



Neutral Citation [2020] EWCH 1463 (Ch)

Claim No: BL-2019-001768

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

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

Date: 11 June 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) OCADO GROUP plc
(2) OCADO CENTRAL SERVICES LIMITED

Applicants

-and-

MR RAYMOND McKEEVE

Respondent

Mr David Cavender, QC and Mr Alexander Brown (instructed by **Mishcon de Reya LLP**)
for the Applicants

Mr Robert Weekes (instructed by **Foot Anstey LLP**) for the Respondent

Hearing date: 2 June 2020

Supplemental Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. On 6 December 2019, I heard an application by the Applicants, together “Ocado”, for permission to make a committal application in respect of a Mr McKeeve, pursuant to CPR Part 81.14. The application was, thus, for committal for interference with the due administration of justice, a criminal contempt.
2. At the end of February 2020, I circulated, in the usual course, a draft judgment, inviting a list of typographical corrections and other obvious errors in writing from the parties by 11:00am on 6 March 2020, with a view to handing down judgment shortly thereafter. The draft judgment set out my reasons for refusing Ocado’s application.
3. In addition to receiving lists of corrections and errors, I received a more substantive communication from Ocado, in the form of a letter from Counsel to me and a draft skeleton argument for the consequential hearing that would take place on the hand-down of judgment. The latter document was confined to setting out Ocado’s grounds for appeal. It is plain from this document that Ocado considered the draft judgment to be seriously in error. Paragraph 5 of the draft skeleton stated:

“In the above circumstances, there can be no doubt that both the *actus reus* and *mens rea* are satisfied in this case, and that permission for the committal application ought to have been granted. In Ocado’s respectful submissions, something has gone very wrong in the Judgment for permission to be refused.”

There then followed a detailed statement of Ocado’s six grounds of appeal, running to some 19 pages.

4. Applications for permission to appeal are – particularly in hard-fought applications such as this – commonplace, and the fact that the losing party identifies what are said to be errors, even serious errors, in the first instance judge’s judgment is not a reason to hold up the handing down of a judgment. Normally, the intended grounds of appeal are framed later on, after hand-down: the fact that Ocado had, during the process of correcting my judgment, vouchsafed me a preview of their proposed grounds of appeal would not have stopped me handing-down my judgment.
5. However, the covering letter that accompanied the draft skeleton argument made clear that this was not Ocado’s only point. Having referred to the intended application for permission to appeal, the letter went on:

“We are also obliged to inform your Lordship (in advance of making that application) that we believe that the draft Judgment fails to deal with a material part of [Ocado’s] case. As set out in paragraph 40.2.1.3 of the White Book 2019:

“Where, upon judgment being given, counsel believes that a judge has failed to deal with a material part of the case...it is their responsibility to point out the alleged defect to the judge so that the judge may deal with it.

...

In such circumstances, it is not appropriate for counsel to draw to the judge's attention to the alleged insufficiency by way of an application for permission to appeal ((n Re S (Children) [2007] EWCA Civ 6954...))”

...

As per the draft skeleton enclosed with this letter, Ocado's first intended ground of appeal is that your Lordship failed to deal with the first particular of contempt and therefore wrongly refused permission. Instead, Ocado's case in the draft Judgment is incorrectly treated as relying only on specific types of document within the 3CX system (i.e. particulars of contempt 3 and 4 only). Moreover, your Lordship failed to deal with the Email Accounts which formed part of Ocado's case. Further details of these intended grounds of appeal are provided in the enclosed skeleton argument.

It is Ocado's position that if your Lordship had considered the first particular of contempt then your Lordship would have almost certainly concluded that Ocado had made at least a *prima facie* case of contempt and granted permission. In the premises, we write to your Lordship now – prior to applying for permission to appeal – in case your Lordship wishes to issue a revised and/or Supplemental Judgment in light of the points set out in the enclosed skeleton argument.”

6. This practice – which I shall refer to as the “*Re S* jurisdiction” – is a well-established and sensible one. Given the fact that complex cases may raise many points, where a judge inadvertently omits a point run before him or her by one of the parties, it is far better for the point to be dealt with initially at first instance, rather than for the Court of Appeal to be forced to “fill in the gaps” or perhaps even have to remit for further consideration by the judge at first instance.
7. This was an unusual instance of the operation of the *Re S* jurisdiction, because Ocado's points were not so much focussed on an omission from the draft judgment so much as a failure on my part to appreciate the essence of Ocado's submissions, resulting in what might (if Ocado was right) be said to amount to an omission.
8. Mr McKeeve, I should point out, submitted that I had correctly understood and dealt with Ocado's arguments in the draft judgment, and that I should hand down the draft judgment without more, making only the typographical and other minor corrections identified by the parties.
9. Given the controversial nature of the exercise of the *Re S* jurisdiction in this case, I could not “correct” the omission identified by Ocado without further submissions from the parties. That, in itself, strongly suggested that I should accede to Mr McKeeve's submissions and simply hand-down judgment without more. The purpose of the *Re S* jurisdiction is to enable the judge to make quick, albeit substantive, changes, in order to fill an obvious omission, and so spare the time of the appeal courts.
10. On the other hand, a failure at least to consider Ocado's points would present the Court of Appeal – were permission to appeal to be granted – with a situation where Ocado would be contending that the judgment failed to grapple with what Ocado regarded as a fundamental or critical part of its argument, despite Ocado having pointed this out to me.
11. All things considered, given Ocado's specific and careful invocation of the *Re S* jurisdiction, it seemed to me necessary that I explore with the parties precisely what (if anything) I had missed in Ocado's argument and – in light of the responses from the

