditions set out in this contract regardless of whether or not you are using facilities provided by the Company.

Please note that:

15.1.1 any recruitment services carried on during your employment is for the benefit of the Company;

15.1.2 you shall be responsible for ensuring compliance at all times with all relevant regulations and legislation affecting such activities;

15.1.3 you shall immediately account to the Company for any benefit received by you from such activities together with reasonable interest thereon, and hold on trust for the Company the benefit of any such activity pending such account;

15.2 In relation to the use of online networking sites or similar activities involving recruitment services, you agree to comply with the following:

15.2.1 you shall not upload or otherwise make available through such sites any confidential information relating to the Company, including candidate and client contact details, without the express permission of the Company;

15.2.2 you agree that these activities are carried out solely for the commercial benefit of the company and you therefore permit the Company to monitor your use of such sites;

15.2.3 you agree that you shall only use your Company email address for such activities and you agree to make all passwords available to the Company on request;

....

15.2.5 you must ensure that you keep your networking activities separate from any personal networking activities that you carry out and this shall include keeping professional contacts separate from personal and family contacts and refraining from using your Company email address for personal networking purposes; and

15.2.6 on termination of your employment, you agree permanently to delete all electronic records of professional contacts including clients and candidates made during the course of your employment with the Company from your networking or similar accounts and to cease using your Company email address for such purposes.

13. In practical terms this will catch the contents of Mr Wilson's LinkedIn account, about which so much of this application turns. Clause 15.2.3 (passwords) is of particular significance, as will appear.

14. Clause 16 provides:

"16.1 Upon the termination of your employment under this contract you shall:

16.1.1 deliver to the Company all keys, credit cards, swipe cards, computer hardware, software, passwords, mobile phones, books, documents or any other paperwork which may be in your possession or under your control and which are the property of the Company or relate in any way to the business of the Company, and no copies shall be retained by you;

16.1.2 irretrievably delete any information relating to the business of the Company stored on any magnetic or optical disk or memory and all matter derived from such sources which is in your possession or under your control outside the Company's premises; and

16.1.3 provide a signed statement that you have complied fully with your obligations under this clause together with such reasonable evidence of compliance as the Company may request .”

The provision concerning the signing of a statement is important.

15. There is also a separate document, signed by Mr Wilson, governing LinkedIn:

“As stated in the LinkedIn policy, which can be found on the document section on PeopleHR, LinkedIn is a social networking platform which you will use whilst working at Clayton Recruitment Ltd.

As the employee you are advised to create a new account with your work email address.

The Marketing Department will have access to your Clayton LinkedIn account by obtaining your login details.

If you depart the business the connections made while working at Clayton will be removed by the Marketing Department.”

16. The document is signed twice, and between the two signatures is a paragraph headed “Ownership of Connections” which reads:

“Whilst employed at The Clayton Group I acknowledge Clayton Recruitment Ltd has ownership of all connections made on my LinkedIn account. I further acknowledge that Clayton

Recruitment Ltd have the right to remove the connections I have made whilst at the company by any means necessary.”

17. The contract says it has to be read “in conjunction with the Employee Handbook”, and a provision of that document deals with LinkedIn:

“16.23(e) - The contact details of business contacts made during the course of your employment are regarded as our confidential information, and as such you will be required to delete all such details from your personal social networking accounts, such as Facebook accounts or LinkedIn accounts, on termination of employment.”

18. Mr Wilson draws attention to the provisions of the agreement with LinkedIn relating to his account:

“Members are account holders. You agree to:

(1) use a strong password and keep it confidential.

...

As between you and others (including your employer), your account belongs to you.

However, if the Services were purchased by another party for you to use (eg Recruiter bought by your employer), the party paying for such Service has the right to control access to and get reports on your use of such paid Service; however, they do not have rights to your personal account.”

19. I now turn to what happened when Mr Wilson had given in his notice. On 4th March he had a conversation with representatives of the company in which he was asked to delete his LinkedIn connections. He refused to do so because he did not regard them as confidential, or at least they were not items to which he considered the claimant had a confidentiality claim. He seems to have regarded them as his own connections on his personal account. He had already been excluded by the claimant from LinkedIn Recruiter to which the claimant controlled access. However, he was left with all his basic account and his connections. He provided a list of the connections to the claimant but did not delete them.

