Neutral Citation Number: [2021] EWCA Civ 145

Case No: A3/2020/1464

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS LIST (ChD)
MR JUSTICE MARCUS SMITH
BL-2019-001768

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2021

Before :

LORD JUSTICE DAVIS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE NUGEE

- -

Between :

OCADO GROUP PLC & ANR	**Appellants**
- and -	
RAYMOND JOHN MCKEEVE	**Respondent**

- -
- -

Mr David Cavender QC and **Mr Alexander Brown** (instructed by **Mishcon de Reya LLP**) for the **Appellants**
Mr Robert Weekes (instructed by **Foot Anstey LLP**) for the **Respondent**

Hearing date : 13th January 2020

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Approved Judgment

LORD JUSTICE DAVIS :

Introduction

1. This is an appeal, brought by leave granted by Floyd LJ, against an Order of Marcus Smith J made on 11 June 2020 whereby he refused permission to the appellant claimants (collectively, "Ocado") to apply to commit the respondent defendant ("Mr McKeeve") for contempt of court. The committal application, made pursuant to CPR Pt 81.14, was made against a background of underlying proceedings commenced against various parties by Ocado in the High Court. Those proceedings have all the hallmarks of tooth and claw litigation.

2. The context of the contempt application is, on any view, remarkable. It is admitted that within minutes of being notified of the fact that an Order for Search of Premises and Preservation of Evidence had been made in the High Court against clients of his, Mr McKeeve, a solicitor, gave instructions to his clients' Information Technology manager to "Burn it" (or "Burn all"). In consequence, that manager then deleted or disabled various IT accounts. One of these was an account, previously operated on a covert basis, known as the 3CX account. Its deletion has meant that any messages sent via that account are wholly irretrievable. Ocado has alleged that Mr McKeeve's conduct was intended to interfere with the due administration of justice.

3. The judge, after considering the particulars of contempt alleged and after reviewing the evidence, concluded that no sufficient prima facie case of contempt of court had been made out. He accordingly refused permission and dismissed the committal application. The question for this court is whether he was wrong to have done so.

Background

4. Ocado conducts the business of an online-only supermarket in the United Kingdom and also grants licences to other supermarkets a technology platform for online grocery supplies. The holding company has a very substantial capitalisation and is within the FTSE 100 index of companies.

5. One of the founders of the original business was Mr Tim Steiner. Another was Mr Jonathan Faiman. Mr Faiman had been an executive director and Chief Operating Officer. However, Mr Faiman left the business in 2010. Mr Steiner has remained with Ocado. The indications are that in recent times Mr Steiner and Mr Faiman have mutually viewed each other with very considerable hostility and suspicion.

6. Latterly, Mr Faiman determined on establishing a business in the United Kingdom focussing on the same business areas as Ocado. For this purpose he established a company called Project Today Holdings Limited ("Project Today"). Mr McKeeve provided advice to Project Today and Mr Faiman for this purpose, in his capacity as a corporate transactional solicitor. An amount of legal work over the years, it seems, has been conducted by Mr McKeeve for Mr Faiman and companies connected with him. At all relevant times Mr McKeeve was a partner in the firm of Jones Day, based in their offices in the City of London. Mr McKeeve has stated in evidence that he has known Mr Faiman for over a decade and considers him a friend.

7. Ocado has in recent times entered into a commercial partnership with, among others, Marks and Spencer. There is evidence that during the course of 2018 Mr Faiman, through his business styled Today Development Partners, had himself made an approach to Marks and Spencer with a view to creating an online food business for them. There were a number of meetings for that purpose. It is said in the evidence that Mr Faiman had insisted that such meetings should take place on a secret basis. Mr McKeeve attended at least some of those meetings.

8. At one of those meetings, held on 2 July 2018, Mr Faiman attended, according to the filed evidence, accompanied by someone introduced to the representatives of Marks and Spencer as "Jon" (before the meeting, it had been said that Mr Faiman would in fact be attending with someone called "Mark"). It has since been identified that "Jon" was Mr Jonathan Hillary. Mr Hillary was at that time Group Transformation Director for Ocado. He had been with the Ocado Group for many years, in various senior roles.

9. According to affidavits filed on behalf of Ocado by senior employees of Marks and Spencer, Mr Faiman had in discussions with them at these meetings indicated that he had been in contact with a number of senior Ocado employees with a view to their joining Today Development Partners (the business name of Project Today). He also had, according to them, indicated that his business plan involved creating an online food platform based closely on methods and technology similar to those used by Ocado but involving an extension of them. "Jon" was introduced at the meeting in July 2018 by Mr Faiman as someone very senior at Ocado who Mr Faiman said he was intending to bring to Project Today. "Mark" had also been presented as such a person at Ocado who it was intended to bring to Project Today.

10. At another meeting, held on 12 September 2018, one of those attending on behalf of Marks and Spencer was Mr James Waddilove, a consultant. Mr Waddilove in fact had previously been an employee at Ocado. Because of this, the presence of Mr Waddilove, as has been said, caused Mr Faiman to become agitated. According to Mr Waddilove's notes of that meeting Mr McKeeve was also present. According to those notes (the accuracy of which remains to be tested) Mr Faiman had spoken on his own to Mr Waddilove saying, among other things, that he had Ocado's June 2018 management data. Mr McKeeve at one stage also spoke to Mr Waddilove on his own, discussing how Mr Waddilove could become an employee of Project Today and talking of reducing Mr Waddilove's exposure to anticipated litigation by the provision of an indemnity and so on. At all events Mr Waddilove as a result of all this felt uncomfortable in involving himself any further in the discussions (and he thereafter did not do so). Also at that meeting, according to an affidavit of a very senior representative of Marks and Spencer who had attended, Mr Faiman had stated to her that he had confidential information of Ocado and offered to produce it to her (which she declined). It had also, as is said in the evidence, been stated at that meeting by Mr Faiman that he himself expected Ocado to litigate.

11. In the event, the discussions with Marks and Spencer did not result in any business deal with Project Today. Instead, they formed a commercial relationship with Ocado. As for Mr Hillary, he continued to be in the employ of Ocado until, on 15 May 2019, he gave notice of his resignation. He stated at the time that he was going to join Project Today. The following day, it was announced that Project Today had entered into an agreement with Waitrose, the supermarket group. Shortly after that, it was reported in the press that Mr Hillary was joining Project Today as Chief Operating

Officer. However, the contractual period of notice under Mr Hillary's contract with Ocado was six months, during which period he was prohibited from working for any other person. He had in fact been placed on gardening leave until he was dismissed by Ocado on 2 August 2019.

12. Matters had come to the attention of Ocado. They took the view that confidential information belonging to Ocado had been misappropriated. They also took the view that the course of events was such as to give rise to a real risk that relevant evidence would be destroyed unless forestalled under or prohibited by court order.

The Search Order

13. On 3 July 2019 Ocado applied, ex parte, for a Search of Premises and Preservation of Evidence Order. The application was accompanied by a considerable quantity of affidavit evidence.

14. In addition, Ocado issued a Claim Form seeking, among other things, injunctions restraining the use of confidential information relating to the business of Ocado and restraining the inducement of any breach of contract by any employee of Ocado. Damages and equitable compensation were also claimed. The three named defendants were Mr Faiman, Project Today and Mr Hillary.