parties – consider whether the draft judgment needed to be revised. Through my clerk, I wrote in these terms to the parties, identifying what I understood to be the “three points that Ocado considers the draft judgment fails to address”. The letter concluded:

“The Judge does not consider that it would be appropriate to re-visit his draft judgment without a substantive answer to the points raised in this letter, and very much regrets the necessity of troubling the parties still further. The Judge is presently of the view that these points can be dealt with by way of sequential written submission (Ocado, McKeeve, Ocado in reply), but should the parties consider a further hearing to be necessary, that can be arranged.”

12. As informally directed in my letter, I received substantial sequential submissions from the parties. I refer to Ocado’s initial, post-draft, submissions (dated 8 April 2020) as the “Ocado Submissions”; I refer to Mr McKeeve’s submissions in response (dated 22 April 2020), as the “McKeeve Submissions”; and I refer to Ocado’s reply submissions (dated 6 May 2020) as the “Ocado Reply Submissions”.
13. In both the Ocado Submissions and the Ocado Reply Submissions, Ocado stressed the importance of a further hearing, and – given that – such a hearing was arranged and took place remotely on 2 June 2020. Given that the draft judgment remained embargoed, that hearing inevitably took place in private, by my order.
14. I should record my gratitude to all counsel for their careful submissions. Although I consider that this protracted, post-draft-judgment process was inevitable, given the points raised by Ocado, I should also record my sincere regret to Mr McKeeve for the delay in bringing this application to a close. It is he who has borne the burden of the uncertainty of this process.

B. APPROACH

15. Both parties agreed that whilst this process had commenced with Ocado triggering the *Re S* jurisdiction, I was entitled (in theory, at least) to revisit the substance of the draft judgment and (using my judgment) could entirely re-write it, if I considered appropriate.
16. On the other hand, the draft judgment was a considered (indeed, reserved) one, reached after a fully argued application at which both Ocado and Mr McKeeve were represented, and where there has been (whether since the hearing or since the draft judgment) no material change in circumstance. Thus, whilst I (strictly speaking) have the jurisdiction to re-visit the draft judgment, I should be careful in exercising that jurisdiction. In particular:
 - (1) I should not re-write the draft judgment unless satisfied that it is in the interests of justice to do so – the interests of justice including, to be clear, re-writing to correct what I might now perceive to be an error on my part.
 - (2) I should be astute to avoid this post-judgment process turning into a re-hearing. In particular, I should not permit Ocado – unless the point arose out of a correction I was minded to make to the draft judgment – to take points that Ocado had eschewed in December 2019. In other words, and purely by way of example, absent a material change to the draft judgment justifying this, I should not accede to an application now made by Ocado to adjourn the committal application, when such an adjournment was resisted by Ocado at the hearing in December 2019.

- (3) I should be astute to ensure that this process did not evolve into an appeal “by the back door”. In many cases where the *Re S* jurisdiction is exercised, the correction identified is uncontroversial and the judgment in question is corrected without more. This case is very different. As I have described, although Ocado raised in no uncertain terms the issue of a material part of its arguments not having been understood, and so, not dealt with in the judgment, Mr McKeeve was equally firm in contending that this was no more than an attempt by the losing party either to conduct an appeal by the back door or – still worse – to re-frame its argument to take new points which could have been taken, but were not, at the original hearing.
17. In order to understand the points made by Ocado, it is necessary to read and consider the draft judgment itself. A copy of that draft (as circulated to the parties at the end of February 2020) is appended hereto as Annex 1. From this point on in this supplemental judgment, it is taken as read. The terms and abbreviations in the draft are adopted for the purposes of this supplemental judgment.

C. BASIC PRINCIPLES

(1) Introduction

18. At the original hearing in December 2019, little was said about the basic rules that govern applications for committal of this nature. The exchanges since the draft judgment was circulated suggest that it is necessary that some of these briefly be articulated. Three, related, aspects need to be considered:
- (1) The specificity with which the grounds of contempt must be articulated by the applicant in the proceedings.
 - (2) Where – that is to say, in which particular documents – the grounds of contempt must be articulated.
 - (3) The extent to which, and the circumstances in which, the grounds of contempt can be amended.

