Neutral Citation Number: [2021] EWHC 462 (Ch)

Case No: BL-2019-001377

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8/3/2021

Before:

MASTER CLARK

- -

Between:

EURASIAN NATURAL RESOURCES CORPORATION LIMITED **Claimant**

- and -

AKE-JEAN QAJYGELDIN **Defendant**

- -
- -

David Glen (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Ben Silverstone (instructed by **Memery Crystal LLP**) for the **Defendant**

Hearing date: 17 February 2021

- -

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.

.....

Master Clark:

1. This is my judgment on the application dated 4 January 2021 of the claimant, Eurasian Natural Resources Limited, seeking orders in respect of disclosure against the defendant, Ake-Jean Qajygeldin. The order originally sought was wide-ranging, but the issues remaining now are relatively narrow.

The claim and the parties

2. The claimant is the parent company of a group of companies with international business interests, including mining in Kazakhstan and Africa, integrated energy, processing and logistics.

3. The defendant is a former Prime Minister of Kazakhstan, who resigned in 1997 and formed a political party in opposition to the then government. He fled Kazakhstan in 1998, and has lived in the UK since 2002. He describes his main activities as tracing and recovering assets unlawfully seized from Kazakh nationals, including himself, by individuals connected with the Kazakhstan government ("the stolen asset tracing activities"). The defendant alleges that the claimant is controlled by and acts on behalf of the Kazakhstan government.

4. The defendant's evidence is that his activities (which include co-operating with law enforcement agencies in the USA and UK) have resulted in repeated attacks and threats by individuals connected with the Kazakhstan government, including the following. On 13 October 1998 he was the subject of an assassination attempt when he was shot several times. In December 1999 his assistant was attacked and stabbed by a Kazakh man. In 2002 two of his former bodyguards in Kazakhstan were tortured by Rakhat Aliyev (the son-in-law of the then President and deputy head of the Kazakh KGB). Several attempts have, he says, been made to identify his home address in order to cause him harm, both in the UK and in the USA. I am not in a position to and am not asked to decide whether these matters are true.

5. The claim is for breaches of confidence, falling into two categories:
   (1) a single incident in 2012 or 2013 involving the defendant obtaining, through a Mr Robert Trevelyan, an encrypted hard drive, which he passed to a third party;
   (2) several occasions between 2010 and 2015 when the defendant is said to have acquired confidential information from a Mr Mark Hollingsworth.

6. The defendant admits dealings with both Mr Trevelyan and Mr Hollingsworth for the purpose of the stolen asset tracing activities, but denies acquiring or using any confidential information belonging to the claimant.

Application

7. The application concerns two categories of electronic repositories of documents said by the defendant to be irretrievable. These are

   (1) 2 email accounts: operabus@gmail.com ("the operabus account") and operaksgb@gmail.com ("the operaksgb account") (together "the email accounts");

(2) a laptop, 2 smartphones and a mini-iPad ("the Devices") all said to have been stolen on 14 April 2016 from the defendant when he was checking in to the Meridien Hotel in Frankfurt-am-Main, Germany.

Email accounts

8. The defendant's evidence as to the status of the email accounts is contained in his witness statement dated 22 January 2021, and is as follows.

9. He believes that emails and electronic devices are not secure, and has never used them for anything confidential. His main use of email accounts has been to send news articles, open source material, and sometimes (but not always) to book tickets or hotels. Between 2008 and 2016 he almost never used emails, only physical mail, for security reasons. He is, he says, not very "tech-savvy".

10. The operabus account was created in approximately 2000 and used between then and sometime between 2010 and 2015. When he tried to access the account in June 2020 for the purposes of this claim, it was not recognised by Google.

11. The operaksgb account was created and used from about 2015 until about May 2020. In September 2020 the defendant tried to access the account. His password was not recognised, and he "gave up". The defendant tried again on 20 November 2020 to access the account. His evidence as to what then occurred is apparently inconsistent. At para 30 of his witness statement, he says that the password was again unrecognised, he was prompted to answer certain questions for the purpose of recovering (access to) the account, and he did not know the answers. At para 35 of his witness statement, he says that Gmail did not recognise the account, and he believes he may have made a mistake in entering the email address. There is no evidence as to what these events show about the status of the account.