15. Fancourt J granted the Search of Premises and Preservation of Evidence Order ("the Search Order") sought. The Search Order was directed at each of Mr Faiman, Project Today and Mr Hillary.

16. Among other things, the Search Order permitted the identified persons to enter the identified premises. It also permitted them to access any electronic data storage devices (framed in wide terms) at or accessible from the identified premises and to search for and copy all documents listed in Schedule C to the Order. The Order gave each respondent a period of grace of 2 hours for delaying the search pending obtaining legal advice, on terms, among others, that the respondents and Controller of Access (as defined) should "not disturb or remove any of the Listed Items". Further, amongst the other very detailed provisions it was ordered that the respondents and any Controller of Access should hand over for copying or imaging all electronic storage devices (as defined) at or accessible from the premises in question.

17. A detailed definition of "Listed Items" was contained in Schedule C. That in the relevant respects provided as follows:

"**Schedule C**

THE LISTED ITEMS

1. Any document, in hard or soft copy, (i) created by or on behalf of either of the Intended Claimants and (ii) containing Confidential Information, including:

    a. Any reproductions of the 'dashboard' summary of the performance of the Ocado business;

    b. Any reproductions of the Ocado businesses' weekly or monthly key performance indication (KPI) summaries;

c. Any reproductions of documents relating to the projects entitled Ocado "Zoom" or Ocado "Orbit";

d. Any of the underlying information or data used to produce any document in category (1) a, b or c above;

2. Any document, in hard or soft copy, incorporating or reproducing information from a document in category (1);

3. Any document, in hard or soft copy, incorporating or reproducing information about the Ocado business (i) which was obtained directly from a person who was at the time an employee of an Ocado company and (ii) which was not also publicly available at the time of its receipt by the Respondent;

4. Any document evidencing:

   a. the provision to the Respondents, or obtaining by the Respondents, of any document in category (1);

   b. the creation of any document in categories (2) and (3);

   c. any use made by the Respondents, whether directly or indirectly, of any documents in categories (1), (2) or (3), including (without limitation) any transmission or disclosure of any such document or the contents thereof to third parties; and

   d. any work carried out directly or indirectly by any current employee of an Ocado company for or on behalf of the First or Second Respondents or the "*Today Development Partners*" business.

5. In respect of the First and Second Respondents only, any property belonging to the Applicants and which was provided to the First and Second Respondents by the Third Respondent.

For the purposes of this order:

"Confidential Information" shall constitute:

a) Information in whatever form (including, without limitation in written, oral, visual or electronic form or on any magnetic or optical disk or memory and wherever located) relating to the business, clients, customers, products, affairs and finances of the Applicants or any Group Company for the time being confidential to the Applicants or any Group Company and trade secrets including, without limitation, technical data and know-how relating to the business of the Applicants or of any Group Company or any of its or their supplies, clients, customers, agents, distributors, shareholders or management, that the Third Respondent created, developed, received or obtained in connection with his employment with the Second Applicant, whether or not such information (if in anything other than oral form) is marked confidential; and

b) Any information described at a) above that was, at the time of its provision or disclosure to the Respondent, confidential to the Applicants or any Group Company."

The execution of the Search Order on 4 July 2019

18. The Search Order was executed on the morning of 4 July 2019 (it was in fact also extended later that day to further identified premises). So far as Mr Faiman was concerned, it was executed at the Connaught Hotel in Central London. He apparently retained a suite of rooms there for his personal use when visiting London. Those attending that morning included solicitors from Mishcon de Reya, Ocado's solicitors, and IT consultants. Also present, of course, was an independent Supervising Solicitor.

19. Mr Faiman was served with the Search Order at around 8.20am. It seems that he in fact was on his way that morning to meet Mr McKeeve and representatives of Waitrose at the offices of Jones Day. The evidence indicates that Mr Faiman was entirely cooperative. The proposal was made that the car due to take Mr Faiman to the offices of Jones Day should instead be utilised to collect Mr McKeeve and bring him to the Connaught Hotel so that Mr Faiman could (as permitted under the Search Order) receive legal advice.

20. As set out in the report of the Supervising Solicitor, Mr de Jongh, he sought at around 8.25am to explain to Mr Faiman the gist of the Search Order. At around 8.30am Mr Faiman said that he wished to speak to Mr McKeeve of Jones Day. Mr de Jongh used Mr Faiman's phone briefly (for around a minute and a half) to speak to Mr McKeeve. As recorded in a subsequent email, Mr de Jongh does not claim to have discussed with Mr McKeeve the terms of the Search Order (which Mr McKeeve said he wanted to see) or draw his attention to, for example, paragraph 33 of the Search Order. That had provided:

> "Until 4.30 p.m. on the Return Date, the Respondents and any Controller of Access must not destroy, tamper with or part with possession, power, custody or control of any Listed Items otherwise than in accordance with the terms of this order provided that, after the making of the electronic copies as set out in paragraph 21 above, the Respondent is permitted to make use of any Electronic Data Storage Devices in the ordinary course of business or personal use."

Then at around 8.38am Mr Faiman spoke to Mr McKeeve on the phone, subsequently also making calls to Herbert Smith Freehills, the solicitors.

21. At 8.45 am there was a missed phone call to Mr Faiman from Mr McKeeve. When he returned the call, there was a discussion between the two for some minutes. Thereafter, Mr de Jongh himself also spoke on the phone to Mr Sion Richards, a senior litigation partner at Jones Day (to whom Mr McKeeve had also previously spoken by phone). At 8.59am Mr de Jongh emailed Mr McKeeve, copying in Mishcon de Reya so that Mr McKeeve could electronically obtain a copy of the Search Order and related documents directly from them. Thereafter, the search group was shown into Mr Faiman's suite at the Connaught Hotel.

22. At 9.25am Mr Faiman was provided with the service bundles. A legal team from Jones Day (including Mr McKeeve and Mr Richards) arrived at around 9.45am. Thereafter, they were closeted with Mr Faiman for some time. In the meantime, a search of the car intended to convey Mr Faiman had been made; and a search of his suite eventually started in the afternoon. In addition, Mr Faiman had provided passwords and passcodes for his various devices, which were imaged. The searching group eventually left at around 11.30pm. Mr de Jongh himself thereafter left in the early hours. It appears that Mr McKeeve had been present for much, if not all, of this time.

23. Further inter partes hearings have taken place since the initial execution of the Search Order. They are not relevant for present purposes.

The actions of Mr McKeeve

24. What has since emerged as also happening on the morning of 4 July 2019 was this, according to the current evidence.

25. As I have recounted, the Supervising Solicitor and Mr Faiman both spoke to Mr McKeeve shortly after 8.30am. As is accepted, Mr McKeeve then himself, very shortly after that, contacted the "infrastructure architect", Mr Henery, who was responsible for IT matters at Project Today. Mr McKeeve did so using a specialist private messaging system called 3CX. The message so sent by Mr McKeeve, according to his recollection, read "Burn it." According to Mr Henery's recollection, it read "Burn all".

26. At all events, shortly after that, Mr McKeeve also made a call on his phone to Mr Henery, who at the time was travelling by bus to Project Today's offices in Hammersmith. Mr McKeeve says that his purpose in so calling was to ensure that Mr Henery understood that he was to get rid of the 3CX app. It is not suggested that Mr Henery himself was ever made aware of the Search Order at this time.

