Case No: D30MA569

Neutral citation number: [2018] EWHC 3171 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

3 October 2018

BEFORE:

HIS HONOUR JUDGE HODGE QC
sitting as a Judge of the High Court

\- - - - - - - - - - - - - - - -

BETWEEN:

SEATRIEVER INTERNATIONAL HOLDINGS LIMITED **Claimant**

- and –

ANDREW DALY **Defendant**

\- - - - - - - - - - - - - - - -

\- - - - - - - - - - - - - - - -

Legal Representation

Miss Kelly Pennifer (Barrister), instructed by Pannone Corporate, on behalf of the Claimant
Mr Andrew Daly - Litigant-in-Person

Transcribed from 11:15:13 until 13:31:38

Reporting Restrictions Applied: No

\- - - - - - - - - - - - - - - -

Judgment Approved

His Honour Judge Hodge QC:

1. This is my judgment on the hearing of two applications by the Claimant in claim number D30MA569, Seatriever International Holdings Limited, for the committal to prison of the First Defendant to that litigation, Mr Andrew Daly. The first application for committal is dated 4 July 2018 and seeks Mr Daly's committal to prison for failure to comply with an order that I made on 12 June 2017 and for failure to comply with undertakings given to the Court by Mr Daly and recorded in orders of His Honour Judge Pelling QC made on 16 June 2017 and Her Honour Judge Moulder made on 27 July 2017. The second application seeks Mr Daly's committal to prison for signing statements of truth without an honest belief in their truth and knowing, when he signed the statements of truth, that the documents contained information which was not true. That application was issued on 22 August 2018 and His Honour Judge Davies, by an order made by consent on 14 August 2018, has given the Claimant permission to make that application as required by the Civil Procedure Rules.

2. Essentially, the contempts which are the subject of the first application are set out in the Particulars of Contempt. They relate, first, to Mr Daly's concealment and deletion of the johnbbrown@gmail.com email account (to which I shall refer as "the JBB email account"); second, Mr Daly's concealment of, and failure to deliver up, copies of documents uploaded to a Dropbox associated with the JBB email account (to which I shall refer as "the JBB Dropbox"); third, Mr Daly's failure to deliver up to the Claimant's IT expert for imaging a family iPad; fourth, Mr Daly's failure timeously to deliver up schedule A/schedule D hardcopy documents (the documents being the same but identified as schedule A documents in the orders of myself and Judge Pelling and as schedule D documents in the order of Judge Moulder); and, finally, Mr Daly's late compliance with my order in other respects.

3. The contempts which are the subject of the second application all relate to the making of false statements without an honest belief in their truth by Mr Daly in his Defence and in various of his several witness statements. The particular statements relied upon are the same as those identified by Mr Daly in his seventh witness statement dated 6 July 2018 as being false.

4. Mr Daly has filed a Defence to the Particulars of Contempt which are the subject of the first application and also affidavits from himself, his wife, Terina Louise Daly, and his former solicitor, Ms Polly Stephenson, a solicitor and partner in Ashtons Legal of Ipswich. Ashtons Legal acted as Mr Daly's solicitors throughout this litigation until Tuesday 25 September when they came off the record. Mr Daly has since been acting as a litigant-in-person.

5. On 26 September, the day before this hearing commenced, Mr Daly sent a long and detailed email to the Court at about 12:45. I have read and taken the contents of that email into account. The hearing commenced at 10:30 last Thursday, 27 August. The Claimant (and Applicant) is represented by Ms Kelly Pennifer (of counsel). Mr Daly attended to represent himself and was accompanied by his wife, Mrs Daly.

6. In accordance with the judgment of Mr Justice Blake in the case of *King's Lynn and West Norfolk Council v Bunning* [2013] EWHC 3390 (QB), reported at [2015] 1 WLR 531 (and subsequently approved by the Court of Appeal in the later case of *Haringey LBC v Brown* [2015] EWCA Civ 483, reported at [2017] 1 WLR 542), at the outset of

the hearing I indicated to Mr Daly that he was entitled to apply to me for an order granting him legal representation with the assistance of legal aid funding and that if he were to make such an application, I would be prepared to grant it and to grant him an adjournment of the hearing of the committal applications for a reasonable period of time to enable him to instruct solicitors and counsel and for them to get up to speed.

7. Mr Daly initially indicated that he wanted the matter to be disposed of on that and the following two days. I therefore allowed him a short adjournment to discuss the matter with his wife and for him to consider whether he wished to reconsider his initial position. There was an adjournment for about ten minutes or so and, when the Court resumed, Mr Daly told me that he had discussed the matter with his wife long and hard both before the hearing and in the short adjournment I had given him. It was not a decision he had taken lightly, but he had decided that he would like to proceed with the committal applications over the next couple of days. He reiterated the apology he had previously proffered for his actions, and he emphasised that he was the father of two very young boys, aged one and three, and that his apology was not given lightly.

8. The hearing therefore, proceeded on Thursday 27 September and continued the following day. Miss Pennifer opened the committal application. The evidence relied upon by the Applicant comprised the first affidavit of Mr Andrew Mark Vickerstaff, a solicitor and the Claimant's Group Legal Counsel, sworn on 4 July 2018, a second, confidential, affidavit of Mr Vickerstaff sworn on the same day, and a third affidavit of Mr Vickerstaff sworn on 17 September 2018.

9. Mr Vickerstaff went into the witness box and confirmed the truth of those three affidavits and also of the seven witness statements that he had made from time to time during the course of this litigation. Mr Daly was afforded the opportunity of cross-examining Mr Vickerstaff but he indicated that he did not want to challenge any of Mr Vickerstaff's evidence. He commented that he, Mr Daly, accepted that he had done wrong.

10. The Applicant's only other witness, Ms Sarah Bazaraa, a solicitor and senior associate with the Claimant's solicitors, Pannone Corporate, had also made an affidavit, sworn on 30 July 2018. She too went into the witness box and confirmed the truth of that affidavit and, again, Mr Daly indicated that he wished to make no challenge to her evidence, or ask her any questions in cross-examination.

11. Mr Daly then addressed the Court for about 15 minutes. He had served a Defence to the Particulars of Contempt, dated 7 August 2018, which had apparently been settled by counsel and was verified by a statement of truth. In those Particulars of Defence Mr Daly admitted the basic facts relied on in support of the committal application. He had previously done so in a seventh witness statement that he had made in the course of the litigation and which was dated 6 July 2018.

12. Mr Daly's position had been summarised at paragraphs 2 through to 6 of his Defence. It was there said that the suspension and termination of Mr Daly's employment with the Claimant in March 2017, together with his personal circumstances at that time and thereafter, had led him to take steps which he acknowledges and accepts he should not have done, and for which he, again, humbly apologises to the Claimant and to the Court. He apologises for his breaches, or perceived breaches, of the first order and the undertakings incorporated in the second and third orders.