12. The account was, he says, unrecognised when his solicitors tried to access it between 20 and 25 November 2020. However, on 4 December 2020, when his solicitors tried to access it, the account was recognised, but the password (which the defendant says he is certain he remembers correctly) was not recognised.

Order sought

13. As will be seen, the claimant has made extensive requests for information concerning the email accounts and the Devices, and the enquires made by the defendant as to recovering the data on them. The claimant has several criticisms of both the responses by the defendant to its requests and the steps taken by him to investigate data recovery. These criticisms are the basis for the orders sought by it, which are that:

> "1.b. the defendant write to Google LLC (copying the claimant into all such correspondence **and any responses received**) seeking all information held by Google regarding the purported change in state of operabus and operaksgb accounts including:
>
> i. the current status of those Accounts;
> ii. the reasons why those Accounts are no longer accessible and the dates on their status have materially altered;
> iii. the periods in which those Accounts were in use;

iv. whether Google has retained, or has control of, any data, documents or information pertaining to those Accounts of the Defendant, including copies of emails to and from Operabus and associated data (and, if so, the steps required to restore access to those Accounts, emails and/or data);
v. all data held by Google regarding log-in attempts to the Accounts from 24 July 2019 to date;
vi. confirmation of whether such log-in attempts were successful or not; the IP address(es) from which the log-in attempts were made; and
vii. the recovery email addresses in respect of those Accounts; and
vii. any information known about the owner of the Samsung Galaxy A50 handset identified in respect of the Operaksgb Account;

c. the defendant write to Kaergel De Maiziere & Partner (identified by the defendant as his German lawyers) and the German police and/or relevant law enforcement agencies (copying the claimant into all such correspondence **and any responses received**) seeking:
i. all information held about the nature and circumstances of the April 2016 theft of his electronic devices;
ii. the details of the investigating police officer(s);
iii. the nature and outcome of any ensuing investigations; and
iv. any assigned crime reference numbers."

14. The defendant has agreed to write making those inquiries but (as I have indicated in bold) does not agree to providing to the claimant copies of the responses received.

15. The application therefore raises the following points:
(1) whether the court has power to order disclosure of documents relevant to whether the disclosing party has fulfilled their disclosure duties;
(2) if so, the principles governing the exercise of that power; and
(3) whether the power should be exercised in the circumstances of this case.

Procedural chronology

16. The claim form was issued on 24 July 2019.

17. On 12 June 2020, the defendant provided an initial draft of his Section 2 of the Disclosure Review Document ("DRD") to the claimant.

18. In section 2, the defendant identified the email accounts as data sources. Question 12 of that section asks about irretrievable documents:

> "**Irretrievable documents**
> Please state if you anticipate any documents being irretrievable due to, for example, their destruction or loss, the destruction or loss of devices upon which they were stored, or other reasons."

19. The defendant's response was:

> "The Defendant is currently aware of the following limitations on his ability or collect and/or search dates contained within the repositories identified in 2, above:
>
> (a) In and around April 2016, the Defendant's personal laptop computer, two smartphone devices and an iPad mini were stolen from a hotel in Frankfurt, Germany. The contents of those devices are irretrievable.
>
> (b) The webmail account operabus@gmail.com is expired."

20. On 16 June 2020, the claimant's solicitors wrote to the defendant's solicitors raising queries about this. As to the email accounts, these included:

(1) dates of creation and use of the accounts;

and as to the operabus account,

(2) an explanation of the meaning of "expired";
(3) whether it was possible to restore access to the account or its contents;
(4) steps taken or planned to be taken to restore access to the account;
(5) whether any data (including emails) had been permanently deleted from the account, and, if so, when, in what circumstances and why.

21. As to the Devices, they asked a range of detailed questions as to their make and model, dates purchased, the circumstances of the theft, and steps taken to recover the Devices or the data on them, whether any of the Devices were backed up, and details of how and when. They also asked for documents "corroborating" the theft, including

> "any communications with the hotel, any police report or other communications with law enforcement agencies, any crime reference number (or similar) provided to the Defendant, or any documents or communications relating to any insurance claim."