I consider these three points in the following paragraphs.

(2) Specificity of the grounds of contempt

19. Committal proceedings are originated in various ways. This was a case of interference with the due administration of justice and so needed to be commenced (as it was) by way of a Part 8 claim under CPR Part 81.14. Had this been a case where the contempt alleged was the breach of a court order, the process would have been laid down in CPR Part 81.10, and the process would have been commenced by way of an application under CPR Part 23.

20. The form of process should not affect the specificity with which the grounds of contempt are framed. In relation to applications under CPR Part 81.10, *Arlidge, Eady & Smith* says this:¹

“There must be a Part 23 notice in the proceedings in which the relevant order was made. It must set out in full the grounds on which the committal is sought and must identify separately and numerically each alleged “act of contempt” (which would obviously include an omission in the case of a mandatory order) and the date (if known). This accords with long standing practice based on the respondent’s entitlement to know exactly what the accusation is. Correspondingly, at the hearing, the applicant will generally be confined to the grounds and evidence notified. The requirement is generally strictly insisted upon; for example, in *Environment Agency v. Hughes*, where the notice of application to commit was said to be “woefully lacking in particularity” and the nature of the alleged breach “simply too vague”, so that the application to commit failed. More latitude was allowed in *Group Seven Ltd v. Allied Investment Group Ltd*. It was held by Hildyard J that although an application notice “did not adumbrate as clearly and comprehensively as it should all the grounds relied on by the Claimant...[the Defendant] and his advisers were aware of the allegations and arguments that they had to meet”. It was emphasised, however, that the circumstances were exceptional and his conclusions were “not to be taken as any dilution for the future of the rule that a committal application must give clear and fair notice of the breach alleged and the basis of the allegation; and ordinarily any defect cannot be cured by reference to the supporting affidavit, still less a subsequent skeleton argument.”

21. It would be entirely surprising were different rules to apply in the case of applications under CPR Part 81.14. As to this, *Arlidge, Eady & Smith* says this:²

“The requirements are contained in CPR 81.14. This falls under section III of Part 81. The form should include or be accompanied by a detailed statement of grounds and an affidavit setting out the facts and exhibiting all documents relied upon.”

22. It would, of course, be wrong to allow technicalities to obstruct the due process of justice. Technical rules exist for the protection of the respondent: but they should not be allowed to be abused. That is the clear signal sent by Hildyard J in *Group Seven Ltd v. Allied Investment Corporation Ltd*.³ In that case, Hildyard J articulated the general rule as follows:⁴

“It is obvious and clearly established that an application notice for committal must be particularised in clear terms sufficient to provide the respondent with full and reasonable notice of the conduct alleged to constitute contempt: see *Harmsworth v. Harmsworth*, [1987] 1 WLR 1676. I accept that that is so whether the contempt alleged is civil or criminal in nature, not least since both seek imprisonment as the ultimate sanction.”

¹ Londono (ed), *Arlidge, Eady & Smith on Contempt*, 5th ed (2017) (“*Arlidge, Eady & Smith*”) at [15-20] (emphasis added).

² *Arlidge, Eady & Smith* at [15-24].

³ [2013] EWHC 1509 (Ch).

⁴ At [38].

23. However, where the conduct alleged to constitute contempt is clear beyond peradventure – and specifically, is clear to the respondent – the respondent will not be permitted to evade the consequences of his or her conduct by relying on a technicality:⁵

“On balance I have concluded that, though the application notice did not adumbrate as clearly and comprehensively as it should have all the grounds relied upon by the claimant in support of its case that any dealing with the debt was, for the purposes of the freezing order, a dealing with one of Mr Sultana’s assets, Mr Sultana and his advisers were aware of the allegations and arguments that they had to meet. I would not in such circumstances consider that the argument should be ruled impermissible. But in reaching that conclusion I emphasise in this context also that I consider the case to be exceptional: my conclusion is not to be taken as any dilution for the future of the rule that a committal application must give clear and fair notice of the breach alleged and the basis of the allegation; and ordinarily any defect cannot be cured by reference to the supporting affidavit, still less a subsequent skeleton argument.”

24. Woolf LJ made the same point in *Harmsworth v. Harmsworth*:⁶

“What I would emphasise is that in proceedings for contempt the court should always have in mind the fact that the liberty of the subject is involved. However, it should not allow that fact to produce a result which unnecessarily makes a mockery of justice.”

25. If an applicant seeking the committal of a respondent falls short in terms of providing the respondent, in the application, with full and reasonable notice of the conduct alleged to constitute contempt, the application will be at risk. It may, of course, be that matters are so obvious that a deficiency in the application can be overlooked or remedied. But the risk of an application failing for lack of specificity is one that all applicants should strive to avoid.