13. In relation to the JBB email account and Dropbox, he admits that he deleted the email account and failed to disclose the Dropbox account. Whilst he admits that confidential information was stored on the Dropbox account, the extent of such confidential material, the use to which it was put, and any loss suffered by the Claimant, or profit made by Mr Daly, or what have been known as the "Sunbay" parties, were said to be matters for trial. In relation to those, Mr Daly reserved his position; but he asserts that the prejudice suffered by the Claimant appears to have been limited.

14. In relation to the family iPad, it is said that that did not fall within the first or subsequent orders as it did not contain schedule A documents. Alternatively, Mr Daly did not realise that it fell within the first or subsequent orders as it was said to be a family device of which he had made limited use for a short period after the termination of his employment and before he had acquired a laptop. In evidence, he put that period at about ten days. It was said that the Claimant had suffered no prejudice as the impugned documents on the iPad were documents which were also available on an email account and/or other devices to which access had been provided pursuant to the first order and which had therefore been preserved.

15. As for the hard copy documents, it is said that these had simply been overlooked by Mr Daly and had been delivered up when first discovered in June 2018. It is said that the Claimant suffered no prejudice as those documents were not confidential, nor of any commercial value, and were not disclosed to any third party, nor put to any other improper purpose.

16. As to the late compliance, it is said that Mr Daly sent his devices, namely a laptop and iPhone, for imaging by the Claimant's IT expert, together with the known access codes, just shortly after the time for compliance as it had been acknowledged by the Claimant; the Claimant had said that the devices were to be delivered up by 16:30 on 14 June and in fact they were delivered up about an hour and 20 minutes later. It is said that those devices, between them, contained the impugned email messaging and storage accounts, which were therefore available for imaging from those devices in accordance with the terms of the first order.

17. On the Claimant's insistence, and presumably because the laptop had been frozen by their IT expert, the online details of those accounts were provided subsequently. It is said that, in any event, the accounts were preserved. It is also said that the Claimant has provided no evidence to support any contention that it has suffered any prejudice by reason of the alleged late compliance. It is said that at the time the original order was served upon the First Defendant, which was at about 21:45 on the evening of 12 June, at the home of the First Defendant and his wife, and at a time when she was seven months pregnant, Mr Daly and his family were in a highly vulnerable situation, and Mr Daly was fearful, not only for himself, but also for his family. Whilst no excuse for his actions, it is said that, following disclosure, he has sought to redress matters. The prejudice to the Claimant by reason of the breaches is said to be in fact limited, and in several instances to be non-existent.

18. It is said that in his seventh witness statement of 6 July 2018, Mr Daly, in order to set the record straight, has set out a detailed account of his dealings with the Sunbay parties and his response to the orders. It is said that that was prepared before having had time to consider this committal application, which was served upon him on 5 July 2018. It is said that the First Defendant has addressed his breaches of the first order

and his undertakings so far as possible, and that he has demonstrated by his compliance with subsequent orders that he has learned from his errors.

19. He has also apologised in his seventh witness statement for related false statements made in his Defence and Counterclaim and in his previous witness statements, which are now the subject of the second committal application. It is said that, if Mr Daly is committed to prison, his wife and children will suffer severe hardship. Mrs Daly has recently been made redundant and she and their children are reliant upon Mr Daly for financial support, which he would be unable to provide from prison. It would also affect Mr Daly's ability to defend the proceedings, or to compensate the Claimant financially for his admitted wrongdoing insofar as any loss has been suffered, which it is said has not been proved at this time.

20. In addition to that Defence and his seventh witness statement, Mr Daly has made an affidavit expressly addressing the committal application and, as I have indicated, there are further affidavits from his wife and his former solicitor. During the course of his brief response to Miss Pennifer's opening of the committal application, Mr Daly emphasised that at the time he had been dismissed from the Claimant's employment, his wife had been three months pregnant. He had left his employment with a lot of anger, bitterness and hurt, and a feeling that he had been hard done by. Looking back 18 months after the event, he accepts now that his actions were extremely stupid. He had felt that the Claimant's accusations against him were not truthful. He had no idea of the seriousness of what he was doing. He accepts that he had lied about the JBB email account and the related Dropbox. He had made a conscious decision to say that they did not exist. It was a lie at the time but he says he had not manipulated anyone to go along with that lie. He described it as "not a deep-rooted, every day lie". Mr Daly's seventh witness statement had taken easily some four to six weeks to complete and had involved a lot of work and taken a lot of time. He had tried to compile that witness statement and to share it with the Claimant long before the first committal application. It was in no way a reaction to that application.

21. Mr Daly emphasised that he was 35 years of age and he was married with two young sons. He said that the legal fees he now owed as a result of this litigation exceeded the value of his house. The case had impacted on his life now and would do so for the future. In the substantive litigation, he had read what he had perceived to be false accounts of his actions and he had not appreciated that he was lying to the Court as well as to the Claimant. Essentially, he said that he had acted in sheer panic, trying to defend his family.

22. After his brief opening, Mr Daly called his wife, Terina, who confirmed the terms of her affidavit. She accepted in cross-examination by Miss Pennifer that she had received the court order made by me and had read the penal notice. She knew that her husband had approached the Sunbay parties and had received payment from them. She accepted that at that time her family had not actually been in financial difficulties because of payments her husband had received. It was put to her that she knew that her husband had been involved in selling confidential information and she said that she believed that what her husband had been doing was for the benefit of the family. She was asked whether she thought it right or wrong that her husband should have been selling confidential information and her answer was that she had "not been happy about it". It was put to her that the panic was the result of the thought that the Claimant had known the full extent of Mr Daly's wrongdoing and she said she did not know about that. I accept that Mrs Daly is a truthful and honest witness who did not in any

way seek to mislead the Court. She was clearly seeking to assist her husband. I derive little real benefit from her evidence beyond her corroboration of the difficult situation in which she and her husband now find themselves as a result of his actions.

23. Mr Daly then went into the witness box. He had been warned that he did not need to do so, and during the course of the hearing, and also during his evidence, he was given appropriate warnings about the privilege against self-incrimination and about not disclosing matters covered by legal professional privilege or the cover of "without prejudice" communications between parties. He was warned about the potential dangers of partial waiver of legal professional privilege and where that might lead. Mr Daly confirmed the contents of his affidavit, the Defence to the committal application and his seventh witness statement and he also confirmed the truth of the matters that he had told the Court in opening.

24. He was then cross-examined by Miss Pennifer from 12:30 until about 16:40, in total for in excess of some three hours, albeit with the customary one-hour break for lunch. He accepted that he had read all of the penal notices and had been in no doubt as to the consequences of any breach of the court order or undertakings. He knew that in relation to the JBB email account that what he had done was wrong. He accepted that, in relation to the Sunbay parties, he had known that the statements in his witness statements were false, and known to be false, in relation to the JBB email account, the related Dropbox and the Sunbay parties.

25. Mr Daly accepted that he had known that his actions were calculated to interfere with the administration of justice and also that his purpose had been to cover up his dealings with the Sunbay parties. He accepted that he had used the pseudonym "John B Brown" for the JBB email account in the hope of preventing it from being detected. He accepted that he had offered to sell confidential information to the Sunbay parties for, initially, £50,000.