27. In his affidavit of 17 July 2019, Mr Henery has stated that in May 2019 he had been trialling various voice-over internet systems for Project Today. They permit calls and also provide messaging services but they do not, it is said, have the capacity to transfer documents or images. One such system so trialled was the 3CX system.

28. On 17 (or 7) – the current evidence is not altogether clear – May 2019 he created on the 3CX system individual accounts for Mr Faiman, Mr Hillary, a Mr Gawdat (a senior employee of Project Today), Mr McKeeve and Mr Henery himself. The system permitted both group "chats" and individual "chats". The current evidence is, however, that the 3CX system was, when used, considered "clunky" and with poor practical functionality.

29. In addition, on 21 May 2019 Mr Henery had established a Todayuk.com email account for Mr Hillary. The initial username was "Jon". That was then changed to "Belinda" on 7 June 2019 (the reason for such change is not given in the current evidence, but one inference would be that it was to distance Mr Hillary from being identified with the account) and then again, on 26 June 2019, to "Josephine". As to that account, Mr Henery says this in paragraph 14 of his affidavit:

> "On or around 1 July 2019, following reservations expressed by Mr McKeeve about the communications between TDP and Mr Hillary, I disabled that account by "suspending" it. "Suspend" is a Gmail term of art, which means the account was placed in suspension by Gmail and would remain suspended until reactivated (see page 1)."

30. It appears from the evidence of Mr McKeeve in his own affidavit of 17 July 2019 that the like pseudonyms had been used for the 3CX account. He says this at paragraph 5 of his affidavit:

> "I became aware that Mr Henery had arranged for Mr Hillary's todayuk.com account and his 3CX account to use pseudonyms because I received perhaps ten emails in total from Mr Hillary from a Todayuk.com email with the username "Belinda de Lucy", my wife's name, and a few 3CX messages from his account which had the same username. This became a source of some annoyance to me, for a number of reasons. First, on an entirely personal level, I became concerned and generally unhappy about the use of my wife's name as a pseudonym for Mr Hillary, in particular as she was at the time becoming a more public figure (as to which see paragraph 6 below). Second, I was concerned generally about TDP establishing any communication links with Mr Hillary since he was on garden leave, and I thought it was inappropriate, and potentially harmful, to do so, with little upside. I also thought that adopting pseudonyms lacked judgment, in particular gave an entirely unhelpful appearance of covertness."

He also says in that affidavit that the 3CX system was little used by him and such messages as were sent were innocuous. He says that "I do not believe any of the messages that were deleted were of material relevance to the current dispute."

31. Following receipt on 4 July 2019 of the "Burn it" (or "Burn all") message, and following the subsequent brief telephone conversation, Mr Henery, on arrival at Project Today's offices between 9.00 and 9.30am, "terminated" the 3CX account. This had the consequence that the messages on it were irretrievably lost. In addition, however, Mr Henery, as he explains, "disabled" three particular accounts, called in these proceedings the "Slushminer accounts". These, as Mr Henery says, had been set up by him on 3 July 2019 at Mr Hillary's request made at Project Today's offices (at a meeting said to be in the presence of Mr Faiman and Mr McKeeve) as he, Mr Hillary, wished to be able to have direct email access to two individual consultants being used by Project Today. Here too pseudonyms were used for those accounts.

32. It may be noted that at this time Mr Hillary was still subject to his contract of employment with Ocado. Further, in his affidavit dated 17 July 2019, made as required under the Search Order, Mr Hillary has among other things stated that previously, in March 2019 (again, of course, while Mr Hillary was still employed by Ocado), Mr Faiman, accompanied by Mr McKeeve, had attended Mr Hillary's home in Ascot. During that meeting, Mr Hillary, according to his affidavit, provided them with an Ocado CFC Division of Responsibility document, a Technology Division of

Responsibility document and the rest of the body of, and schedules to, the Ocado "Smart Platform" contract. These were provided, at the request of Mr Faiman, as a sample contractual structure, according to Mr Hillary. In addition, he provided them with Ocado operational metrics documents for the years 2017 and 2019. He may also, as he says in his affidavit, have provided them with slides and other documents relating to the Ocado Smart Platform.

33. As to the contents of the (irretrievably) deleted messages on the 3CX system, Mr Henery says that there were very few messages sent within the group and, similarly very few sent or received by him by way of individual "chats". In his own affidavit of 17 July 2019 Mr Faiman says this about 3CX:

> "41. I did not use 3CX very much at all, as I found it cumbersome and unreliable. As a result, sometime in late June or early July 2019 (but in any event prior to being served with the Search Order) I deleted the 3CX app from my phone. At the time of providing answers to the Applicants' solicitors' questions on the evening of the search I did not think that my 3CX account would constitute a Device as I had deleted the app from my phone a few days beforehand."
>
> 42. I do not recall much of the content of the messages sent via 3CX, but, to the best of my recollection, I never sent a group message on the system, and only communicated very infrequently with Mr Hillary on the service. To the best of my recollection, the few messages that I did exchange with Mr Hillary would have been short, and mostly were, I think, requests that Mr Hillary call me back."

34. Mr Hillary shortly says this in paragraph 23.9 of his affidavit with regard to the 3CX account:

> "I have a 3CX account in the name of "Belinda de Lucy", which is accessible from my iPhone and silver MacBook. This account contained documents containing information which was confidential to the First and Second Respondents or the "*Today Development Partners*" business but which may also have been documents falling within Schedule C to the Order. While I retain access to the account, I can see that all communications have been wiped remotely. I confirm that I was not involved in clearing the data."

35. It was, at all events, this instruction by Mr McKeeve to Mr Henery to "Burn" the 3CX account (if not others also) which was the basis for the subsequent application by Ocado to commit Mr McKeeve for interfering with the due administration of justice. In this respect, I might add, Mr McKeeve at no stage during the course of the day, 4 July 2019, when the Search Order was being executed, had told anyone of the "Burn" instruction which he had given to Mr Henery that morning. At no stage did he ring Mr Henery during that day in order to cancel his instruction. In fact, the truth only emerged when some days later Mr Henery himself informed an assistant solicitor at Jones Day. Thereafter Mr McKeeve has since apologised and has referred himself to

the Solicitors' Regulation Authority. I will summarise below his explanation for his instruction to Mr Henery.

The committal application

36. As required by the Rules, the application was made by way of Part 8 Claim Form. It was issued on 25 September 2019. It was accompanied by a detailed affidavit of Mr James Libson, a partner in Mishcon de Reya. In the course of his affidavit, Mr Libson among other things noted Mr McKeeve's involvement at various meetings with Marks and Spencer, including the one at which Mr Hillary had attended. He also noted certain Ocado documents found at Mr McKeeve's office, including a copy of a confidential contract between Ocado and Marks and Spencer. (As I have said above, Mr Hillary had stated that Mr McKeeve with Mr Faiman attended his home in Ascot in March 2019 and they were then provided by him with a number of Ocado business documents.) Mr Libson alleges that Mr McKeeve apparently was "himself heavily involved in the use (and misuse) of Ocado's confidential information"; and alleges that he is to be regarded as a co-conspirator.