26. In these circumstances, it is appropriate to emphasise, as Hildyard J did in *Group Seven*, that the essential rule is as stated in *Harmsworth v. Harmsworth*:⁷

“So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed, they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what would otherwise be a deficiency in the notice...the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. *A fortiori*, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant times and dates and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place.”

⁵ At [45].

⁶ [1987] 1 WLR 1676 at 1686.

⁷ [1987] 1 WLR 1676 at 1683 (*per* Nicholls LJ).

27. Woolf LJ said this, by way of qualification of the views expressed by Nicholls LJ (with which he agreed):⁸

“In an appropriate case it is possible to incorporate another document for the purpose of giving to a respondent particulars of what is alleged against him. This can, however, only be done if the notice, or in the case of the High Court the motion, still complies with the provisions of the relevant rules...”

(3) In what document must the grounds be articulated?

28. It is clear from the discussion in *Harmsworth* and *Group Seven* that an applicant commencing committal proceedings needs to have in mind two things:

- (1) First, the specificity of the grounds of contempt. The respondent must be told exactly what the accusation against him or her is, so as to enable him or her to meet the charge.
- (2) Secondly, there is the related question of where the statement of the grounds of contempt appears.

29. The importance of a respondent knowing precisely the allegations against him or her is self-evident. No less important is that a respondent be able to identify those allegations by reference to a specific document. *Harmsworth* stands for two propositions. The first – already considered in paragraphs 19 to 27 above – is that the person alleged to be in contempt must be given enough information to enable him or her to meet the charge. The second is that that information must appear in the documentation (in *Harmsworth*, the “notice”) originating the committal application. Here, this was the Part 8 claim form. Of course, especially where the particulars are long and complex, there may be a pleading appended to the claim form, setting out the case against the respondent with full particularity.

⁸ At 1686.

30. As *Harmsworth* clearly states, a respondent cannot be expected to trawl through a series of different documents in order to ascertain for him- or herself what the case against him or her actually is. It is not for the respondent to cobble together the grounds of contempt from multiple documents:
- (1) In the first place, this is intrinsically unfair: it is for the applicant to frame the grounds of committal, not the respondent to formulate the case against him or her. More to the point, there is great danger in the case against the respondent developing or changing as additional documents are exchanged. A respondent must be protected from having to respond to a “moving target”.
 - (2) In the second place, the very process of requiring the respondent to look beyond the “notice” of the case against him or her is liable to introduce uncertainties in terms of what the case against the respondent really is. For that very simple reason the courts insist that the case against the respondent be made in the document commencing the committal proceedings – whether that be a Part 23 application or a Part 8 claim – and not in other documents.
31. Of course, the exception in *Group Seven* applies here, also. A respondent will not be permitted to say that the process is flawed where (for example) some detail has been omitted from the originating notice, when the grounds of contempt are otherwise clear.

(4) Amendment

32. The importance of clearly articulated grounds of contempt in a single document is reinforced by CPR Part 81.28(1), which makes clear that the court may not, at the hearing of an application to commit, permit the applicant to rely on any grounds other than those set out in the claim form or application notice, as the case may be.
33. That does not, however, preclude amendment. *Arlidge, Eady & Smith* says this on the question of amendment:⁹

“...the general principle is that an applicant is not permitted to rely on grounds which have not been notified. Nevertheless the court may, at any stage, either of its own motion or upon the application of any party to the proceedings, order any document other than a judgment or order to be amended, unconditionally or upon terms. This power was formerly expressed to be for the purpose either of determining the real question in controversy between the parties or of correcting any defect or error in the proceedings, although now the rule is stated in broader terms, but clearly it would not lightly be exercised on an application for committal, particularly if any prejudice were likely to arise in relation to the person sought to be committed.”

34. So, amendments are permitted: but they must meet the same standards of clarity and specificity as would be expected of the originating documentation; and the respondent must not be prejudiced. In this context, proposed late amendments and proposed amendments that the respondent has not had a proper chance to consider will be problematic for the applicant seeking to amend.
35. Of course, the manner in which amendments are framed and presented to the court for permission to amend is very fact specific. The sort of factors that the court will take

⁹ *Arlidge, Eady & Smith* at [15-53].

into account will be their lateness; the reason for the amendments (in particular, whether the amendments could not, for whatever reason, be framed sooner); the prejudice to the other party or parties; and the extent to which the amendments represent a clear and final re-articulation of the case being advanced. Of course, the party seeking to amend must offer to pay the other parties' costs of and arising out of the amendments: but that may often not be sufficient to compensate those parties in a meaningful sense.¹⁰

36. For reasons that will become apparent, it is important to emphasise that amendments must be clearly formulated in advance of the application to amend. They cannot be “sprung” on a party – particularly the respondent in committal proceedings. In *Swain-Mason v. Mill & Reeve LLP (Practice Note)*, Lloyd LJ noted in relation to amendments that were poorly framed:¹¹

“Even apart from that, however, it seems to me that the judge was wrong to allow the pleading to go forward...both because it is not clear enough or full enough in itself to show the defendants what the case is that they have to meet, and because, though not appreciated at the time, it was equivocal and therefore embarrassing and unsatisfactory as to the case that was to be put forward.”