22. The defendant's solicitors responded on 22 June 2020

> "As a general note, the Defendant reiterates that he has lived with frequent threats to his life, particularly between 1997 and 2017. The Defendant does not, as a general rule, and as advised by those protecting him, keep data or documents. The Defendant frequently changes his electronic devices and periodically changes telephone numbers. All historic devices are either reset, so as to have no data, SIM cards are removed and the Defendant does not keep backup data."

23. As to the operabus account, they said:

> "Our client does not recall precisely when this email account was created but believes that it may have been active from 2000 for approximately 10 years at least, but no more than 15 years. The period of its use was a dangerous time for our client because at the time Mr Rakhat Aliyev was alive and aware of our client's asset tracing exercise. The Defendant believes that this email account was subject to hacking attempts during its period of use. The Defendant was

ultimately advised to avoid using email accounts by Special Branch of the Metropolitan Police. Special Branch provided advice and assistance with regards to the Defendant's personal security during this time period."

and

"Our client has not used this email account for at least 5 years. A search for operabus@gmail.com using Google's account recovery tool, which is used to recover Google accounts, reported that the account could not be found. It is our understanding that Google's policy at the time was that any account which was inactive for more than 9 months could be permanently deleted by Google pursuant to its terms of service. This is in accordance with the Defendant's understanding that the account had "expired". The Defendant will consider further whether the information that was contained in the account is retrievable by making further enquiries with Google, however, the Defendant's present understanding is that the information within that account has been permanently deleted and is irrecoverable."

24. As to the operaksgb account, the defendant's solicitors said:

"As best as the Defendant can recall, the email account operaksgb@gmail.com was active from around 2015. It is still in use, but infrequently used."

25. As to the Devices, the defendant's solicitors' responses included the following

"The Defendant has a business card, which was given to him by a German police officer. It has what may be a crime reference number handwritten onto it. The Defendant is making enquiries with his German lawyer to see if the German lawyer retained any records relating to the theft."

They also confirmed that none of the Devices were backed up.

26. Several months then elapsed without further substantive correspondence until mid November, when the parties turned their minds to the CMC listed on 3 December 2020.

27. On 13 November 2020, the claimant's solicitors wrote complaining that nothing had been heard from the defendant's solicitors for more than 4 months, and asking a range of detailed questions arising out of the defendant's solicitors' letter of 22 June 2020.

28. By way of example, they asked "as a matter of urgency":

"Please specify:

1. a. Between which dates Special Branch provided advice and assistance to the Defendant and the nature and type of that advice;
   b. When exactly the Defendant was advised by Special Branch to avoid using email accounts and what precisely prompted that advice at that point; and
   c. how the Defendant communicated with those with whom he was previously in contact by email after he had received and acted on this advice.

2. Where applicable, please provide any documents in the Defendant's possession which evidence or record of the advice and events referred to in 1(a)-(c) above."

29. They also asked the defendant's solicitors
(1) to confirm and document the nature of the enquiries made with Google (or any other IT technician) regarding the recovery of data from the operabus account and the outcome of those enquiries; and
(2) to provide the results of the enquiries with German lawyer.

This letter sought an entirely unrealistic and unnecessarily short time for responding of 2 working days later.

30. The defendant's solicitors responded substantively on 25 November 2020. Their letter stated that the defendant had tried to access the operaksgb account on 20 November 2020, but that Google Mail was not recognising the account. It continued

> "We are inquiring with Google about the recoverability of data from this account, as with operabus – see 5 below"

The letter then set out the terms of Google's current policy that an account can be deleted after 2 years of inactivity, and that its earlier policy was that the period was 9 months. Para 5 of the letter stated in relation to the operabus account

> "We have inquired with Google about the recoverability of data from that account."

31. As to the Devices, the defendant's solicitors set out that the defendant had made enquiries of his German lawyer but that he (the lawyer) was currently unwell and could not recall where any record of the theft might be.