37. The Part 8 Claim Form briefly set out the background of the Search Order and the instruction given by Mr McKeeve to Mr Henery on 4 July 2019. It refers to the claim issued by Ocado against Mr Faiman, Project Today and Mr Hillary (defined in the Claim Form as the "Underlying Claim"). Permission was sought to pursue a committal application against Mr McKeeve and also to rely on documents disclosed in the Underlying Claim, pursuant to CPR Part 31.22 (1) (b). The latter application was in due course granted by the judge.

38. The Particulars of Contempt set out in the Claim Form read as follows:

> "In the circumstances summarised above and set out in the Affidavit of James Lewis Libson, the Defendant intentionally interfered with the due administration of justice by:
>
> 1. Intentionally causing the destruction of documentary material which is of relevance to the claim by the Claimants against Mr Faiman, Today and Mr Hillary.
>
> 2. Intentionally causing the destruction of documentary material which is of relevance to a potential claim by the Claimants against the Defendant.
>
> 3. Intentionally causing the destruction of documents which constituted a "Listed Item" within Schedule C of the Search Order.
>
> 4. Intentionally causing the destruction of information which constituted "confidential information" within Schedule C of the Search Order."

(Although paragraph 1 refers to "the claim" it seems to me evident that it was designed to refer to the "Underlying Claim" as previously defined in the Claim Form.)

The proceedings before and decision of the judge

39. Ocado was represented before the judge (as before us) by Mr David Cavender QC and Mr Alexander Brown. Mr McKeeve was represented before the judge (as before us) by Mr Robert Weekes. The defendants in the underlying proceedings were not party to the application and were not represented. The initial hearing took place on 18 December 2019.

39. The judge had before him a considerable quantity of evidence. This included the affidavit of Mr McKeeve dated 17 July 2019, to which I have previously referred. In the course of that affidavit Mr McKeeve had given this explanation for sending the "Burn it" (or "Burn all") instruction to Mr Henery:

> "10. I had no idea what the Search Order related to or what in practice it meant. However, I was immediately concerned about the fact that there were people from outside the TDP business who might be able to get access to an app which had my wife's name in it. Given the sensitivity of her new role, and particularly since it now looked like there might be a high profile investigation or dispute regarding TDP, I was concerned to contain the exposure of Belinda's name. Immediately after my call with Mr de Jongh or my subsequent brief call with Mr Faiman but before I spoke to Mr Richards at 8:40am (so, I believe, some time between 8:35 am and 8:40am), I therefore sent a short message using the 3CX app to Mr Henery which read, I think, "*burn it*"."
>
> 11. What I meant by that message was that Mr Henery should get rid of the 3CX app. In case Mr Henery did not understand my (very short) message, I also called him to tell him to delete the 3CX application. I recall that he was on a bus at the time on the way to work. I did not say anything about the Search Order to him, and it truly did not occur to me at the time that what (sic) I was asking him to do anything that might represent a breach of the terms of the order. I have never been involved in a Search Order before, and had no appreciation at all in relation to its effect. It also did not occur to me that it was otherwise inappropriate to delete the 3CX account given the limited and (as far as I was concerned) inconsequential nature of the communications on it.
>
> 12. I appreciate that may sound somewhat naïve but I have been a deal lawyer for 25 years and did not even do a litigation seat as part of my training contract with Dickson Minto in Edinburgh and London. I can only emphasise that I was not driven in any way by a desire to destroy evidence, and did not consider that I was doing so. My gut reaction was to try to protect Belinda and my sole concern was to avoid having my wife

> dragged into a potentially embarrassing, high profile investigation, where her name had been used without her consent and without her knowledge. I was concerned about the reputational harm it could cause her. I panicked, and in the heat of the moment committed a serious lapse of judgment, in order to do what I could to protect her...."

40. In addition, Mr McKeeve has since made a further witness statement, dated 18 November 2019, in response to the committal application. He there gave further details of what he said were the innocuous kinds of messages being sent on the 3CX app and stated that he had no awareness that any such messages could have fallen within the Search Order. As to the events of 4 July 2019 he says that he had been told that morning (he could not recall by whom) that mobile phones and other devices were being taken and that "triggered my concern about protecting my wife's name." His instruction to Mr Henery "was a knee-jerk reaction on my part which was borne solely out of my desire to protect my wife's name."

41. After receiving the detailed submissions of counsel the judge reserved judgment.

42. Towards the end of February 2020 the judge sent out to counsel a draft of his proposed judgment, comprising 31 paragraphs, with a view to his handing it down on 6 March 2020.

43. In that draft judgment, the judge briefly summarised the background and events of the morning of 4 July 2019. He summarised the principal terms of the Search Order; set out the relevant terms of the committal application; dealt with the ancillary application under CPR Pt 31.22 (1) (b); and summarised the legal elements of criminal contempt. In this regard, after referring to various authorities, the judge directed himself that, at this permission stage, he should apply a standard of "at least a prima facie case". He further directed himself that he must also be satisfied that it was in the public interest that an application to commit should be made. It had been argued before the judge on behalf of Mr McKeeve that neither point could be fulfilled by Ocado.

44. In dealing with the requisite actus reus and mens rea, the judge among other things said (setting out the four particulars of contempt alleged) that:

> "The problem faced by Ocado is that each of the particulars of contempt alleged makes very specific averments regarding the content of the material deleted or caused to be deleted by Mr Henery at the instance of Mr McKeeve."

45. The judge then went on, dealing with the alleged actus reus, to say that "it is extremely difficult to see how Ocado could make good this very specific averment"; that (given that the 3CX messages could not be reinstated) "it is impossible to point to any communications showing that documents of the nature alleged to have been destroyed were in fact destroyed"; and that "Mr Libson is driven to rely on inference". He went on at a later stage, referring to Mr McKeeve's affidavit, to say: "The problem is that Mr McKeeve alleges that the messages on the 3CX app were innocuous"; and

the judge then referred to the explanations given by Mr McKeeve in his affidavit for ordering destruction. The judge concluded in this way on actus reus:

> "26. In these circumstances, it is difficult to see how – beyond a hope that Mr McKeeve's evidence will be disbelieved in the witness box – Ocado can improve their case against Mr McKeeve. The problem is that Ocado has assumed the burden of showing that specific types of document were destroyed, when evidence regarding these documents is going to be hard to adduce, and when the inference that such documents did in fact exist is both fragile and disputed. It may be that the evidence in the Underlying Proceedings will improve the case, but I do not consider that I can factor so speculative a point into my consideration, and I do not do so."

46. Having so concluded on actus reus, the judge then said this on mens rea:

"27. These weaknesses feed into the *mens rea* allegations. Clearly, Ocado must make good not merely that Mr McKeeve's actions in fact resulted in the destruction of the types of document alleged in the particulars of contempt, but also that Mr McKeeve intended to thwart the operation of the Search Order in this way. For the reasons already articulated, this case is both fragile and disputed:

> (1) In the first place, as I have described, Mr McKeeve denies that it was his intention to cause the destruction of documents of the type alleged in the particulars of contempt. Rather, he claims an altogether different intention – keeping his wife's name out of damaging publicity.
>
> (2) In the second place, the plausibility of Mr McKeeve's case in this regard depends on showing that documents of the type alleged to have been destroyed were in fact destroyed. Clearly, if Mr McKeeve could be shown to be wrong about the nature of the material that was destroyed, that would at least serve to undermine his explanation as to his intention when speaking to Mr Henery. But, as I have described, it is unlikely that there will be further evidence in this regard."