26. In the course of her cross-examination, Miss Pennifer addressed with Mr Daly separately each of the mitigating circumstances upon which he had seemed to rely. She challenged, in cross-examination, his assertions that he had deleted the JBB email accounts, and the related Dropbox, because he had been frightened and had panicked and had then been too frightened to own up. She challenged the fact that he had not prevented the disclosure of the email account on disclosure in March 2018. She challenged his assertion that he had readily, fully, and frankly owned up when the issue had first been raised by the Claimant's solicitors.

27. She challenged Mr Daly's assertion that he had made a full and frank clean breast of the matter by his seventh witness statement and his more recent affidavit. She would have addressed Mr Daly's assertion that there was no sensitivity and value in the confidential information, but Mr Daly made it clear in cross-examination that he was not relying on any lack of commercial sensitivity in the confidential information, commenting that, either way, what he had done had been wrong.

28. In the course of her cross-examination, Miss Pennifer put it to Mr Daly that his motivation had not been fear, but rather an unwillingness to give the Claimant any information. His decision not to disclose details of the JBB email account had been deliberate. It was only because Pannone Corporate's letter of 17 April 2018 had first raised the point that any admissions had eventually been made, and Mr Daly's initial response had not been to come clean. That had only come about some two months

after disclosure on 10 May 2018. Even then, it was said that Mr Daly had continued to lie, not only to the Claimant but also to his own solicitors, by saying that the JBB email account had been created for Mr Daly by a third party, and had been closed before my first order had been made, and by suggesting that, although it had been intended that a payment should be made to Mr Daly, the transaction had, in fact, aborted.

29. It was only with the threat, in express terms, of the committal application within Pannone Corporate's letter of 21 May 2018 that it was suggested Mr Daly had embarked upon the disclosures contained within his seventh witness statement. Even in his solicitors' letter of 24 May 2018, Mr Daly had still been lying about the date of the deletion of the JBB email account. Mr Daly, rightly, did not dispute that assertion, merely commenting that he and his solicitors had allegedly been well into preparing the seventh witness statement by that point.

30. Miss Pennifer pointed out that it was only with Mr Daly's solicitors' letter of 15 June 2017 that there had been a first reference to providing a full account to the Court. It was only after the application for committal to prison had been threatened that Mr Daly had considered the position more fully with his solicitors. That was some two months after Pannone Corporate's letter of 17 April 2018 which had first raised the matter. Mr Daly's response to that was to say that, when preparing his seventh witness statement, he had taken some legal advice from other legal people in the industry and that he had wanted to put it all into his seventh witness statement.

31. In relation to the family iPad, Mr Daly said that the failure to deliver it up had been an oversight. He accepted that it was for the Court to decide whether there had been any schedule A documents on the iPad and, thus, whether it had been required to be delivered up. In the course of her cross-examination, Miss Pennifer made it clear that she was only relying upon one document, an email of 18 March 2017 (at bundle 7, page 209), which had been sent from the iPad, as rendering the family iPad liable to disclosure. She had in her skeleton argument sought to rely upon a second document but reliance on that was abandoned.

32. Mr Daly's explanation for the failure to deliver up the family iPad was that at the time of my order, it was his laptop and iPhone which had been the devices he had been working on. It was suggested to him that there had been two weeks - Mr Daly in fact put it at ten days - when he had possessed no laptop because he had returned his work laptop and he had not, by then, purchased a substitute laptop. During that two weeks - or ten days - there had been an intensive period of discussions about setting up in competition with the Claimant. That was a period of intense activity. As a result, Miss Pennifer struggled to see how Mr Daly had not considered the family iPad as a possible device which was required to be delivered up.

33. Mr Daly's evidence was that the question that had been put to him, presumably by his solicitors, was: what devices he had used for work? He said that he had an iPad at the present time but rarely sent emails from it. He had been used to sending emails from his phone. It was put to him that at the time he had not had any laptop. In relation to the breaches of the court order, Mr Daly's position was that he and his solicitors had complied with the order as quickly and as efficiently as they could. He pointed out that, for part of the time when queries were being raised, he had been in the United States.

34. It was put to him that Mr Daly had been communicating with an associated party of the Sunbay parties, a Mr Jonathan Fanoe, by telephone on 19 June and 23 June, according to the telephone records, in both cases for about ten minutes. It was suggested that it was only after those telephone conversations that Mr Daly had decided that he was going to delete the JBB email account from his laptop. It was also put to him that he had decrypted the laptop that had been ordered to be delivered up to the expert by my order and which, when the expert had examined it, had locked itself because of the encryption, and which the expert had proved unable to decrypt.

35. It was put to Mr Daly that he had decrypted the original laptop at some time before 16 July 2018 because on that day that laptop had been used to access the Dropbox account. Mr Daly denied having decrypted the laptop and denied having the knowledge to do so. That was the point at which Miss Pennifer terminated her cross-examination, at about 16:40 on the first day of the committal hearing. At that point I adjourned, indicating to Mr Daly that he should consider matters overnight and should address those matters which he wished to address, and which had been raised by Miss Pennifer in cross-examination, on the following morning, effectively by way of personal re-examination.

36. Due to another matter in my list, the hearing did not resume until 11:30 on Friday 28 September. Because it seemed to me that the allegations had perhaps not been fully appreciated by Mr Daly after some three hours in the witness box and two and a half hours of continuous cross-examination, I indicated to Miss Pennifer that she should put her case about the decryption of the laptop to him again. Miss Pennifer did so and Mr Daly's response was very much along the lines he had previously given. During the course of his cross-examination on the Thursday afternoon, in response to questions about decrypting the laptop, Mr Daly had asked rhetorically: where the evidence was of what he was said to have done in accessing the Dropbox on 16 July? Mr Daly posed that rhetorical question again the following morning, asking: when the person accessed the Dropbox, what did that person do? It was put to Mr Daly that he had succeeded where the expert had failed in decrypting the original laptop. It was also put to him that his intention throughout had been to suppress and remove all evidence of his dealings with the Sunbay parties, and that latter point Mr Daly did accept.

37. It was put in terms to Mr Daly that, on 16 July, for whatever reason, he had accessed the Dropbox using the old, previously encrypted, laptop which he had been ordered to hand over to the IT expert and which the IT expert had been unable to decrypt, and Mr Daly indicated that that was not correct. In his re-examination, Mr Daly emphasised that it was impossible for him to prove the negative, that he had not accessed the laptop and Dropbox on 16 July. He said that he had been completely prepared to work with both parties' IT experts to analyse all relevant devices.

38. He reiterated the length of time that had been spent in preparing his seventh witness statement. He said that the order to give access to the Dropbox had been made in early July of this year and he understood that the Claimant's IT expert would have full control over the Dropbox so that he, Mr Daly, would have been a complete fool to have decrypted the original laptop and then gone into the Dropbox. In any event, that allegation was said to be more relevant to the substantive litigation than the committal application.

39. He apologised again for the non-disclosure of the JBB email account and the related Dropbox. He said that panic could last not only for a moment but could extend for days and weeks. He again referred to his wife having been seven months pregnant at the time the order was served and being regularly monitored for stress. He said that he had had to borrow money to keep up in this litigation. He was, and remained, the main income-earner for the family. He had gone from being a full-time employee with prospects to being self-employed. He was the sole financial support for his family. He emphasised the time-lag between doing work and receiving any financial benefit for it.