32. The claimant's solicitors responded 2 days later, on 27 November with further questions arising out of the information provided. Understandably, they raised the issue of the operaksgb account no longer being accessible, and asked a series of detailed questions as to this.

33. At the CMC on 3 December 2020 I made an order that the parties give Extended Disclosure by 26 March 2021 in accordance with the DRD as approved by me.

34. The defendant's solicitors responded to the claimant's solicitors' letter of 27 November 2002 in their letter dated 18 December 2020. This set out the following details of the defendant's attempts in September and November 2020 to access the operaksgb account. In September 2020, he tried to access the account but could not remember the password (this was corrected on 21 December to entering the correct password, which was not accepted by Google). Between 20 and 25 November 2020, the account was said to be unrecognised by Google. After 25 November the account was recognised, but the defendant's password was rejected. When attempts were made to recover access to the account, a message appeared stating "Get your Samsung Galaxy A50 handset". The defendant did not have and never has had a Samsung Galaxy A50 handset.

35. The letter set out the enquiries which the defendant's solicitors had made to that date, namely reviewing various documents on Google's website. The defendant's counsel told me on instructions that his solicitors also sent feedback requests to Google support services. There is no evidence expressly to that effect before me, but the defendant's witness statement at para 37a states that his solicitors have made enquiries using support.google.com. The letter confirmed that the defendant's solicitors had written on 8 December 2020 to Google UK Limited and enclosed a copy.

36. The claimant's solicitors' 5½ page response dated 24 December 2020 asked 24 detailed questions (some with sub-questions) about the information in the defendant's solicitors' letter of 18 December 2020. It set out the claimant's solicitors' understanding that Google did not handle content or service inquiries via its United Kingdom subsidiary, or hold any data in the United Kingdom. As to the German lawyer, the letter asked when he had first been contacted. The letter required a response by 30 December 2020 i.e., 1 working day after its date and over the Christmas period.

37. When no response was received by that deadline, the claimant issued its application, 1 working day later, seeking an urgent listing with a time estimate including pre-reading and judgment of 2 hours, with no provision for evidence in answer by the defendant.

38. On 7 January 2021, the defendant's solicitor wrote to Google LLC by email and post, copying in Google Ireland, making various inquiries relating to the email accounts, including as whether any data (including copies of email sent to and from the accounts) was retained by Google.

39. The email response of 11 January 2021 from Google stated that it came from the Legal Investigations Team "which handles third party legal requests". As to the operabus account, the email provided Google LLC's postal address in the USA (to which the letter of 7 January 2021 had already been sent). It also stated that Google was prohibited from providing the contents of a subscriber's email communications (or content stored on behalf of a user); and that

> "The appropriate way to seek such content is to direct your request to the [litigant] account holder who has custody and control of the data in the account."

40. As to the operaksgb account, the defendant's solicitor's letter was said to have been forwarded to the appropriate team at Google Ireland.

41. On 10 February 2021, the claimant's solicitors (having seen Google's email of 11 January 2021) wrote stating that it was clear from the email that Google or at least its legal team had misunderstood the position and wrongly believed the defendant's solicitors were a third party wishing access to data held on/about the operabus account, without the consent of the owner of that account; and asking the defendant's solicitors to write to them again.

42. On the same day, the defendant's solicitors replied. They did not accept that their previous letter was unclear, but agreed to write re-iterating that they acted for the defendant, and that he was seeking information in respect of his own accounts.

Disclosure – applicable legal principles

Disclosure Pilot

43. Disclosure in the Business and Property Courts is of course governed by the Disclosure Pilot Scheme in CPR Practice Direction 51U ("the Pilot").

Issues for Disclosure

44. Para 2.4 of PD 51U provides:

> "The court will be concerned to ensure that disclosure is directed to **the issues in the proceedings** and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in Appendix 1)."
>
> (emphasis added)

45. Appendix 1 does not in fact contain a definition of Issues for Disclosure. This is found in para 7.3:

> "Issues for Disclosure" means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission."

46. Para 7.4 provides further guidance, referring to the claimant's duty to ensure that the draft list of issues is "a fair and balanced summary of the key areas of dispute identified by the parties' statements of case."