47. The judge thus concluded that the particulars of contempt did not disclose a sufficient prima facie case and for that reason alone the application for permission should be refused.

48. Having so concluded, he went on to add this at paragraph 29 of his judgment with regard to the public interest:

> "29. I do not consider that it would be appropriate to consider this requirement further. It is obvious that the public interest is coloured by the requirement that there be a *prima facie* case. Had I been persuaded that there was a *prima facie* case, then it is likely that I would have considered that ensuring that the

> search order regime is upheld and respected would have rendered this application in the public interest. However, I do not consider that it is either appropriate or necessary to consider in any detail the points made in relation to the public interest requirement where I have found the requirement of a *prima facie* case not to be satisfied"

He also indicated that adjournment of the application or potential amendment of the grounds of contempt had not been appropriate options.

49. Ordinarily, a draft judgment is sent to counsel for typographical and editorial corrections only. However, that was not the response on behalf of Ocado. On 5 March 2020, Ocado's counsel wrote to the judge stating, among other things, that the judgment had failed to deal with a material part of Ocado's case, in that (so it was said) it had not dealt with the first ground of contempt as particularised in the Claim Form but had been confined to the third and fourth grounds of contempt particularised and by reference to the 3CX system, and in that it had also not dealt with the email accounts.

50. There was communication between judge and the parties. Further written submissions were directed and filed. There was then a further hearing on 2 June 2020.

51. On 11 June 2020 the judge handed down his first judgment and at the same time handed down a supplemental judgment. Both such judgments therefore constitute his decision. In the supplemental judgment (which comprised 69 paragraphs) the judge among other things referred to the principles relating to the requisite specificity of particulars of contempt and principles relating to amendment.

52. Having done so, and having referred to the submissions, the judge stated at paragraphs 42 and 43:

> "42. Although it is not immediately evident on the face of the grounds of contempt, the problem faced by Ocado in articulating those grounds was that the 3CX app and the messages that were sent via that app have been irretrievably deleted. We do not know what those materials said; and we will never know. As a result, it is not possible to use the nature of the material deleted by Mr Henery at Mr McKeeve's behest to inform the grounds of contempt against Mr McKeeve. Quite literally nothing can be said about the nature of this material.
>
> 43. This difficulty seemed to me not to be addressed by the grounds of contempt as framed by Ocado and was, essentially, the reason why the application failed. As I say in paragraph 24 of the draft judgment, "[t]he problem faced by Ocado is that each of the particulars of contempt alleged makes very specific averments regarding the content of the material deleted or caused to be deleted by Mr Henery at the instance of Mr McKeeve". I go on, in paragraph 25 of the draft judgment, to explain why it is "extremely difficult to see how Ocado could make good" the averment that material of a specific sort was destroyed."

53. The judge went on, in essence, to maintain his first judgment. For example, he said this at paragraph 45 (3):

> "(3) There are, thus, two problems with grounds 3 and 4. In the first place, the material that Mr McKeeve caused to be destroyed (the 3CX app) cannot be shown to be within Schedule C, because that material has irretrievably been lost, and Mr McKeeve asserts that the material was not within the class of "Listed Items". Secondly, even if the 3CX material did fall within the class of "Listed Items", it cannot be shown that Mr McKeeve intended destruction of such material, because he was in ignorance of the terms of the Search Order itself, including in particular Schedule C."

54. As to the first particularised contempt, the judge in effect indicated, whilst stating that he did not seek to construe it, that it was unsatisfactorily broad. He also said that what had to be shown was the intentional destruction of documentary material which was of relevance to the claim. He further went on to say that Ocado had not particularised in the Claim Form knowledge by Mr McKeeve of the terms of the Search Order or of the underlying proceedings.

55. Overall, the judge held that the first judgment had dealt in substance with the points raised before him at the first hearing. He declined to permit any amendment, essentially because, although possible amendment on the part of Ocado had previously been discussed, no formal amendment had ever been placed before him: and it was far too late for Ocado to seek to do so now.

56. Thus it was that the permission application was dismissed. Ocado was ordered to pay Mr McKeeve's costs.

Grounds of Appeal and Respondent's Notice

57. Ocado was and is very aggrieved by that decision. It raises seven grounds of appeal. These can be summarised as follows.

(1) The judge erred in failing to consider whether the committal application was in the public interest.

(2) The judge erred in failing to apply correctly to Ocado's allegations the prima facie case test for permission.

(3) The judge erred in failing to conclude that the 3CX app was a document and that its deliberate deletion gave rise to a contempt.

(4) The judge erred in holding, in relation to the 3CX app, that nothing could be said about the material on it; and that Ocado was in no position to controvert Mr McKeeve's evidence as to its contents.

(5) The judge erred in his approach to the requirements of specificity and particularisation within the claim form.

(6) The judge erred in his approach to amendment.

(7) The judge erred, and acted in a procedurally unjust way, in dismissing the permission application at this stage.

58. Mr McKeeve seeks to uphold the judge's decision and reasoning. In addition, however, further reasons for upholding the decision are advanced in a Respondent's Notice. These can be summarised as follows:

(1) Ocado has not shown that it is a fit and proper person to bring committal proceedings (which are public interest proceedings).

(2) No strong prima facie case (the criminal standard applying) was shown.

(3) The alleged conduct of Mr McKeeve did not give rise to a case that it had a significant and adverse effect on the administration of justice.

(4) The public interest did not require committal proceedings to be brought.

(5) Alternatively, even if the judge's decision was to be set aside, the permission application should be adjourned to the trial judge for decision after determination of the underlying proceedings; or (even if permission were now granted) the substantive committal application should be directed to be heard after determination of the Underlying Proceedings.

59. The respective arguments were advanced very fully and carefully. I have sought to bear in mind all points made: although I do not propose to deal specifically with every individual point so raised.

Discussion and disposal

60. Mr Weekes submitted (citing ample authority in support of his proposition) that an appellate court should be very cautious in interfering with an evaluative judgment of a judge deciding whether or not to grant permission on an application in a contempt case. I accept that. As it seems to me, the appellate court will ordinarily not be justified in interfering unless there has been some error of law or principle, or some failure to take into account a material matter or taking into account an immaterial matter, or unless the conclusion is outside the range of decisions reasonably open to a judge (in other words, is plainly wrong).

61. In the present case, I am in no doubt at all, with all respect to the judge, that he reached a conclusion which was plainly wrong. Indeed such a conclusion would seem to set at a premium, where litigation is under way, the deliberate and irretrievable destruction of documents so that it is then asserted that no one can say for sure what they contained. No court can or should readily countenance that.

62. My essential reasons for so concluding are these.

63. I was not much impressed by Ocado's first ground of appeal, taken on its own. True it is that it has been said that:

> "The critical question, on this and every case, is whether or not it is in the public interest that an application to commit should be made."