20. On 7th March he was asked to provide his LinkedIn password. He refused to do so, apparently on the basis that his agreement with LinkedIn (see above) prevented it.
21. The claimant then seemed to take no further steps for a while. However, on 1st April the second defendant was incorporated and Mr Wilson shared the news on LinkedIn. It went to all the connections on that database. He got some responses, some of which were from people on the claimant's CRM database. Those matters apparently caused concern on the part of the claimant.
22. On 5th April the claimant's solicitors wrote to Mr Wilson pointing out what they said were his obligations and saying that his activities indicated he was dealing with clients in breach of his contractual obligations. It complained about his soliciting through LinkedIn (presumably because of the post just referred to), and relied on his failure to provide passwords and access to his LinkedIn account and his failure to allow the removal of connections made whilst in the employment of the claimant. It invited him to sign undertakings. Some of those undertakings were to do acts, such as delivery up, which were the equivalent of obligations under the contract. Others went wider and were essentially undertakings to comply with his contractual obligations. In outline they were as follows:
 - (a) An undertaking to comply with the restrictive covenants in clause 12 of the contract, and not to solicit or have dealings with any client or candidate, in line with the provisions of his contract, for the period to 1st September 2022.
 - (b) An undertaking to deliver up hard copy confidential information by noon on 7th April, and deliver up a list of confidential information (as defined) on electronic devices "including but not limited to LinkedIn"; and for the avoidance of doubt the reference to confidential information included, inter alia, passwords.
 - (c) An undertaking to delete confidential information that was digitally held when called on to do so by the claimant.
 - (d) An undertaking not to misuse confidential information (as defined).
 - (e) An undertaking to swear an affidavit confirming compliance with the preceding undertakings, listing confidential information in his possession, exhibiting hard copy confidential information, confirming deletion and setting out confidential information that had been passed to third parties.
 - (f) An undertaking to pay the company's reasonable legal costs within 14 days of demand, to be assessed by the Court if not agreed.
23. Some of these undertakings had corresponding provisions in the contract; some did not, and some were very extensive and significant (for example those summarised in subparagraphs (e) and (f) above).

24. Mr Wilson responded in two emails. In the first he refused to provide the undertakings on the basis that he was not aware of any breach of the contract having occurred. In the second he challenged the requirement that he give access to his LinkedIn account on the footing that it would contravene his LinkedIn user agreement and it was a personal account. He invited the claimant to provide evidence of solicitation and dealing with clients.
25. The action was then commenced and the application made. What happened on the hearing of the application appears above.
26. Against that background the dispute about the costs of the application arises. I have summarised the respective positions of the parties above.
27. Both sides seemed to accept that the dispute about the LinkedIn account was a key factor in the dispute at the time, and very significant in relation to the incidence of costs. The claimant regards it as a significant prize that it obtained the deletion of the connections, because it regards the connections (or at least those made during Mr Wilson's employment, which is likely to be most of them) as being the claimant's and a good tool for solicitation of business. It obviously regarded Mr Wilson's post about his new venture as a form of solicitation, and with some justification, in my view. For his part Mr Wilson maintains even now that the connections were in essence his and not the claimant's, that the claimant was not entitled to have them deleted, and that he was not obliged to give up his password to the account so that the claimant could control it. He maintains that the contract did not entitle the claimant to any of that, and his agreement to delete the connections was done voluntarily because he did not want to argue about it. The deletion of the connections under the order was therefore not a success for the claimant for the purposes of determining the incidence of costs. (I was told at the costs hearing that Mr Wilson had gone further and actually closed the account, but that does not add anything relevant to the present debate.)
28. There has not been a full trial of the effect of the terms of the employment contract and separate LinkedIn agreement, and their interaction with the LinkedIn/Wilson agreement terms, so far as the claimant's rights to connections are concerned, but it is clear enough to me that Mr Wilson was plainly wrong to resist the demands of the claimant in relation to the connections. The effect of clause 15 of the employment contract is to make the list of connections in the LinkedIn account (or at least professional contacts added during the employment) contacts which enured for the benefit of the claimant (rather like a customer list), and clause 15.2.6 clearly provided for their deletion. The separate LinkedIn agreement reinforced that. Mr Wilson was wrong to regard the connections as purely his. The separate LinkedIn agreement clearly relates to the connections in the LinkedIn account, and not (as Mr McGrath submitted) just the LinkedIn Recruiter

feature. The provision set out under “Ownership of Connections” could hardly be clearer. The “Connections” referred to must be those in the normal LinkedIn application, because it would not necessarily be right to view those appearing in the LinkedIn Recruiter feature as connections because one of the points of that feature is that it goes beyond the “connections” in the basic application.