Inherent jurisdiction

47. In addition, as implicitly acknowledged by the defendant, the court has an inherent jurisdiction to order disclosure in interim proceedings, and this extends to issues which do not arise on the statements of case.

48. As to the principles governing that jurisdiction, in *Harris v Society of Lloyd's* [2008] EWHC 1433, David Steel J said (at para 10):

> "It is well established under the previous procedural rules that the power to order disclosure for the purpose of interlocutory proceedings should be exercised sparingly and then only for such documents as can be shown to be necessary for the just disposal of the application: *Rome v Punjab National Bank* [1989] 2 All E.R. 136. There are good reasons for concluding that the same if not a stricter approach is appropriate under the provisions of CPR: see *Disclosure*, Matthews and Malek 3rd Ed. Para 2.68."

The 5th edition of *Disclosure* at para 2.39 is materially identical.

49. In *Revenue and Customs Commissioners v IGE USA Investments Limited* [2020] EWHC 1716 (Ch), James Pickering QC (sitting as Deputy High Court Judge) held that the jurisdiction under PD51U extended to issues arising on proposed amendments alleging fraud, as issues which would need to be determined by the court in order for

there to be a fair resolution of the proceedings as a whole. That decision (which is binding on me) confirms that the court's jurisdiction to order disclosure extends beyond the issues on the statements of case.

Disclosure duties under the Pilot

50. The parties' duties in relation to disclosure are set out in para 3.1 and are, so far as relevant to this application:

> "(1) to take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings;
> …
> (4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search; and
> (5) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party."

51. Paragraph 4 amplifies the duty to preserve relevant documents. Paragraph 4.2, which confirms that the duty under paragraph 3.1(1), includes:

> "(3) an obligation to take reasonable steps so that agents or third parties who may hold documents on the party's behalf do not delete or destroy documents that may be relevant to an issue in the proceedings."

52. Paragraph 10.9 provides that each party must file a signed Certificate of Compliance in the form of Appendix 3 to PD51U before the case management conference. In the version of the certificate for represented parties, the solicitor confirms that s/he has discussed, explained and advised the client on the matters including the following:

> "2. The duties that I and my client are under in relation to disclosure pursuant to paragraph 3 of Practice Direction 51U;
> 3. The overriding objective in all cases to seek to ensure that the burden and costs of disclosure are reasonable and proportionate in the context of the proceedings."

The Certificate includes a statement of truth to be signed by the solicitor confirming that "the information provided in this disclosure review document is, to the best of my knowledge and belief, true and accurate."

Court's power to enforce disclosure duties

53. Para 20.1 provides for sanctions for failure to comply with obligations under the Pilot:

> "20.2 If a party has failed to comply with its obligations under this pilot including by—
> …
> (2) failing to discharge its disclosure duties; or
> (3) failing to cooperate with the other parties, including in the process of seeking to complete, agree and update the Disclosure Review Document,

the court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the court shall specify."

These provisions do not include a power to order disclosure.

Application's jurisdictional basis – discussion and conclusions

54. The claimant's application notice relies upon PD 51U paras 10.3 and 17.1 as providing jurisdiction for the order sought.

Para 10.3

55. Para 10 is headed "Completion of the Disclosure Review Document". Para 10.3 provides so far as relevant:

> "The parties' obligation to complete, seek to agree and update the Disclosure Review Document is ongoing. If a party fails to co-operate and constructively to engage in this process the other party or parties may apply to the court for an appropriate order …, and the court may make any appropriate order… ."

56. The relevant part of the DRD in this case is section 12 (set out at para 18 above). This requires the disclosing party to provide information. It does not in my judgment require them to provide documents evidencing why documents are irretrievable. In my judgment, since a party's obligation to complete the DRD does not extend to providing documents to prove the steps it has taken (or *a fortiori*, any responses it has received to such steps), the "appropriate order" which the court has power to make does not extend to the provision of such documents.

Para 17.1

57. Para 17.1 provides:

> "17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—
> (1) serve a further, or revised, Disclosure Certificate;
> (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
> (3) provide a further or improved Extended Disclosure List of Documents;
> (4) produce documents; or
> (5) make a witness statement explaining any matter relating to disclosure.
>
> 17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4)."