See *Makdessi v Cavendish Square Holdings Br* [2013] EWCA Civ 1540 at paragraph 79, per Christopher Clarke LJ. Similar remarks were made in *KJM (Superbikes) Ltd v Hinton* [2008] EWCA Civ 1280, [2009] 1 WLR 2406 at paragraph 20 of the judgment of Moore-Bick LJ. In one sense, of course, that is indeed right: the public interest does underpin committal cases. But the invariable practice in such cases is for the court first to consider whether a sufficient prima facie case has been made out. In fact, in *Makdessi* itself, Christopher Clarke LJ had preceded his statement set out above by saying, at paragraph 77:

> "It is axiomatic that, upon an application for permission, the judge is required to find whether or not there is a strong prima facie case, not whether that case is established. It may not, however, be an altogether easy task to express a conclusion that there is a strong case without appearing to indicate that the case is established…."

64. This is a principled approach. In fact, I find it difficult to conceive how it can ever be in the public interest to grant permission on a committal application in private litigation where a sufficient prima facie case has not been shown. Certainly the fact that the background may have involved the making of a Search of Premises and Preservation of Evidence Order, as in this case, cannot of itself cause it to be in the public interest for a committal application to be pursued, irrespective of the underlying prima facie merits (or lack of them). At all events, the judge's methodology in his judgment in this respect was, in my opinion, entirely proper. Having concluded that (in his view) no sufficient prima facie case had been made out he was justified in saying that public interest did not need further consideration. Nor, contrary to Mr Cavender's submission, had the judge ignored the public interest aspect. To the contrary, the judge expressly indicated his view that had he found the prima facie case requirement to be satisfied then he probably would have considered the application to be in the public interest. I can see nothing wrong in that approach.

65. Mr Cavender's second ground included, as one aspect, the proposition that the judge had been wrong to direct himself that "at least a prima facie case" must be made out by Ocado. He submitted that that overstated the requirement. All that was required, he said, was a prima facie case. He went on to say that the judge in any event failed correctly to apply the appropriate prima facie test to Ocado's allegations: and furthermore had continued to focus on the third and fourth particularised contempts, to the virtual exclusion of the first. To an extent, this second ground of appeal also runs into Grounds 3 and 4 of the appeal.

66. In so far as Mr Cavender submitted that there was no requirement for a "strong prima facie case" in this context, the weight of authority is against him. *Makdessi* (cited above) is one such authority. There are many others: see, for example, *Berry Piling Systems Ltd v Sheer Projects Ltd* [2013] EWHC 347 (TCC); *Tinkler v Elliott* [2014] EWCA Civ 564 at paragraph 44, per Gloster LJ.

67. It is true that *Makdessi*, as are a number of those other cases, was concerned with an alleged dishonest statement of truth. In the Divisional Court case of *Solicitor-General v Holmes* [2019] EWHC 1483 (Admin) the alleged contempt was contempt in the face of the court. The court there considered what the applicable test was in such a context. It indicated that a "strong prima facie case" test may set the bar too high in that

context: see paragraphs 41 to 48 of the judgment of Coulson LJ, giving the judgment of the court. But the court did not feel it necessary to decide the point, being content to say that "the applicant must demonstrate at least a prima facie case of contempt in the face of the court". In fact, the Divisional Court in that case held that there was, on the evidence, a strong prima facie case anyway.

68. Whilst I can see that the courts will be particularly wary, in committal applications at the permission stage, where the context is an alleged deliberate false statement of truth (an allegation all too easily and frequently made in hotly fought litigation) I would be reluctant to say that the actual legal test for the threshold varies depending on the nature of the committal application. Ordinarily, therefore, in my opinion, the test to be taken is as that of a strong prima facie case. I would however acknowledge at least one potential exception to that: and that is where a permission application is made by a Law Officer or other relevant public body: see *Attorney-General v Yaxley-Lannon* [2019] EWHC 1791 (QB).

69. It seems to me that the overall general approach should, where claimants are not Law Officers or other relevant public bodies, be to require that a prima facie case of sufficient strength is being presented such that, provided the public interest so requires, permission can properly be given. That approach would thus enable the filtering out of cases which can, even on a prima facie basis, be assessed as weak or tenuous, even if just about sufficient to limp through a strike out application. Moreover, whilst the court must avoid delving too deeply into the merits at this stage, the phrase "strong prima facie case" seems to me to present the judge concerned with an evaluative range and a degree of flexibility, depending on the evidence and circumstances of the particular case, whilst at the same time requiring the case to be sufficiently strong so as to merit its going forward.

70. Overall, therefore, I see no misdirection adverse to Ocado on the part of the judge as to the requisite test. The critical question, as I see it, thus is whether he properly applied it to the evidence and circumstances of this case.

71. I do not think that he did. In my view, his approach was, with respect, much too narrow and placed both an unreasonable requirement on what Ocado needed (at this stage) to show and too restrictive an interpretation on the Search Order and the Particulars of Contempt. In my discussion of this issue, I propose to take the balance of Ground 2 and Grounds 3 and 4 of the appeal compendiously.

72. The judge's approach was essentially geared to the terms of grounds 3 and 4 of the Particulars of Contempt as set out in the claim form (Ocado did not ultimately pursue the second particularised contempt). In that context, he placed much emphasis on the apparent fact that at the time he gave the "Burn" instruction Mr McKeeve neither had seen a copy of the Search Order nor had been told of its precise terms or of the contents of Schedule C.

73. But whilst Mr McKeeve's knowledge of the fact that the Search Order had been made was the trigger for his conduct, and whilst Ocado placed due emphasis on that at the hearing below, as I read the first particularised contempt set out in the Claim Form it clearly is not confined to the Search Order itself. Indeed if it was it is difficult to conceive what purpose there was in including that first ground of contempt in the first place. It is, moreover, not the case that Ocado at the first hearing had entirely

subordinated that ground of contempt to the third and fourth grounds of contempt: as the transcript shows.

74. The point advanced by Ocado was that, by being told of the Search Order, Mr McKeeve knew that Ocado had started proceedings against his clients. Because of his prior involvement in the negotiations with Marks and Spencer and in the contacts with Mr Hillary, he would have known in broad terms what the claim was about. Irrespective of his knowledge, or lack of knowledge, of the precise terms of the Search Order, he would have known as a solicitor (the fact that he was not a litigation solicitor matters not for present purposes) that he should not deliberately destroy documents of potential relevance to the proceedings. But that is, on the face of it, precisely what he caused to be done.

75. It is said by him in his affidavit and witness statement that he only did so because he was concerned about reputational damage to his wife. That may or may not be the case. Ocado, at all events, does not accept that explanation. Besides, there surely was a clear potential awkwardness, to put it at its very lowest, for Mr McKeeve personally: in that he had allowed himself, as a solicitor, to be made party to a covert communication system which, by design, included as a member a very senior employee of his clients' principal competitor (a matter on which, as his own evidence shows and as the evidence of Mr Henery also shows, Mr McKeeve at the time was sensitive and had "reservations"). In any event, his explanation, even if it were to be accepted, does not of itself by any means necessarily give a complete answer. As Mr Cavender pointed out, that assertion goes to motive. The fact remains that Mr McKeeve intentionally caused to be destroyed documentary materials which were of potential relevance to the claim and would be liable to examination by Ocado. Indeed, he must have so appreciated – why else cause them to be destroyed? The answer has to be, as a matter of inference at this stage, to prevent them from coming under investigation by Ocado. I therefore simply do not agree that the inference that relevant documents existed on the 3CX system was "fragile", as the judge put it.