40. The original delivery up order had been used aggressively to intimidate Mr Daly and his wife by being served at about 21:30 at night at their family home when his wife was known to be seven months pregnant. He referred to what he described as the Claimant's aggressive tactics. He had not believed that the family iPad had had to be handed over; it was simply an oversight on his behalf. It contained only some ten or so emails, all of which he said had been preserved. He said he had been completely open and transparent in his seventh witness statement. He described the present litigation as a witch hunt and a personal vendetta against him. He said he had tried to bring this litigation to an end in order to take his life forward. In total, Mr Daly was in the witness box for a little over four hours.

41. Miss Pennifer then addressed me in closing either side of the luncheon adjournment. She acknowledged that the late delivery of documents vanished almost into insignificance in the context of the committal application. She also accepted that, viewed independently of the other matters, the late delivery of the devices was of little practical significance, but it became much more serious when viewed in conjunction with the other alleged contempts. The encryption of the laptop by a BitLocker and its subsequent decryption, as Miss Pennifer submitted, by Mr Daly, was said to be a matter of some gravity. The Court could be sure that Mr Daly had had the BitLocker recovery key. When one looked at Mr Daly's evidence, and that of Miss Stephenson, the only inference one could draw was that Mr Daly must have written the recovery key down. He had certainly found it since he was ordered to deliver up the laptop in June of last year.

42. It was said that Mr Daly must have made a conscious decision, some time before the laptop was delivered up, to activate the BitLocker in the hope that, when accessed by the Claimant's expert, the laptop would lock itself and encrypt all the material within it. On Mr Daly's alleged mitigation, Miss Pennifer submitted that he had made a deliberate and calculated decision to conceal evidence, having weighed up the potential benefits and the countervailing risks. Thereafter, his motivation in keeping silent was said to be exactly the same: his self-interest in suppressing and concealing evidence from the Claimant and the Court. It was submitted that the admissions that Mr Daly had made in his seventh witness statement had not gone a jot further than what had already been incontrovertibly discovered by the Claimant. Any admissions have been dragged from Mr Daly kicking and screaming after the Claimant had threatened a committal application.

43. Mr Daly's seventh witness statement was really a detailed account of no more than was already known. His apologies and admissions in that witness statement were said to be entirely self-serving, consisting of what benefited him the most. He could have provided those admissions many months before, and without the compulsion of the threat of a committal application. Even now, there was said to be no real or general

appreciation of the wrongness of what Mr Daly had done and no real or general contrition. He was still presenting himself as the victim of a witch hunt and a personal vendetta.

44. His frustration in response to any questions about the Sunbay parties was described as resembling that of a petulant child, an allegation that clearly stung Mr Daly. Instead of owning up, he had tried to deflect his frustration away and towards the Claimant. He was said still not to have come clean in relation to the BitLock matter. In relation to the family iPad, it was said that, at the very least, he had been reckless in failing to hand it over when it had been the device he had been using for, on his own admission, ten days when he had had no laptop.

45. So far as prejudice to the Claimant was concerned, the Court could be sure that, had the order been complied with, the Claimant would have discovered the involvement of the Sunbay parties and would have taken immediate, effectively quia timet, action to restrain the use of the Claimant's confidential information by those parties. Instead, the Sunbay parties had been in possession of confidential information belonging to the Claimant, as their competitor, for a year before the Claimant knew about it. On any analysis, the result of Mr Daly's actions would be that the Claimant would be involved in more extensive, time-consuming and costly litigation with the Sunbay parties than would have been the case had the matter been disclosed at the outset, enabling protective action to be taken on an interim basis before any real use could be made of the Claimant's confidential information. There was clear and obvious prejudice to the Claimant which could not now be rectified. Moreover, the Claimant had to incur the costs of this present committal application, and the Court had been troubled with it.

46. Miss Pennifer submitted that the preservation and delivery up order was only one step down from a search and seizure order. It was less intrusive but was just as important because its sole purpose was the preservation of evidence. It was said that what Mr Daly had done struck at the very root of the administration of justice and was serious conduct in any context. It was akin to perverting the course of justice or seeking to do so. Miss Pennifer recognised that committal to prison would be very difficult for Mr Daly's family, but it was something that he had brought upon them and upon his own head. It was said that there was no other viable alternative. Mr Daly, on his own account, had been driven to the point of bankruptcy so a substantial fine was not a viable alternative, and, in any event, there was a liability in costs of some £36,000. Mr Daly had been involved in a continuing attempt to suppress relevant evidence, as demonstrated by his ability to decrypt the laptop and access the Dropbox. It was said that Mr Daly had not yet learned his lesson; his conduct interfering with the course of justice in this litigation would continue unless he was punished.

47. Miss Pennifer recognised that it was not for the Claimant to advance submissions on sentence, but she indicated that the Court should view Mr Daly's conduct as being at the more serious end of the two-year period which committal for contempt of Court attracts. She invited the Court to consider a sentence of 12 months or more. She accepted that there was no continuing breach of Court orders and, therefore, no proper scope for apportioning any sentence between past breach and future non-compliance. When I enquired about suspending any sentence of imprisonment, Miss Pennifer submitted that that would be to let Mr Daly off the hook too lightly. A suspended sentence was not something that the Court should choose.

48. I gave Mr Daly a short break for him to consider his response. Mr Daly denied that he had decrypted the laptop. The Claimant's IT expert had been unable to do so; he, Mr Daly, was merely a "sales guy" and was unable to fool the IT experts. There had been no prejudice in the failure to deliver up the iPad because all relevant emails had been captured off Mr Daly's iPhone. He accepted that he should have remembered that he had been using the iPad for ten days and had sent emails from it.

49. In relation to the JBB email account and Dropbox, Mr Daly accepted that his concealment of both had been despicable. His decision to meet with the Sunbay parties had been driven by hatred, bitterness and anger, but not by the prospect of financial gain. He said that he had been extremely worried and stressed, with no idea of how he was going to defend himself from this litigation. He said he had not known how he would feed his family. He had made decisions that were wrong, that was for sure, but his life was now a mess and absolutely ruined.

50. His reasons for avoiding jail were that he had admitted his acts in his seventh witness statement. That had taken four to six weeks to complete. This was his first offence; he had never been in trouble with the law before. He was no threat to the Claimant or to the Court. He unreservedly apologised, both to the Court and to the Claimant, for his actions. They had had a far greater impact on his life than on either the Claimant or the Court. He needed now to find a way through bankruptcy and put an end to the ongoing litigation. He was the sole wage earner in the family. Jail would, he said, most certainly mean that his wife and boys would lose their home. He would not be there to pay the bills. Thus, the impact on his wife and his two sons would be huge.