58. The defendant's counsel submitted that para 17.1 was not engaged because the date by which the parties are to give Extended Disclosure has not yet arrived. The claimant's counsel submitted that there was no reason in principle why paragraph 17.1 should not apply where an order for Extended Disclosure had been made, and where it has become

apparent that a party's compliance with his ongoing duties (including his duties to cooperate and preserve evidence) is or may be deficient.

59. Complying with an order for Extended Disclosure requires (in summary) 3 things to be done:
    (1) service of a Disclosure Certificate;
    (2) service of a List;
    (3) production of documents.
    Until the time when these things are to be done (in this case, 26 March 2021) and the court is then able to assess what has been done, a party cannot, in my judgment, be said to have failed to comply with an order for Extended Disclosure. Para 17.1 is not therefore engaged.

60. It follows from the above that the jurisdictional basis relied upon by the claimant does not in my judgment support its application.

Alternative jurisdictional basis – inherent jurisdiction

61. However, I turn to consider the claimant's position if I am wrong about that, or, indeed, on the basis, set out above, that the court has an inherent jurisdiction to make the order sought.

The claimant's complaints

62. I turn therefore to consider the claimant's complaints, which can be summarised as follows:
    (1) Delays in making enquiries;
    (2) Misleading statements that enquiries had been made when they had not been;
    (3) Misrepresentation that Google LLC were looking into matters when they were not;
    (4) Failure to take steps in response to the email of 11 January 2021 from Google LLC until pressed to do so;
    (5) Inconsistencies in the defendant's account of his steps to try to access the operaksgb account;
    (6) Delays in providing information as to the German theft;
    (7) The change in the defendant's position as to his Apple laptop.

Delays in making inquiries

63. The claimant criticises the defendant for not promptly taking steps to investigate recovery of the operabus account. In my judgment, it is wrong to say they took no steps. The defendant's witness statement sets out that they reviewed relevant online material and forums on Google's website, including, as referred to above, making enquiries using support.google.com. Having done so, they concluded that

> "Google's terms of service have, historically, permitted Google to delete Gmail accounts on a general basis. More recently Google operated a policy of account deletion after 9 months of "inactivity". Google recently announced a policy of deleting Gmail accounts and other services across Google after 2 years of "inactivity". This new stance has been widely publicised. The enquiries also indicated that **Google does not offer a means to escalate issues relating to Gmail account recovery nor does Google provide a live, or staffed, support service in respect of Gmail**."

(emphasis added)

64. The claimant's counsel's submissions were premised on the assumption that these steps were not "enquiries" or not adequate steps to investigate the recoverability of the data on the operabus account. He also submitted that it should have been clear to the defendant's solicitors that they needed to write to Google LLC and/or Google Ireland because it has been repeatedly emphasised that Google UK does not handle service or content inquiries via its UK subsidiary. However, the 2 decisions[1] referred to by him concern an internet service called Blogger.com, as to which evidence was adduced that it was operated and controlled by Google Inc, now Google LLC. Those decisions were not concerned with email accounts, nor with the appropriate entity to which enquiries as to content or service in respect of email accounts should be directed.

65. Bearing in mind that the defendant had stopped using the operabus account in 2015, and the published information available to them as to Google's policies of deleting accounts for non-activity, I do not consider that the defendant's solicitors are to be criticised for lack of promptness in their enquiries in relation to that account.

66. As for the operaksgb account, the defendant's solicitors wrote to Google on 8 December 2020, just over 2 weeks after first discovering that the account was unrecognised, and following the discovery on 4 December 2020 that it was then recognised, but the password was not. I do not consider that this constitutes undue delay.

Misleading statements that enquiries had been made when they had not been

67. The claimant's counsel based his submissions as to this on:
    (1) the defendant's solicitors' letter dated 22 June 2020 stating that the defendant would consider whether the information in the operabus account was retrievable by making further enquiries with Google;
    (2) the representations made in the defendant's solicitors' letter dated 25 November 2020 – set out at para 30 above.