Clearly, this is right. Unless they are clear on their face, and appropriately specific in setting out the (reformulated) case against the alleged contemnor, amendments to the grounds of contempt should not be permitted, whatever the merits otherwise might be.

D. THE POINTS RAISED BY OCADO

37. In my letter of 23 March 2020, I sought to identify the points which Ocado considered the draft judgment had failed to address. In none of the later submissions was it suggested that this list was incomplete.¹² In substance, there were two points:
- (1) The first concerned the true meaning of ground 1 of the particulars of contempt.¹³ This is considered in Section E below.
 - (2) The second related to whether the grounds of contempt extended to the email accounts deleted by Mr Henery, or only to the 3CX app; and, if so, what the significance of this was.¹⁴ This is considered in Section F below.

¹⁰ *Worldwide Corporation Ltd v. GPT Ltd*, unreported decision ([1999] CA Transcript No 1406) of the Court of Appeal dated 2 December 1998, cited with approval in *Swain-Mason v. Mill & Reeve LLP (Practice Note)*, [2011] EWCA Civ 14 at [85].

¹¹ [2011] EWCA Civ 14 at [85].

¹² See, in particular, paragraphs 1 and 2 of the Ocado Submissions.

¹³ This is point (3) in my letter of 23 March 2020.

¹⁴ Points (1) and (2) in my letter of 23 March 2020. For the purposes of this supplemental judgment, I deal with both points together.

E. THE MEANING OF GROUND 1 OF THE PARTICULARS OF CONTEMPT

(1) Introduction

38. In this case, on the face of it, the underlying facts on which the grounds of contempt are founded appear to be extremely simple:¹⁵ the Search Order is obtained; its existence, and some of its terms, are communicated to Mr McKeeve over the telephone; Mr McKeeve shortly thereafter procures the deletion of the 3CX app and its contents by Mr Henery.
39. The particulars of contempt are similarly extremely simple and short. They are quoted in paragraph 11 of the draft judgment, and I do not repeat them here. As is plain from paragraph 8 of the draft judgment, my view – at the time of the December hearing and when I wrote the draft judgment – was that the essence of the contempt alleged against Mr McKeeve was that he (Mr McKeeve) had interfered with the due administration of justice by interfering with the proper operation of the Search Order. The only reason, as it appeared to me, that Mr McKeeve had not been proceeded against pursuant to CPR Part 81.10 was because the Search Order was not addressed to him. Ocado had, presumably, taken the view that it could not be said that Mr McKeeve had himself breached the Search Order.¹⁶
40. Whilst this appears to be a correct understanding of grounds 3 and 4 of the particulars of contempt, in the aftermath of the draft judgment, Ocado suggested that this was a complete misunderstanding of ground 1. (Since ground 2 was abandoned by Ocado, I need say little about it: but, as will be seen, it is relevant to an understanding of ground 1.) It is necessary to consider with some care the case Ocado says it was making.

(2) Ocado's approach in relation to the grounds of committal

41. The best starting point are the Ocado Submissions made in response to my letter of 23 March 2020, in which I suggested that ground 1 might have lacked clarity. Ocado did not accept that suggestion,¹⁷ and went on to explain the position as follows:
- “91. As set out above, Ground 1 is clear. The complaint against Mr McKeeve is that he deleted documents of relevance to Ocado's claim against Mr Faiman, [Today] and Mr Hillary.
92. It cannot be suggested that Ocado could and should have provided particulars of the documents deleted on Mr McKeeve's instruction. As a result of Mr Henery irretrievably deleting the 3CX system on Mr McKeeve's instructions, Ocado does not know the precise documents that were deleted and has been prevented by Mr McKeeve's actions from providing a particularised list of documents in the grounds of contempt.
93. Indeed, if Ocado had included detailed particulars alleging the deletion of particular sorts of documents then it is inevitable that Mr McKeeve would have argued that Ocado could not satisfy the *prima facie* case threshold in respect of such particulars as

¹⁵ They are set out in paragraphs 1 to 5 of the draft judgment.

¹⁶ See paragraph 8 of the draft judgment.

¹⁷ Ocado Submissions at paragraph 90.

it is unable to prove the precise documents which were deleted. In this context, Ocado notes that the Draft Judgment at paragraphs 24 and 26 appears to adopt this reasoning in finding that there is no *prima facie* case in respect of Grounds 3 and 4 as they involve “*very specific averments*” regarding “*material of a specific sort*” (paragraphs 24 and 26 of the Draft Judgment).