51. In her brief reply, Miss Pennifer emphasised that it was not difficult to set up a BitLocker encryption, but it was very difficult to break it once it had been set up and that was the very purpose of encryption. Mr Daly had clearly been able to decrypt the original laptop. She reminded the Court that, in relation to his original company mobile and laptop, he had returned them at the end of his employment, with all relevant data irretrievably removed. It had been beyond recovery even by two IT experts. That demonstrated some degree of IT know-how on the part of Mr Daly. Mr Daly had known sufficient to delete all information concerning the JBB email account in a way which had put it beyond recovery by the Claimant's IT expert. On that basis, the Court could conclude that he had more than sufficient IT skills to set up the BitLocker encryption key.

52. The Claimant had no objection to the proceedings being stayed in relation to Mr Daly whilst he was serving any sentence of imprisonment. Before rising, I enquired of Mr Daly how he was going to pay some £36,000 of legal costs and he indicated that he had no idea, but if it were to be imposed by the Court, as an alternative to prison, he would find a way to make payment.

53. I am satisfied that all procedural requirements in relation to this application have been properly complied with. In relation to the orders and undertakings, Miss Pennifer addressed me on the procedural requirements of those. The first order had been served on Mr Daly personally and had borne the necessary penal notice, as Mr Daly had acknowledged. The second and third orders, recording the undertakings given to the Court by Mr Daly, and accepted by the Court, had not been personally served on Mr Daly. The terms of the second order had been agreed between the parties, who had both been legally represented by solicitors and counsel at the time. On 15 June 2017, the day before the scheduled return day, a signed copy of the consent order had been

filed for the Court's approval just before 19:00 that evening, together with written confirmation from the solicitors acting for Mr Daly that they had advised him in relation to the undertakings offered. The signed consent order, and all prior travelling drafts of it, had borne a penal notice, in slightly amended form to reflect the fact that undertakings were being given.

54. On 16 June, the Claimant's solicitors had been notified by telephone that Judge Pelling had approved the order and they had informed Mr Daly's solicitors of that by email. The sealed copy of the second order had been collected by the Claimant's solicitor on 19 June and that had been served on the Defendant's solicitors by email and post that day. So far as necessary, Miss Pennifer seeks a dispensation, pursuant to CPR 81.8, of the requirement for personal service of the second order. She says "so far as necessary" because, although personal service was required, the only alleged breach of the undertakings recorded in the second order is the deletion of the JBB email account in the event that that took place after the making of the second order and before the making of the third. Mr Daly has asserted that the JBB email account was, in fact, deleted on a date he cannot precisely recall, but after service of the first order and before service of the second. If that is correct, there are no other breaches of the second order undertakings and so no dispensation would be required.

55. I am satisfied that, to the extent necessary, it would be appropriate for the requirement of personal service of the second order to be dispensed with. Mr Daly had already been personally served with the first order, endorsed with a penal notice, on 12 June and the following day he had instructed Ashtons¸ who had continued to act throughout until 25 September 2018. The undertakings recorded in the second order were the subject of negotiation and agreement between the parties. Mr Daly was, throughout such negotiations, represented by experienced and able solicitors and counsel. All travelling drafts of the orders had borne a penal notice. In relation to the second order, the Claimant's solicitors had sought and obtained confirmation from Ashtons that they had advised Mr Daly in relation to the undertakings, and that confirmation was filed at Court, together with a signed consent order for the Court's approval, which was given the following day. There is no suggestion that Mr Daly had been unaware of the making of the second order or the terms of the undertakings recorded in it, and his partial compliance with it demonstrates that he was aware of the same. In those circumstances, the Court can be in no doubt that Mr Daly had notice of the undertakings recorded in the second order. It would, in my judgment, therefore be just to dispense with the requirement for personal service of the second order. I will, therefore, make an order in the terms of paragraph 7 of Miss Pennifer's draft, that the requirement to serve Judge Pelling's order is dispensed with.

56. So far as the third order is concerned, in my judgment, there is no need for any dispensation. The third order was handed to Mr Daly's legal representatives when he was present in Court. In my judgment, that is sufficient service to satisfy the requirements of CPR 81.7 and 81.8. So, I accept that paragraph 7 of the order should provide that Judge Moulder's order, having been served in accordance with CPR 81.7(1), no such dispensation is required.

57. Miss Pennifer also seeks the privacy provisions contained in paragraphs 1 through to 6 of her draft. She submits that the documents uploaded to the JBB Dropbox contain information that is highly confidential and commercially sensitive to the Claimant. To protect the confidentiality of that information, she seeks those privacy provisions. I am satisfied that those provisions are directed solely at the documents uploaded to the

JBB Dropbox, together with a few other documents containing the Claimant's confidential information to which reference is made in the evidence, and the information they contain. I am satisfied that those paragraphs go no further than is strictly necessary to protect the confidentiality of such documents and information and that, exceptionally, such limited derogation from the important principle of open justice is justified. I will, therefore, make orders in the terms of paragraphs 1 through to 6 of the order.

58. Turning to the substance of the committal application. The burden of proof is on the Claimant and the relevant standard of proof is the criminal standard. I have to be sure that each of the several allegations has been made out. Miss Pennifer has reminded me of the guidance given by the Court of Appeal to the enforcement of mandatory orders and undertakings in *Re L-W (Enforcement and Committal: Contact)* [2010] EWCA Civ 1253, reported at [2011] 1 FLR 1095, at paragraph 34 by Lord Justice Munby:

> "(1) The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the Defendant to do. That is a question of construction and, thus, a question of law. (2) The next task for the judge is to determine whether the Defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ's language, Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout on the applicant: it is for the applicant to establish that it was within the power of the Defendant to do what the order required, not for the Defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the Defendant guilty of contempt the judge must be sure (a) that the Defendant has not done what he was required to do and (b) that it was within the power of the Defendant to do it. (5) If the judge finds the Defendant guilty, the judgment must set out plainly and clearly (a) the judge's finding of what it is that the Defendant has failed to do and (b) the judge's finding that he had the ability to do it."

59. In relation to the prohibitory orders and undertakings, Miss Pennifer reminds me of what was said by McCombe LJ in *Khawaja v Popat* [2016] EWCA Civ 362. To paraphrase, an alleged contemnor's belief that he was entitled to act as he did does not excuse the breach of a Court order. In *Stancomb v Trowbridge UDC* [1910] 2 Ch 190 at page 194 Warrington J said this:

> "In my judgment, if a person … is restrained by injunction from doing a particular act, that person … commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order."

The party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to a Court order. If the disobedience is more than casual or

accidental and unintentional, it is nothing to the point that an alleged contemnor did not intend to break the terms of the order.

60. Nevertheless, the breach of a Court order must have been deliberate. That includes acting in a manner calculated to frustrate the purpose of the order. It is not necessary that the Defendant intended to breach the order, in the sense that he or she knew its terms and knew that his or her conduct was in breach of the order. It is sufficient that the alleged contemnor knew of the order, and that his or her conduct in response was deliberate, as opposed to inadvertent. Although not cited to me, it seems that the point was put extremely clearly by Mr Justice Millett in the case of *Spectra Vest Inc v Aperknit Ltd* [1988] FSR 161 at 173:

> "To establish contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order."

Deliberate breach of an order in that sense is very significant. It is clearly in the public interest that Court orders be obeyed.