68. As noted, there is no evidence that the defendant's solicitors had sent letters or emails to Google before 7 January 2021. The claimant's counsel invites me to conclude that, in those circumstances, the statement by the defendant's solicitors that they had enquired with Google was a misrepresentation. However, given the defendant's evidence that his solicitors made enquiries through support.google.com, I reject that submission. Indeed, given the defendant's unchallenged evidence that Google does not provide a live or staffed support service in respect of Gmail, doing so was a sensible course to take.

Misrepresentation that Google LLC were looking into matters when they were not

69. Para 24(b)(ii) of the defendant's witness statement sets out in respect of the operabus account that his solicitors wrote to Google UK on 8 December 2020 and to Google LLC and Google Ireland on 7 January 2021. It concludes by stating:

[1] *Richardson v Google (UK) Limited* [2015] EWHC 3184 (QB) and *ABC v Google Inc.* [2018] EWHC 137 (QB)

> "On 11 January 2011, Google LLC responded by e-mail to say that the matter has been passed to one of its representatives. I am awaiting further responses from Google before deciding what if any additional steps should be taken."

The statement that the matter had been passed to one of Google's representatives was true in respect of the enquiry as to the operaksgb account, but not that as to the operabus account. However, the defendant's solicitors had already taken the steps which Google's email indicated it should take, namely writing to Google LLC's postal address (provided in the email), so that the enquiries were proceeding. So the inaccuracy in the witness statement does not affect the practical position that the defendant's solicitors had taken the necessary steps to contact Google in respect of the operabus account, and were awaiting its response. The inaccuracy in the defendant's witness statement was of no practical significance.

Failure to take steps in response to the email of 11 January 2021 from Google LLC until pressed to do so

70. The claimant also relied on the defendant's solicitors' failure to take any further steps following receipt of Google's email of 11 January 2021, until pressed by the claimant to do so. I agree that in the context of the need to give Extended Disclosure on 26 March 2021, the defendant should have responded more promptly to Google's email of 11 January 2021, and chased a substantive response to its queries, as indeed it has now agreed to do.

Inconsistencies in the defendant's account of steps to access operaksgb account

71. These apparent inconsistencies are noted in para 11 above. It is however clear that the account was recognised in September 2020, not recognised when the defendant's solicitors tried to access it between 20 and 25 November, and is now recognised, albeit the defendant's password is not recognised. Indeed, the status of the account is available to anyone who enters the email address on the Gmail login page. I do not consider these inconsistencies in the defendant's evidence to be significant when the actual position is clear.

Delays in providing information as to the German theft

72. The claimant relies upon:
    (1) the defendant's initial refusal to provide the name of the hotel where the theft took place;
    (2) his solicitors' statement in June 2020 that he had a business card with the crime reference number on it; followed in November 2020 by their statement that he no longer had a copy of the business card;
    (3) his solicitors' statement in June 2020 that he was making enquiries of his German lawyer, when his witness statement states that he made the enquiry in January 2021;
    (4) the recent information provided by the defendant that the relevant lawyer, is not at Kaergel de Maiziere, but another firm.

73. As to these, the defendant's disclosure obligations are, in my judgment, to take reasonable and proportionate steps to search the Devices, which would involve taking such steps to recover them. They do not include providing information which is not relevant to fulfilment of that duty.

74. The defendant initially refused to provide name of the hotel from which the Devices were stolen "for reasons of personal security"; but revisited this decision and did provide the name. I do not consider this significant, particularly when the information sought was not relevant to the defendant's ability to recover the Devices.

75. The statement in correspondence in June 2020 that the defendant had a business card with what might be a crime reference number written on it followed in November 2020 by the bare statement that the defendant no longer had the business card is an instance of a concerning lack of reliability in his instructions to his solicitors. The position is similar as to the instructions set out in correspondence as to enquiries made of the German lawyer. As to the defendant's apparent mistake as to the firm at which his lawyer, but not the identity of the lawyer, this is not in my judgment, significant.

Apple laptop

76. Section 2 of the defendant's DRD stated that the defendant's search for the purposes of disclosure would include his "personal laptop computer, which the Defendant has used since 2017" (his previous laptop having been one of the Devices), which in June 2020 was confirmed as being an Apple MacBook. These statements can only have been made on instructions from the defendant.