94. In other words, Ocado was conscious that the grounds of contempt could not be too specific as they would be met by a defence that Ocado is unable to prove the specific documents that were deleted on Mr McKeeve’s instructions.
95. The Draft Judgment proposed at paragraph 31(2) that Ocado could have included a ground of contempt that Mr McKeeve had deleted electronic material covered by the Search Order, and that on this basis “*it does not matter what the nature of the data was: whatever its nature it was subject to and protected by the Search Order.*”
96. However, this proposed ground of contempt would have been too general, as it would have included the deletion of entirely irrelevant documentation (e.g. a spam email folder or a folder containing schoolwork carried out by one of Mr McKeeve’s children) which had absolutely nothing to do with Ocado or this dispute. The deletion of such material would not have a significant and adverse effect on the administration of justice, which is one of the requirements for this type of contempt (see paragraph 18(2) of the Draft Judgment). Indeed, this point is common ground between Ocado and Mr McKeeve. In short, in order to have an adverse effect on the administration of justice, Mr McKeeve must have deleted something of relevance to Ocado’s claim. In any event, even if the learned Judge’s proposed alternative Ground might potentially have been a ground of contempt that Ocado could have pursued, that is not a reason for refusing permission on Ground 1.
97. The grounds of contempt need to capture the actual complaint that Ocado has against Mr McKeeve i.e. the deletion of material relevant to the claim – whilst avoiding being too specific or too general. The actual complaint against Mr McKeeve is that he deleted material of relevance to the claim and that is why Ground 1 has been formulated as it has:
- a. Ground 1 is not too specific. It does not allege the deletion of specific documents, which Ocado may be unable to prove.
 - b. Ground 1 is not too general. It does not include irrelevant material, the deletion of which would not have a significant adverse effect on the administration of justice.
98. In Ocado’s submission, Ground 1 meets the goldilocks test of being neither too specific nor too general. It captures the complaint against Mr McKeeve using clear and concise language that Mr McKeeve could understand.”
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.¹⁸ We do not know what those materials said; and we will never know. As a result, it is not possible to use

¹⁸ See paragraph 5 of the draft judgment. This is the key distinction between the 3CX app – which, with all messages, is irretrievably gone – and the email accounts (considered further below) which have been recovered, but where the emails are under review in the Underlying Claim. Although these emails are being reviewed, none were available to Ocado at the time of the application.

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.
44. One of Ocado's responses to this point was that it would be absurd were the very success of Mr McKeeve in irretrievably deleting material to render his committal for contempt of court impossible. That would be tantamount to letting Mr McKeeve “get away” with it and would – so Ocado suggested – be (quoting Woolf LJ¹⁹) to make “a mockery of justice”. I return to this point below. It is important to note that I sought to explore the difficulties arising out of the deletion of the 3CX app to Ocado at the December hearing. This is referred to in paragraph 31(2) of the draft judgment.
45. It is fair to say that had Ocado indicated a desire to go down this route, it would have been necessary for Ocado to frame its new grounds and to seek permission to amend. Inevitably, that would have required an adjournment, at Ocado's cost. Certainly such an amendment could not be made “on the hoof” and Mr Weekes, on behalf of Mr McKeeve, made very clear that he would have a great deal to say on Mr McKeeve's behalf were such an amendment to be moved. In the event, Ocado did not move an amendment along these lines, and stood by grounds 1, 3 and 4 as framed.²⁰ I considered the grounds of contempt on that basis.
46. Ocado's reasons for not going down the route articulated by me in paragraph 31(2) of the draft judgment were, I infer, fourfold:
 - (1) First, it would have entailed an adjournment, which Ocado wanted to avoid. At the December hearing, it was Mr McKeeve who suggested (as part of his case) various reasons why the application might be adjourned, were it not dismissed. Ocado resisted the efforts to adjourn.
 - (2) Secondly, as stated in paragraph 96 of Ocado's Submissions,²¹ the proposed ground of contempt would be “too general”. I find this objection difficult to understand. The point about search orders is that they preserve often widely defined classes of document (in particular as regards electronic documents, which tend to be “imaged” indiscriminately²² for later review) that are at risk of being

¹⁹ See paragraph 24 above.

²⁰ I will deal with Ocado's submission that it applied to amend the grounds in other respects further below.

²¹ Set out in paragraph 41 above.

²² I want to be clear that I am not using this word pejoratively. The fact is that when presented, e.g. with a computer hard-drive comprising megabytes of data, it is not possible to do a page-by-page review. The best that

destroyed, so as to enable their later review on grounds of relevance.²³ If documents preserved by the order are destroyed, then the purpose of the search order is thwarted, even if those documents proved or might have proved – on subsequent inspection and review – to be entirely irrelevant. The due administration of justice is interfered with by the failure to enable the search order to operate as intended.