61. So far as the second committal application is concerned, in order to make out an allegation of contempt in relation to a false statement of truth it is necessary for the applicant to establish (1) that the statement was not true; (2) that the maker of the statement knew that it was not true, or did not honestly believe it to be true; and (3) that the maker of the statement intended to interfere with the administration of justice, or knew that it was likely that the administration of justice would be interfered with as a result. For the purposes of the second of those requirements, recklessness is sufficient mens rea; carelessness is not. Recklessness means not caring whether the statement is true or not. It is not enough that the maker of the statement has not conducted sufficient checks to see if the statement is true provided he honestly believes it to be true.

62. I turn then to the alleged contempts. First of all, the JBB email account. Mr Daly does not dispute that that account was within his possession, power and control at the time of the service of the first order. He does not dispute that he deliberately deleted the JBB email account to conceal his dealings with the Sunbay parties. Whilst he cannot recall the precise date on which he did so, he believes that it was after service of the first order, and after receiving advice from Ashtons in relation to the same, but before service of the second order. On the evidence I have heard, on the balance of probabilities I would have found that it was in fact after the making of the second order and, in all probability, about the time of one or other of Mr Daly's two conversations with Mr Jonathan Fanoe on 19 or 23 June 2017. However, I cannot be sure that it was after service of the second order, particularly since Mr Daly puts it earlier than that. What I can be sure of, however, is that the JBB email account was deliberately deleted after service of the first order on 12 June and after Mr Daly had received legal advice from Ashtons, and on or before 23 June. I can be sure that it was in breach either of the first order or the undertakings in the second order. In my judgment, given that the undertakings were in the same terms as the previous Court order, it is unnecessary for me to be sure of the precise date of the deletion as long as I am satisfied so as to be sure, as I am, that it was after service of the first order and during the currency of either the first order or the undertakings given to the Court.

63. Mr Daly accepts that he did not notify the IT expert of the JBB email account or provide usernames and passwords for it, with the consequence that it was not imaged by the IT expert. Mr Daly accepts that, if it is found that the JBB email account was an email account within the meaning of the first order or the undertakings in the second order, he made false statements in paragraph 8 of his first witness statement and paragraph 1 of his first supplemental statement. Mr Daly does not dispute that if it is found that the JBB email account was an email account within the meaning of the first order or the undertakings, his breaches of that order, or of those undertakings, in relation to it, were intentional and made with full knowledge of all material facts. Mr Daly also does not dispute that the statements in Ashtons' letters of 10 and 24 May 2018 that the JBB email account was deleted before the service of the first order were false.

64. It follows that the sole issue in relation to this alleged ground of contempt is whether the JBB email account was one to or from which any schedule A document had been sent or stored and so was an email account within the meaning of the orders. Mr Daly does not dispute that he sent emails from the JBB email account. He does not dispute that Asda and Co-op were persons who fell within paragraph 2.14 of schedule A to the first and second orders. The question, therefore, is whether any of the relevant emails were emails containing evidence concerning or relating to any and all communications, negotiations, agreements, arrangements or dealings on or after 4 August 2014 between Mr Daly and any person acting for or on behalf of Co-op or Asda.

65. Miss Pennifer relies upon draft emails sent to Jonathan Fanoe to be forwarded on to Asda, Co-op and two other bodies within the scope of paragraph 2.14 of schedule A, Poundland and AS Watson. Those emails are to be found in bundle 4 at pages 537, 538, 541 and 542. I do not accept that those emails do fall within the scope of paragraph 2 of schedule A. They are emails that were intended to be sent by Jonathan Fanoe to companies within the scope of paragraph 2.14. They were not emails that were to be sent by the First Defendant. Paragraph 2 is clear in distinguishing between emails sent by the First Defendant, or received by him, and emails sent or received by any person acting for or on behalf of one of the Claimant's customers, suppliers, distributors or sales agents. In my judgment, an email intended to be sent by someone other than Mr Daly does not fall within the scope of the relevant provision in schedule A.

66. However, I am entirely satisfied, to the criminal standard, that the other email relied upon - that sent to Mr Bo-Stieler on 24 May 2017 at bundle 4, page 540, which included the sentence:

> "We have started our discussions with both Co-op and Asda re future opportunities for your products and this will be ongoing in the future as agreed."

- does fall with the scope of paragraph 2.14 of schedule A.

67. I am satisfied that that email clearly evidences, concerns or relates to communications or dealings after 4 August 2014 between Mr Daly and persons falling within paragraph 2.14 of schedule A to the first order, namely Co-op and Asda. Thus, I am entirely satisfied, to the criminal standard, that the JBB email account was an email account for the purposes of the first order and the undertakings given by Mr Daly and incorporated in the second and third orders. I am satisfied, to the criminal standard so

as to be sure, that Mr Daly deliberately acted in breach of the first order, as alleged in paragraphs 34 and 35 of the particulars of contempt or, depending on the timing of the deletion of the JBB email account, in breach of the undertakings given and incorporated in the second order. I so find.

68. I am satisfied that the Defendant acted in breach of the first order in the respects identified in schedule C to the draft order for committal at paragraphs 1 through to 5. In breach of paragraphs 7.2, 7.3 and 7.4 of the first order, Mr Daly failed, whether within 24 hours of service of the first order or at all, to notify the IT expert of the JB Brown email account and also the JB Brown Dropbox. He failed also to provide the IT expert with all and any details necessary to enable him effectively to access the JBB email account and Dropbox. As a necessary consequence, he failed to permit the IT expert to make and retain forensic images and/or copies of that email account and Dropbox.

69. In breach of paragraph 11 of the first order, he also falsely stated, in paragraph 8 of his first witness statement, that he had notified the expert of any electronic storage facility and email account in his control; and, in paragraph 1 of his first supplementary witness statement, that his first witness statement was intended to confirm his compliance with paragraphs 6, 7 and 9 of the first order. Depending on the date of the deletion, Mr Daly was also in breach, in the same respects, of the corresponding undertakings recorded in the second order.

70. I turn then to the family iPad. Mr Daly does not dispute that this was in his possession and control at the time of service of the first order. He does not dispute that he used the family iPad for ten days between the date on which he returned his company laptop, a few days after 16 March 2017, and his purchase of a new laptop. He does not dispute that an email of 18 March 2017 (at bundle 7, page 209) was sent using the family iPad to Bertrand Verkaeren and Frank Demeyere setting out his thoughts on their joint business venture, including in respect of light up balloons.

71. Mr Daly also does not dispute that the family iPad was not delivered up to the IT expert pursuant to the first order and that the access details were not given and, as a result, that the family iPad was not imaged. Mr Daly denies that he is in breach of the first order, or the corresponding undertaking incorporated into the second order, on grounds that the emails identified as having been sent from the family iPad were not schedule A documents within the meaning of the first order. His argument is that Mr Verkaeren and Mr Demeyere were acting in their personal capacities and that the express reference to Frank Demeyere in paragraph 2.4 of schedule A, on its true construction, meant "Frank Demeyere in his capacity as a representative of Goodmark Asia". The email of 18 March was not sent to Mr Demeyere in that capacity and was not, therefore, a schedule A document. I accept Miss Pennifer's submission that that construction of the first order and corresponding undertaking is wrong. Paragraph 2.4 of schedule A uses the term:

> "Frank Demeyere and/or Goodmark Asia Ltd."