29. Furthermore, I consider that the effect of the contract and the separate LinkedIn agreement was that Mr Wilson was obliged to give up his password to his account so that the Marketing Department could remove the connections, and Mr Wilson was wrong to resist this. The agreement between him and LinkedIn does not override his contractual obligations to his employer. Whatever the effect of that latter agreement may be as between him and LinkedIn, the fact remains that he contracted to provide his password (and other login details) to his employer, and that contract co-existed, and was fully effective, alongside the LinkedIn/Wilson contract.
30. It follows that Mr Wilson was quite wrong to refuse to delete contacts and provide his password. Since the LinkedIn connections were regarded as being potentially valuable for marketing purposes, and doubtless were (which is why Mr Wilson would want to retain them) it was perfectly reasonable and understandable that LinkedIn would wish to insist on controlling the account and on the deletion of connections. In conceding the point Mr Wilson was not merely conceding an arguable point; he was actually bowing to the inevitable, even if he did not think he was.
31. Mr Wilson was also wrong about his contractual obligations in another respect. The contract provided that he provide a signed statement that he had complied with his obligations under clause 16. While the proposed undertakings went further than this clause both in their extent and in the fact that they required an affidavit and not merely a signed statement, he was at least obliged to provide the signed statement. So while he protested that he did not need to do anything because he was already under his contractual restrictions, he did at least have to do that. In achieving a signed acknowledgment of deletions the claimant has again achieved something that it was contractually entitled to and which was being refused, and to that further extent can claim to have been victorious.
32. Beyond that I am not minded to treat the claimant as having succeeded merely by dint of the final order containing provisions which they sought to obtain. I cannot dismiss the possibility that Mr Wilson was providing the restraints and obligations in the order to avoid the distraction of further litigation and that he might have established that he never intended to breach the obligations of his contract (other than those that I have held to have been breached) such that a wider application (and the wider aspects of the action) were unnecessary and further relief inappropriate.

33. However, there is still the question (which both sides treat as relevant) of whether the claimant acted reasonably in making its application. Mr Ayoo, for the claimant, in submissions of commendable clarity, contended that it certainly did;. Mr McGrath for the defendants equally clearly said that it did not; it was heavy handed and employed an unjustifiable sledgehammer, for which the claimant should not be rewarded with an order for costs.

34. I consider that I can form a judgment about this on the basis of the information in the papers before me. The evidence is simple and plain enough for present purposes. The claimant was justifiably sensitive about Mr Wilson maintaining his connections in his LinkedIn account. They, or a very large part of them, were connections which the claimant was entitled to protect under its contract. When they were used for the purposes of Mr Wilson's circular about his new business the claimant was justifiably concerned that those connections would be used for Mr Wilson's own competing activities. Mr Wilson's refusal to delete them would have caused justifiable concern; and his use amplified that concern. When he was approached in the letter before action and invited to give undertakings his response would not, to put it at its lowest, have alleviated those concerns. Mr Wilson might have been legally entitled to refuse to give express undertakings that he would comply with the terms of his contract (other than those referred to above) but having wrongly refused to delete his connections and then used them for an advertising circular which it is known came to the attention of at least some of the clients or candidates on the claimant's CRM database, his dismissive response would cause understandable concern. The challenge to produce evidence of breach, rather than calm reassurances about his intentions, was somewhat inflammatory and not at all reassuring as to his intentions.

35. I therefore consider that the claimant was justified in being sufficiently concerned to start proceedings and seek interlocutory relief. Mr Wilson has to some extent brought an understandable application on himself.

36. That does not get the claimant completely home in terms of costs, however. There are two significant factors which have to be born in mind before deciding what costs order to make.