76. In his second judgment, the judge had also rejected the proposition that the 3CX app was a "document" within Schedule C of the Search Order. I would not read Schedule C to the Search Order, and in particular paragraph 4, so narrowly. I consider that the 3CX app (which no doubt in any event had appeared on the iPhones or other devices of the group members) was a document. In any event messages on it – and it was accepted that there had been messages on it – were assuredly documents. Further, in my opinion, the 3CX app, and the messages on it, were "documentary material" within the ambit of ground 1 of the Particulars of Contempt: a conclusion also entirely consistent with the wide definition contained in CPR Part 31.4. I consider Ground 3 of the Grounds of Appeal to be well founded in these respects.

77. Reflecting what I have said above, I therefore am unable to accept that the judge was entitled to conclude, at this stage of the proceedings, that it could not be said that the messages contained on the 3CX app were "relevant" or that Mr McKeeve could have known that they were. Given that their precise contents are unknown just because Mr McKeeve deliberately ordered their destruction, that is a singularly unattractive approach to take at this stage. But quite apart from that, I consider that the judge was in any event wrong in his appraisal of the actual evidence in this respect, in reaching his conclusion that no sufficient prima facie case had been shown.

78. This is because the judge had in terms held, in paragraph 42 of his second judgment, that "we do not know what those [deleted] materials said: and we will never know …. Quite literally, nothing can be said about the nature of this material". But that, in my opinion, simply is not right. Evidence had, it is true, been adduced by Mr McKeeve to the effect that all such messages were innocuous. But he himself had said in his affidavit that some of the messages related to, for example, Mr Hillary's queries as to the location of Project Today's offices and as to potential employment by Project Today of his daughter. As Mr Cavender pointed out, this was not purely social chat: it involved Mr Hillary (while still an employee of Ocado) engaging in discussions of a kind which would be relevant evidence as to whether or not there was a conspiracy as Ocado alleged, in showing the degree and nature of the contact with Mr Hillary. So this evidence tends to support the inference that in any event arises.

79. It is of concern that the judge in places seemed to be saying that, because Ocado's case at this stage was to a great extent based on inference and because Mr McKeeve had sought to rebut that inference in his evidence, that indicated that there was no sufficient prima facie case. I very much doubt if that was the appropriate approach to be taken on this permission application: and it also seems to give scant weight to the accepted fact that the 3CX app was set up and was designed at the outset to be used as a secret means (using pseudonyms) of messaging between the members of the group, one of whom was a senior employee of Ocado.

80. Mr Weekes sought to rely on what Mr Faiman and Mr Hillary said in their affidavits. At one stage, he seemed to be suggesting that that evidence was "independent support" for Mr McKeeve. But those two witnesses cannot at this stage be regarded as independent: indeed Ocado's case involves saying that Mr Faiman, Mr Hillary and Mr McKeeve were all in it together (as evidenced, for example, by Mr Faiman and Mr McKeeve going together to Mr Hillary's home in Ascot and collecting various Ocado documents; and by his being part of the 3CX group).

81. In any event, Mr Hillary's affidavit is yet further evidence which, in my opinion, also displaces the judge's conclusion that "quite literally nothing can be said about the nature of this material". This is because Mr Hillary had himself said, albeit without elaboration, at paragraph 23.9 of his affidavit that the 3CX account, accessible from his iPhone, contained information "confidential to the First and Second Respondents or the Today Development Partner's Business" but "which may also have been" documents falling within Schedule C to the Search Order. Those statements cannot be discounted at this permission stage. Indeed they indicate, first, that the information on the 3CX was *not* all innocuous (rather, it included confidential information of Project Today which he, an employee of Ocado, could access) and, second, that some "may" fall within Schedule C to the Search Order.

82. I also add that Mr McKeeve himself would not have been in a position to know what was stated in any individual messages passing between other members of the group which did not include him. So he was not himself necessarily in a position to state that all such messages were innocuous. I further add that Mr McKeeve's case, as I see it, to an extent potentially may rest on the proposition that he, as is his recollection, said "Burn it" (meaning the 3CX app). But if, as is Mr Henery's recollection, he said "Burn all" then that may cast something of a different light on matters. Certainly it appears that Mr Henery understood the instruction to go wider than the 3CX account: as he also commenced on disabling the Slushminer accounts.

83. In view of Mr Weekes' insistence, nevertheless, that Mr McKeeve had committed what could even at this stage be appraised as no more than an error of judgment, we asked him if he was saying that no sufficient prima facie case would have been made out even in the absence of any rebuttal evidence from Mr McKeeve. He stated that he was so saying.

84. That is not acceptable. It shows no regard to any sense of realities. The obvious inference, in the absence of any explanation, was that the "Burn" instruction, given at a time when it was known that Ocado had started proceedings against Mr McKeeve's clients, was that destruction of (at least) the 3CX app was intended in order to prevent Ocado studying it for the purposes of its case: an intent to thwart the due administration of justice, in other words.

85. Cases derived from circumstantial evidence and inference can often be powerful cases in the criminal context. Mr Weekes emphasised that a conclusion to the criminal standard based on inference cannot be drawn if another possible inference is also available. That, indeed, reflects the criminal law: see, for example, *R v Goddard* [2012] EWCA Crim 1756. But in a criminal trial context the overall test remains whether there is evidence upon which a reasonable jury, properly directed, could infer guilt: see *R v Khan* [2013] EWCA Crim 1345 at paragraph 16 of the judgment of Hallett LJ. A jury may be perfectly entitled, depending on the evidence, to reject the suggestion of other possible inferences which may be postulated. I do not wish to press too far the analogy between a submission of no case to answer at the close of the prosecution case in a criminal trial context and a decision on whether there is a sufficient prima facie case for the purposes of a permission application under CPR Pt. 81.14 (not least because the latter kind of application involves viewing the evidence of claimant and defendant as a whole). Nevertheless in my view, in the present circumstances, it does no harm to consider whether Ocado's case, in the postulated absence of any evidence in rebuttal, gave rise, applying the criminal standard, to a sufficient case to answer, by analogy with *R v Galbraith* [1981] 1 WLR 1039. In my judgment, it is wholly plain that it did.

86. Here, of course, evidence *had* been put in by Mr McKeeve; and there were also the affidavits from Mr Faiman, Mr Hillary and Mr Henery. But Mr Faiman and Mr Hillary are, to say the least, relatively terse in what they say about the messages on the 3CX app. Besides, Mr McKeeve's case in effect involves a requirement that not only what they say in their affidavits but also what he says in his affidavit should at the permission stage be accepted: which, indeed, at various stages in his two judgments, the judge seemed prepared to do. But, as David Richards LJ pointed out in the course of argument, that in effect involves accepting their evidence at the prima facie stage: when a judge is in principle not entitled to explore or make detailed findings of fact and when Ocado has had no opportunity to test what is being said in cross-examination.

87. As Christopher Clarke LJ said in *Makdessi*, it sometimes is not altogether easy to express a conclusion that there is a strong prima facie case without appearing to indicate that the case is established. I make clear that I do not in any way suggest that here the case is established. What I do say is that the evidence before the judge, viewed as a whole, did raise a strong prima facie case (that is to say, of sufficient strength to justify permission being given). Whether all or any of the particular

contempts alleged are proved to the criminal standard will hereafter be entirely a matter for the judge hearing the substantive committal application.