72. It is not possible to read into that the words "Frank Demeyere in his capacity as a representative of Goodmark Asia". Mr Daly's suggested construction ignores the words "and/or Goodmark Asia Ltd" after the reference to Frank Demeyere. I am entirely satisfied, so as to be sure, and to the criminal standard, that the 18 March 2017 email was a schedule A document, with the consequence that the family iPad was an

electronic device within the meaning of the first order and the corresponding undertaking. That would be so even if Mr Daly had deliberately deleted any schedule A documents from it, given that the definition of electronic device expressly encompasses any such device on which any schedule A document "is or has been stored" in the possession, power or control of Mr Daly. It was clearly within Mr Daly's power to hand over the family iPad. He did not do so.

73. I am, therefore, satisfied, to the criminal standard, that in breach of paragraphs 7.1(1), 7.3(1), 7.4(1) and 7.4(2) of the first order, Mr Daly failed, whether within 24 hours of service of the first order or at all, to deliver up the iPad to the IT expert and, as a necessary consequence of that, to provide him with all and any details necessary to enable him to effectively access the iPad and, as a result again, failed to permit the IT expert to make and retain two forensic images and/or copies of the iPad. It also follows that, in breach of paragraph 11 of the first order, Mr Daly falsely stated, in paragraph 8 of his first witness statement, that he had delivered up to the IT expert any electronic device in his control, and, in paragraph 1 of his first supplementary witness statement, that for the avoidance of doubt, his first witness statement was intended to confirm his compliance with paragraphs 6, 7 and 9 of the first order.

74. So far as the failure to deliver up hard copy documents is concerned, Mr Daly accepts that he delivered up hard copy documents which were schedule A or schedule D documents within the meaning of the first and third orders only on 29 June 2018 and had not previously provided copies of them. I am satisfied to the criminal standard that such amounted to a breach of the first order in relation to the provision of copies and the undertakings recorded in the third order in relation to delivery up of the originals. It follows also that the statement in paragraph 6 of his first witness statement, that he did not have any other schedule A document other than a notebook, a copy of which was delivered up in hard copy form, in his possession, power or control and in paragraph 1 of his first supplementary witness statement, that his earlier witness statement was intended to confirm his compliance with paragraphs 6, 7 and 9 of the first order, was false.

75. I also find, to the criminal standard, that, in breach of the undertaking recorded in paragraph 6.11 of schedule A to the third order, the First Defendant failed to deliver up to the Claimant's solicitors the 29 June 2018 items by 16:00 on 16 August 2017 and, in breach of the undertaking recorded in paragraph 7 of schedule A to the third order, Mr Daly falsely stated, in paragraph 4 of his fifth witness statement, that he had complied with that paragraph.

76. So far as late compliance with the first order is concerned, Mr Daly accepts that he failed to deliver up the laptop and iPhone, which are both admitted to be electronic devices, until 17:52 on 14 June 2017, which is just over an hour and 20 minutes after the time when he should have done so at 16:30 on that day. He also failed to notify the IT expert of the admitted email accounts within 24 hours of service of the first order. He did not do so until a letter of 20 June 2017. I accept that, since that letter was copied to the IT expert, although it was addressed to the Claimant's solicitors at Pannone Corporate, that was a sufficient compliance with the Defendant's obligations. I do not accept Miss Pennifer's submission that Mr Daly did not comply until he sent a letter directly addressed to the expert on 23 June 2017. In my judgment, it was sufficient that the details were supplied in a letter sent to the Claimant's solicitors, but copied to the IT expert.

77. I find that Mr Daly failed to provide to the IT expert all and any details necessary to enable him to effectively access the admitted electronic devices or admitted email accounts within 24 hours of service of the first order. Apart from the BitLocker recovery key, he did not do so in respect of the admitted electronic devices until 17:41 on 14 June. In respect of the BitLocker key, he did not do so for the laptop at all. In respect of the admitted email accounts, he did not do so until 09:00 on 23 June 2017. In respect of the BitLocker key, I am not satisfied that Mr Daly knew that to be something that was required. He did not know that the way in which the expert would access the admitted electronic devices would engage the encryption provided by the BitLocker. He may have hoped that it might do so; but I am not satisfied that he knew for certain that this was required to give access and, therefore, I do not find a breach in that respect.

78. As a necessary consequence of the foregoing breaches, I find that Mr Daly failed to permit the IT expert to take and retain two forensic images of the admitted electronic devices and admitted email accounts within 24 hours of service of the first order. I find that Mr Daly failed to deliver up to the Claimant's solicitors a copy of the notebook within 24 hours of service of the first order and did not do so until 21:28 on 15 June 2017. I also find that, in breach of paragraph 11 of the first order, Mr Daly falsely stated, in paragraph 8 of his first witness statement, that he had notified the expert of any electronic storage facility and email account within his control, and that in paragraph 1 of his first supplementary witness statement, he stated that his first witness statement was intended to confirm his compliance with paragraphs 6, 7 and 9 of the first order.

79. Given the contents of Mr Daly's seventh witness statement, I am satisfied that the contempts alleged in relation to the false statements of truth are made out. Mr Daly signed statements of truth in the documents and at the paragraphs listed in schedule D to the draft order for committal without an honest belief in their truth, knowing, when he signed the statements of truth, that the documents contained information set out in those documents which was not true. I find all of the contempts identified in schedule D to the draft order established. Given the nature of the false statements, it is indisputable that Mr Daly must have intended to interfere with the administration of justice or, at the very least, known that such interference was a likely result of the false statements made. I am satisfied that all the contempts alleged by the second application are made out. Indeed, Mr Daly accepted that that was the case.

80. I turn then to the appropriate sentence. I have already identified the various points that Mr Daly has made by way of mitigation and I bear them firmly in mind. Miss Pennifer does not accept the evidence proffered by Mr Daly by way of mitigation. She does not accept that Mr Daly's acts in relation to the JBB email account, JBB Dropbox and the related false statements of truth are excusable as a single act of panic, followed by a cover-up of that act of panic, and then followed by a coming-clean when the Claimant discovered the existence of the JBB email account and Dropbox. She submits: First, that the decision to delete and suppress the JBB email account and Dropbox, - the latter of which Mr Daly believed he had effectively deleted by deleting the email account - was a calculated and cynical decision taken on unhurried reflection, not on the evening of 12 June 2017 when the first order was served, but days later, and after legal advice had been received.

81. Secondly, that the cover-up was sustained and deliberate, Mr Daly repeatedly and knowingly misleading the Court, the Claimant and, it would appear, his own legal

representatives in his witness evidence and statements of case served between 15 June 2017 and 27 September 2017. Miss Pennifer identified two witness statements in June 2017, one in July 2017, one in August 2017 and one in September 2017. She also made the point that amendments had been proposed to the Defence, none of which made any disclosure of the deletion of the JBB email account and Dropbox.