77. However, paragraph 24(d) of the defendant's witness statement stated for the first time that his Apple laptop (and any documents which it contained) were in fact no longer in the defendant's possession, as a result of it being "cleaned and sold" in 2018.

78. The claimant's counsel referred to this as a "volte face". I agree that on an initial impression it is very unsatisfactory and concerning. The defendant has agreed to an order requiring him to provide in a witness statement:

> "xxii. an explanation as how the original draft of the Defendant's DRD and Memery Crystal's letter of 22 June 2020 stated that the Apple laptop was an existing depository; the instructions which he gave to Memery Crystal in both regards; to whom and in what circumstances that laptop was wiped and sold; and details of other laptops which the Defendant has used since selling the Apple laptop (including their make, model and period of use)"

The defendant's response

79. The defendant submitted that the claimant is only entitled to information that it reasonably requires in order to agree the disclosure searches to be carried out by him. He has agreed to inform the claimant of the results of his solicitors' enquiries to that extent. He objects to providing:
    (1) copies of the responses received, which he says may include information which is irrelevant for those purposes and/or confidential and/or the provision of which would breach the GDPR/Data Protection Act 2018;
    (2) information as to the matters set out in 1. b. v to vii of the draft order (see para 13 above) on the grounds that to do so would breach rights of confidence, privacy and/or data protection.

80. The defendant also submitted that the application was in reality an application for third party disclosure, to circumvent the requirements of CPR 31.17 which, he submitted are plainly not satisfied. I agree that the information sought is held by third parties, and

note that the claimant has chosen not to make an application for third party disclosure. However, that is irrelevant to this application, which is concerned with the defendant's obligation to give disclosure of documents in his control.

Discussion and conclusions

81. The fundamental objection to the orders sought by the claimant is that they are orders for disclosure in respect of the defendant's compliance with his disclosure obligations. The claimant did not cite any authority in which such an order has been made.

82. The authorities referred to above establish that, although the court has jurisdiction to order disclosure in relation to issues not arising on the statements of case, that jurisdiction is very sparingly exercised. In this case, the issues as to which disclosure is sought are not issues on the statements of case. There are strong policy reasons for the court's reluctance to order disclosure as to this type of issue, which are vividly illustrated by this case. The parties' and the court's resources should be directed and focussed upon the matters which the court will need to decide in order for there to be a fair resolution of the claim at trial.

83. For example, the defendant's position is that he no longer has the Devices because they were stolen. The precise circumstances of the theft, and the outcome of the police investigation into it are not matters arising on the statements of case. In the absence of exceptional circumstances, it would in my judgment be disproportionate and wrong in principle for there to be disclosure in relation to those matters.

84. The claimant is critical of both the defendant and his solicitors. As considered above, there are some inconsistencies in both the defendant's evidence, and in the instructions he has given to his solicitors as to various factual matters. They fall far short of justifying the disclosure sought.

85. In any event, the claimant has not, in my judgment, shown any basis for criticising the accuracy of the defendant's solicitors' representations as to matters within their own knowledge. There is therefore no reason to conclude that they will not respond accurately in providing the results of their enquiries, so far as relevant to the defendant's fulfilment of his disclosure duties.

86. The defendant is obliged to undertake a reasonable and conscientious search for disclosable documents, and the claimant is entitled to enough information about those searches to show that the defendant has done so. As noted, the defendant has agreed to provide copies of his solicitors' enquiries, and to inform the claimant of the outcome of those enquiries to the extent that his disclosure obligations oblige him to do so. There is no basis for requiring him to disclose the correspondence in response, and to do so would in my judgment be wrong in principle and disproportionate.

87. I am not asked to decide what information the defendant should provide to the claimant if the order for disclosure sought is not made. However, I consider that the information at 1.b. v to vii of the claimant's draft order is not relevant to whether the defendant has fulfilled his disclosure obligations, as those obligations are confined to documents within his control.

88. For these reasons, I therefore dismiss the claimant's application.