- (3) Thirdly, and this point was only articulated by Ocado orally at the hearing before me on 2 June 2020, Ocado appears to have considered the fact that the Search Order was not in standard form to have been fatal to a ground formulated along the lines described in paragraph 31(2) of the draft judgment. As to this:
- (a) The standard form for search orders deals rather ineptly with the modern way of searching electronic documents, in that it postulates a “page-by-page” search of electronic documents at the premises of the search order target, rather than recognising that, these days, the practice is for there to be a wholesale “imaging” of electronically stored documents, with provision for subsequent review and disclosure.²⁴
 - (b) The Search Order – entirely appropriately – did not follow the standard form. The relevant provisions are set out in paragraph 6 of the draft judgment. The Search Order provides for (i) entry to the Premises, (ii) access to physical and electronic documents (broadly defined and without reference to the relevance of such documents to the Underlying Claim), with (iii) search and inspection of this documentation occurring thereafter.
 - (c) Mr Cavender suggested that the fact that the Search Order was in non-standard terms rendered Mr McKeeve’s conduct in causing the 3CX app to be deleted not a contempt when, had the Search Order been in standard terms, the contempt could have been established:²⁵

“Now, the difficulty of what we put to my Lordship is, and this is something Mr Weekes actually said and we’ll go to in a moment, is that the search order this case, particularly the paragraph 21 of it your Lordship referred to previously which deals with the preservation of documents, whether listed items not, is not in the standard form. Nor is the definition of “electronic data storage devices”, they are both bespoke. So when you come to what Mr McKeeve must or ought reasonably to have known when served with that order, he can’t reasonably be taken to have known – this is Mr Weekes’ case and I agree with it – of those two items. The most he can be taken to know of is the standard form attached to CPR 25. Now, that has none of this imaging, none of this imaging of everything, whether listed or not. What it has is a provision at paragraph 17 that they have access to the computers on the premises in order to print out and copy listed

can be done is to “image” the data, and then (usually after careful discussion with IT experts and the other parties, as well as the court) evolve a process for searching this data.

²³ See *A v. B and Hewlett Packard Enterprise Company v. Manchester Technology Data (Holdings) Ltd*, [2019] EWHC 2089 (Ch) and *TBD (Owen Holland) Ltd v. Simons*, [2020] EWHC 30 (Ch).

²⁴ The difficulties with the standard form are considered in *TBD (Owen Holland) Ltd v. Simons*, [2020] EWHC 30 (Ch).

²⁵ Transcript for 2 June 2020 at pp.11-12.

items, the “Listed Items” being a term in the standard form and, as you recall, also being the third charge in this complaint.

So when you stand back and say, when served with this order, what did Mr McKeeve know more about in order to narrow the focus and in order to make his behaviour adverse to the administration of justice? In terms of the order in paragraph 21 and the definition “electronic storage devices”, this is a solicitor, albeit experienced but someone who is a commercial solicitor, is it fair and reasonable to impugn, to say this reaches the threshold and base a charge on that knowledge, or on the facts of this case as we set out in huge detail in our submissions, did he know much more about the claim? It’s because he knew the claim was coming, that’s the reason, and he knew a search order, this vehicle he knows something generally about, was in the offing, it’s the combination of those two that makes his behaviour both an adverse effect on the administration of justice and meet the relevant threshold so to do. Otherwise one would be saying that Mr McKeeve ought to have known about clause 21, not listed items but imaging everything. That is a struggle.”

I have some doubt as to whether the non-standard nature of the Search Order makes very much difference in this case. As will be described, Mr McKeeve actually knew very little about the precise terms of the Search Order when he gave the instruction to delete the 3CX app. He did not, for instance, know the nature of the “Listed Items”, and could not have known this because this was (unsurprisingly) a bespoke part of the order – and would have been so even if the order had otherwise been couched in standard terms. The fact is that properly framed grounds of contempt would have had to have addressed the fact that Mr McKeeve ordered the deletion of the 3CX app knowing of the Search Order, but not very much about its precise terms.

- (4) Fourthly, it was Ocado’s position that these difficulties were fully addressed by ground 1 as framed.
47. Ocado’s position was that ground 1 as framed represented a *tertium quid* between an allegation that Mr McKeeve caused specific documents to be deleted – which Ocado “may be unable to prove”²⁶ – and an allegation that Mr McKeeve deleted documents of an unspecified relevance – which Ocado considered to be an allegation both too wide and too divorced from the due administration of justice.²⁷ As to this:
- (1) For the reasons I have given, I do not understand Ocado’s issues regarding the deletion of irrelevant material, provided the deleted material was subject to the Search Order. However, it is not for me to frame the grounds of contempt, but to act as gatekeeper in relation to them.
- (2) I entirely understand, and sympathise with, the difficulties Ocado identifies in regard to any allegations depending upon the nature of specific documents irretrievably deleted. Indeed, this is substantially the reason on which I declined the application in relation to grounds 3 and 4. There are two problems with grounds 3 and 4:

²⁶ See paragraph 97(a) of Ocado’s Submissions.

²⁷ See paragraph 97(b) of Ocado’s Submissions.