82. Thirdly, it is said that Mr Daly did not come clean on disclosure; neither the JBB emails nor the Dropbox documents appeared in his list as they should have done even if no longer in his possession or control, but only as snippets within highly unwieldy Excel spreadsheets which evidently went unnoticed by Mr Daly and his legal team.

83. Fourthly, when the Claimant finally discovered the existence of the JBB email account and Dropbox and raised the same with Ashtons by letter dated 17 April 2018, Mr Daly still did not come clean but continued to lie, professing, falsely, that the JBB email account had been set up by a third party and had been deleted before service of the first order, and he continued to prevaricate.

84. Fifthly, there was said to be no attempt to even approach coming clean until Mr Daly's seventh witness statement dated 6 July 2018, almost three months after the Claimant's solicitors had first written alleging contempt in relation to the JBB email account and Dropbox, and with the knowledge that the Claimant would be applying to commit him for contempt.

85. In short, Miss Pennifer submits that Mr Daly's contrition is not real or genuine. He is sorry only because he was caught red-handed and faces the prospect of imprisonment, but this is not conduct that can go to his credit, and only serves to aggravate his contempts. It is with regret that I find that those submissions are well-founded and are all established to the requisite standard of proof.

86. In considering the appropriate sentence for Mr Daly's established contempts of Court I have, following the guidance given by Marcus Smith J at paragraph 35 of *Universal Business Team Proprietary Limited v Moffitt* [2017] EWHC 3251 (Ch), to consider various factors. The first is whether the Claimant is prejudiced by virtue of the contempt or whether it is one that is capable of remedy. Mr Daly relies upon the fact that the contempts have already been remedied. However, Mr Vickerstaff identified various heads of prejudice in his first affidavit at paragraphs 55 to 58 and 126 to 130 and in his third affidavit at paragraphs 100 and 102 to 105. Those paragraphs also address the seriousness of the established contempts.

87. I am satisfied that the Claimant has been prejudiced by the lateness of the discovery of the existence of the JBB email account and the involvement of the Sunbay parties in the manner indicated by Miss Pennifer. I have also to consider the extent to which Mr Daly has acted under pressure. I accept Miss Pennifer's submission that the deletion of the JBB email account was not done under the immediate pressure of service of the Court order on 12 June. I am satisfied that Mr Daly made a calculated assessment of the benefits to be gained by suppressing his involvement with the Sunbay parties against the risks of discovery and decided that it was a risk worth taking. He then persisted in that over many months.

88. I am also satisfied that the breach was deliberate and intentional and was of a high degree of culpability. Mr Daly was not placed in breach by the reason of the conduct of anyone other than himself. I accept that Mr Daly appreciated the seriousness of

what he was doing at the time. He had already received the benefit of legal advice. He accepted that the deletion of the JBB email account had been motivated by a desire to keep his dealings with the Sunbay parties secret from the Claimant. Although Mr Daly has co-operated with the Claimant since, that is only because the Claimant had made the discovery of the JBB email account. I am satisfied that he would not have co-operated had the Claimant not made that discovery.

89. I am satisfied that Mr Daly has now admitted his contempt and has entered a guilty plea, but he has only done so in response to the threat of a committal application. I am satisfied that he has made a sincere apology for his contempt and that he is of previous good character. I accept the serious effect that committal to prison would have upon not only Mr Daly, but also his family. Miss Pennifer accepts that the breaches on which the present committal application is founded are not ongoing. Mr Daly cannot be said to have purged his contempt other than by making disclosure of what he has done, but the consequences of what he has done still continue to resonate, in that the full extent of his deletion may never come to light. I acknowledge that he has now accepted his responsibility. In that sense he has shown remorse, but the remorse is, in large part, motivated by his fear of being sent to prison. No reasonable excuse has been put forward for his actions.

90. Had the late delivery of documents and devices stood on their own, then it would not have been worthwhile pursuing this committal application. Certainly, they would have attracted no sentence other than a mild rebuke. But they cannot be viewed in isolation from the other contempts, notably the deletion of the JBB email account and the related Dropbox. That is a very serious matter. There is another matter which does not form the subject of any committal application, but I am satisfied has been adequately addressed in evidence. Mr Vickerstaff, in his third affidavit at paragraphs 58 to 64 and again at paragraph 96, raised the issue of the access to the Dropbox on 16 July this year.

91. I am satisfied that Mr Daly had adequate opportunity to consider the evidence on that, and his response to it; and I gave a further opportunity to Miss Pennifer to put the Claimant's case on that matter on the morning of the second day of the committal hearing. Indeed, Mr Daly, in his affidavit at paragraph 34, had made reference to correspondence concerning access to the Dropbox and, at paragraphs 53 to 57, had addressed allegations about the BitLocker recovery key. I am satisfied, so as to be sure, that the Dropbox was accessed on 16 July 2018 using the original laptop. The only person who could have done that would have been Mr Daly. He then deliberately changed the device name from the original laptop to his new Surface Pro device on 23 July 2018 in an attempt to conceal the fact that it was his original laptop that had been used to access the Dropbox.

92. It also follows that Mr Daly must have been able to decrypt the original laptop, a task which had defeated the IT experts. The fact that Mr Daly had been able to do so shows that he must have kept a note of the BitLocker recovery key. He has persistently maintained that he did not have access to that BitLocker recovery key and has had nothing to do with any of this. I am satisfied that he is responsible for those matters and that they have been made out to the criminal standard so that I am sure of Mr Daly's conduct in that regard.

93. That is not the subject of any committal application that is before me, but it is highly relevant to the way I must view Mr Daly's approach, both past, present and future, to

this litigation. It demonstrates Mr Daly's continued willingness to interfere with the process of this litigation. That must be reflected in the sentence that I impose on Mr Daly because it impacts upon the mitigation that he has put forward and leads me to reject his assertions that he was acting out of panic and was then too scared to own up to it until compelled to do so.

94. It gives me no satisfaction whatsoever, particularly given the effect that this will have upon Mr Daly's family, to sentence him to a term of imprisonment, but I feel that I have no option but to do so in the light of the seriousness of the contempts that have been established and their effect upon the administration of justice.

95. The "sentence" that I propose to impose is one of 6 months' imprisonment. I have considered whether, in justice to Mr Daly and his family, I could suspend that "sentence" but I do not consider, given the seriousness of the contempts, that I can do so. Therefore, it will be a "sentence" of 6 months' imprisonment. Reduced to days, as I understand I have to, that will be a period of 182 days. I appreciate that that will be hard for Mr Daly, but I can see no option in the present case. It seems to me that I should stay the proceedings against Mr Daly until a date 28 days after his release from custody. It is likely that Mr Daly will serve no more than 3 months and possibly less than that. The stay will be until 28 days after his release from custody.

96. So, the decision of this Court is that Mr Daly is committed to Her Majesty's Prison Manchester for a period of 182 days.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

The Transcription Agency, 24-28 High Street, Hythe, Kent, CT21 5AT
Tel: 01303 230038
Email: court@thetranscriptionagency.com