88. Mr Weekes, as to some extent had the judge, also complained that the alleged contempt, and assertions of knowledge, had been insufficiently particularised in the Claim Form. I reject that. It is true that technicality can have its part to play in the law; and it is true that there are certain strict requirements applicable to contempt applications. But the general direction of travel – consistent with the overriding objective – has been to eschew unwanted elaboration in this sort of case: as indeed is reflected in the revised CPR Part 81 introduced in October 2020 (although of course the present case is governed by the previous Part 81).

89. The general principle remains that the application should, within its four corners, contain information giving sufficient particularity of the alleged contempt to enable the alleged contemnor to meet the charges: see, for example, *Harmsworth v Harmsworth* [1987] 1 WLR 1676 at p. 1683 (per Nicholls LJ) and at p.1686-1687 (per Woolf LJ). As Nicholls LJ put it, the fundamental question is whether a reasonable person in the position of the alleged contemnor, having regard to the background against which the committal application was launched, would be in any doubt as to the substance of the breaches alleged. As Cockerill J said at paragraph 80 of her judgment in *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm), after a thorough review of the authorities:

> "…. The Application Notice needs only to set out a succinct summary of the claimant's case, to be read in the light of the background known to the parties: it is for the evidence to set out the detail…"

Precisely so. And in the present case, in my view, Mr McKeeve could have been in no doubt as to the case which he had to meet. In fact, I did not understand counsel on his behalf to have objected below that there was such a doubt.

90. In such circumstances, I do not, I think, need to deal with Ocado's other grounds of appeal relating to amendment and adjournment. On the issue of amendment, it may be that the judge and Mr Cavender were at unfortunate cross-purposes. But it matters not, given the view I take that a strong prima facie case was made out and given my acceptance of the other grounds of appeal. I can, of course, see that grounds 3 and 4 of the Particulars of Contempt, as currently drafted, raise to some extent issues potentially different from ground 1 of the Particulars of Contempt. But, overall, I consider that permission should be given on all three such grounds, since currently all are essentially based on the same factual background. Whether Ocado nevertheless may hereafter seek to amend the Claim Form to add or substitute some further or other ground of contempt is not a matter for this court.

91. Of course, that still leaves the public interest. In view of his conclusion on prima facie case, the judge made no express finding on public interest. But he did, helpfully, indicate his probable view on that aspect in paragraph 29 of his first judgment; and that must weigh with us.

92. I propose to deal with this shortly. I entirely agree with the judge on this. Here, on the allegations made as to the intended interference with the due administration of justice,

a solicitor has ordered the destruction of documentation, knowing of the existence of proceedings and of a Search Order, with a view to that documentation being unavailable for examination by the claimants in those proceedings. I consider that that scenario of itself, in the circumstances, means that the committal application is in the public interest.

Respondent's Notice

93. I turn to the Respondent's Notice.

94. The first point raised is that Ocado is not a fit and proper person to pursue a public interest application such as a committal application. There is no doubt that, in an appropriate case, such a consideration can be a bar to a successful committal application: see, for example, *Tinkler v Elliot* (cited above) at paragraph 111.

95. It is perhaps a point of comment that Mr McKeeve has so closely aligned himself, in this committal application, with the viewpoint plainly held by Mr Faiman. It appears that Mr Faiman's attitude towards Mr Steiner is that Mr Steiner is driven by malevolent hostility towards Mr Faiman and is determined by whatever means, fair or foul, to crush the business of Project Today as a potential competitor of Ocado. I put it in my words, not Mr Faiman's. But that is what it amounts to: as is further evidenced by the counterclaim of Mr Faiman and Project Today in the underlying proceedings. This claims hundreds of millions of pounds in damages against Ocado for (amongst other things) alleged conspiracy to injure; and claims that Ocado's conduct, in particular in obtaining the Search Order, was undertaken in bad faith and for collateral motives and was designed to cause, and has succeeded in causing, Waitrose to terminate its business relationship with Project Today.

96. I view this particular argument, as raised at this permission stage of the committal application, with some bemusement.

97. Ocado is a listed company, with a very large capitalisation. It has a Board of Directors, answerable to the shareholders. It has in this litigation retained very experienced and reputable London solicitors and instructed leading and junior counsel. It cannot possibly be said at this stage that Ocado is to be regarded as some kind of puppet dancing to the tune of Mr Steiner irrespective of legal proprieties. Further, an application to discharge the Search Order (on grounds, as I understand, which include alleged improper motivation and deliberate concealment) has been issued but remains to be decided. In fact, it appears that that discharge application is intended to be dealt with as part of the trial of the underlying proceedings. This court is in no position at this prima facie stage to adjudicate on the allegations there made.

98. Given all this, this point therefore cannot possibly, in my opinion, be a good reason for refusing permission at this stage of the proceedings.

99. The next point raised is that Ocado has not shown, applying the criminal standard of proof, a strong prima facie case. It is true that the judge (understandably, in the circumstances) had applied a test of "at least" a prima facie case. But, as appears from what I have said above, I take the view, on the evidence thus far adduced, that there is indeed a strong prima facie case for the purposes of the permission application. I also reject, for like reasons, the further ground advanced in the Respondent's Notice to the

effect that the alleged conduct of Mr McKeeve has not had a significant effect on the administration of justice (that assertion being essentially founded on the proposition that the messages in the 3CX app were "wholly innocuous" but which, as I have said, remains to be tested). For the reasons also given above, I further reject the ground advanced in the Respondent's Notice to the effect that the public interest does not require committal proceedings to be brought. As I have already said, the public interest does so require. That, moreover, is not displaced by the fact that Mr McKeeve has since apologised and has voluntarily referred himself to the Solicitors' Regulation Authority.

Conclusion

100. I would allow the appeal. The judge's approach was, with respect, flawed and resulted in him reaching a conclusion which was plainly wrong. That has entitled this court to interfere.

101. Given the circumstances as they now stand, there is no purpose in adjourning the permission application to the trial judge. On the evidence available, the judge should, as I have concluded, have granted permission; and this court now should.

102. However, I thought that there was great force in Mr Weekes' alternative submission that the substantive committal application (on the footing that permission is granted) should be adjourned to the trial judge: and I did not understand Mr Cavender strenuously to dissent from that. Given all the allegations and cross-allegations being made, I in fact cannot conceive how this committal application could fairly or properly be dealt with prior to trial. As to that, we were told that the trial is currently scheduled to take place in the first part of 2022.

103. In such circumstances, I would direct that this committal application, for which permission is now given, be adjourned to the trial judge. The trial judge can then give appropriate directions (perhaps by way of pre-trial review) as to the best way, and the appropriate stage, in which this committal application should be dealt with. Given that the overlap of issues is such that the committal application and the trial should be heard by the same judge, and given that Marcus Smith J reached a firm view on the merits of the committal application, I consider that the trial and committal application should be heard by a different judge.

104. Accordingly, I would for my part allow the appeal, would reject the Respondent's Notice, would grant permission on the committal application and would remit the substantive committal application to the trial judge.

LORD JUSTICE DAVID RICHARDS:

105. I agree.

LORD JUSTICE NUGEE:

106. I also agree.