37. The first is that, although the claimant was justified in taking some precautionary steps, the demands in the letter before action might be viewed as over-extensive. For example, the request for an affidavit, and the extent of the ground to be covered in that affidavit, tended towards the extreme. The demand for the payment of costs was ambitious and intimidatory. The calibre of sledgehammer deployed (if sledgehammers are calibrated) was on the over-heavy side.

38. The second, and in my view more significant, factor is one which might be described as one of policy. It is in the interests of all concerned that defendants should not be dissuaded from reaching sensible compromises of interim applications, particularly where, as here, the compromise is capable of disposing of the whole action, by a fear that concessions will be taken to be acknowledgments of wrongful behaviour and of the fact that the claimant was right in its claim (or application). There will be some (probably many) defendants who will give undertakings because that is a practical expedient in the circumstances, not because they acknowledge that they (the defendants) are wrong and the claimants are right. If a defendant is placed in a position in which practical concessions are turned into weapons on costs then that defendant may be disinclined to reach a sensible settlement of the application. That sort of fear should be guarded against and the court should be alive to those risks.
39. That factor has an application in the present case. Mr Wilson's case is that he gave in as a practical matter. That cannot be completely dismissed. Perhaps the best example of that is his attitude in relation to a very limited number of his connections (my recollection is that it was 27) which he said were personal and which he wished not to delete. I understand the claimant was minded not to oppose that, but in the end Mr Wilson agreed to the deletion of even those. This desire for a "quiet life" is likely to have been a significant driver on Mr Wilson's side, and the court should not adopt a stance which discourages that as a factor in settlements.
40. I now draw these strands together in order to arrive at the correct order as to costs. The claimant has succeeded in establishing some of its clear contractual entitlements as against Mr Wilson, and has established, to a significant degree, that it was justified in seeking interim relief. However, there has not been a trial of this matter and it is not at all clear that all the relief sought against Mr Wilson would have been granted had there been a trial and had the court been satisfied as to the (at present untested) bona fides of Mr Wilson's activities and intentions. There is also the factor, operating in Mr Wilson's favour, that defendants such as him should not be discouraged from settling by the prospects of adverse costs orders where there has been no trial.
41. Taking all those matters into consideration I consider that the correct costs order is that the claimant should receive 55% of its costs of the application, and I so order.
42. I am then invited to assess the costs. I received submissions on this at the end of the substantive submissions on costs. The bottom line figure the claimant's costs of the application, excluding the hearing about costs, was £31,173. There was also said to be a further sum of almost £4,000 as the costs of the hearing about costs. Mr Ayoo pressed for the whole of the principal sum, saying it was appropriate and proper. Mr McGrath argued for a gross figure which came out at £10,000, inclusive of the costs hearing.

43. I am afraid that Mr McGrath's proposals (which he broke down) were too unrealistic to be at all helpful. Mr Ayoo himself started from a wrong baseline, because his solicitors' charging rates were significantly over the newly pronounced charge-out rates without any justification, so the excess is not allowable (*Samsung Electronics v LG Display* [2022] EWCA Civ 466). In the case of a partner the excess is over 35%; in the case of the Grade C the excess was almost 20%. The costs schedule was also confusing in that it claimed work done by named Grades A, B and C, but the boxes below claimed work by a Grade D (which I assume to be a mistake because the rate claimed is the stated Grade C rate). Nobody troubled to give me a calculation of what the costs would be on the basis of the guideline rates. In addition VAT is claimed on counsel's fees and process server's fees (but not solicitors' fees); since the claimant is registered for VAT that would not normally be claimable in the costs assessment, and I do not accept Mr Ayoo's stated reasons for maintaining it. So far as individual items are concerned, counsel's fees for the main hearing seem excessive, and there is rather a large figure in "Work done on documents" for "Discussions regarding open offer and settlement".
44. This was obviously a significant claim in which the costs reflected the urgency of the application. An allowance should be made for that. Having considered the statement of costs carefully, I assess the 55% of the costs schedule costs at £13,750, without any VAT element. On the basis that neither party was totally successful on the separate costs hearing I leave each side bearing its own costs of that hearing.
45. My order is that the defendant shall therefore pay the sum of £13,750. I shall allow him 28 days, rather than the usual 14, in which to pay it.