- (a) First, as I noted in paragraphs 25 and 26 of the draft judgment, it is not possible to say what documents were destroyed in the deletion of the 3CX app. It is therefore not possible to say whether they fell within the scope of the “Listed Materials” defined in Schedule C of the Search Order. (I should say that Ocado’s repeated assertion that the 3CX app was itself a document within Schedule C cannot without more be right: it would only be right if a message or messages on the app fell within the scope of Schedule C.²⁸)
- (b) Secondly, and this is a point that should have been made in the draft judgment, but was not, Mr McKeeve had actually quite limited knowledge of the Search Order:

- (i) He was telephoned by Mr Faiman and Mr de Jongh (the supervising solicitor) and informed of the existence of the Search Order on 4 July 2019. It is important to understand what he was told and not told. Paragraph 15 of Mr McKeeve’s first witness statement states:

“At paragraph 9 of my Affidavit, I set out details of my telephone call on the morning of 4 July 2019 during which I had conversations with Mr Faiman and Alex de Jongh (the Supervising Solicitor engaged in connection with the search order obtained by the Claimants in the Underlying Claim). In addition to that evidence, I would also add as follows:

- a. Like Mr de Jongh..., I did not take a verbatim note of that call. However, I recall that my conversation with him was very brief (lasting no more than one or two minutes).
- b. As far as I can remember, Mr de Jongh told me about the existence of the search order but otherwise did not provide me with any detail about its contents or terms (I see from his note that Mr de Jongh records the fact that he informed me about the prohibition on Mr Faiman discussing the search order with anyone other than his lawyers; this may be true but I simply do not recall his telling me that). I also agree with Mr de Jongh’s note to the effect that he did not specifically draw to my attention paragraphs 33 or 34 of the search order (dealing with the prohibition on the destruction and the use respectively of confidential information belonging to the Claimants). I do, however, specifically recall (as recorded at paragraph 9 of my Affidavit) being told that Mr Faiman had two hours to take advice. I remember this as I was deeply concerned about how feasible that was given: (i) the morning traffic, and the time it would take to get to the Connaught Hotel as a result; and (ii) that I had to deal with the Waitrose team, who were waiting upstairs in my firm’s offices for the planned meeting which I had described at the beginning of paragraph 9 of my Affidavit...

²⁸ A point made by Mr McKeeve in his first witness statement at paragraph 14.

- c. Similarly, I do not recall Mr de Jongh providing me with any detail about the nature of the Underlying Claim (and there is nothing in his note to suggest that he did). All that I knew as a result of that call was that some sort of court claim was underway; I was certainly not aware at that stage of the specific allegations that were being made by the Claimants and had no idea, therefore, about the potential issues in dispute.
 - d. During my conversations with Mr de Jongh and Mr Faiman on that telephone call, I was told (I do not recall by whom) that mobile phones and other devices were being taken. It was this information that triggered my concerns about protecting my wife's name...
 - e. I was never instructed by Mr Faiman (or anyone else) – either on that call or previously – to take any steps with a view to deleting the 3CX system.”
- (ii) In essential terms, what Mr McKeeve was told about the Search Order is confirmed by Mr de Jongh:²⁹

“I estimate that I spoke to Mr McKeeve for around a minute and a half. I did not take a verbatim note of the discussion.

I recall that I introduced myself to Mr McKeeve, telling him my name and the name of my firm. I told him that I was an independent supervising solicitor, and that I had just served a search order on Mr Faiman. I told him that the order had been obtained by Mishcon de Reya acting on behalf of two Ocado companies, against Mr Faiman, Project Today Holdings Ltd and Mr Hillary.

I told Mr McKeeve that the order prohibited Mr Faiman from discussing the proceedings or the contents of the order with any third party, except for the purpose of obtaining legal advice. I recall that in reply to this, Mr McKeeve said something to the effect that he would need to see what the order said (I do not recall the precise words he used). I said to him that I would put him in contact with the relevant individuals at Mishcon de Reya by email, so that he could obtain from them a copy of the order and related documents, and I took a note of his email address. As far as I can recall, I did not specifically draw Mr McKeeve's attention to the prohibited acts at paragraphs 33 or 34 of the Order.

I then passed Mr Faiman's phone back to him and he continued the conversation with Mr McKeeve...”

Thus, it does not appear to be possible to say that Mr McKeeve knew – at the time he ordered the deletion of the 3CX app – what constituted “Listed Items” within Schedule C of the Search Order. He also will (on the face of it) not have been able to deduce what might be Listed Items from his understanding of the Underlying Claim.

²⁹ As recorded in the note that he kept.

- (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.

(3) Difficulties in framing the grounds of contempt

48. These problems appear to me to arise in relation to any allegation that specific documents were intended to be destroyed by Mr McKeeve. I do not say – it is not for me – that these difficulties are insuperable. However, it seems to me that any properly framed ground of contempt must address them. Any such allegation would have to make clear, so that Mr McKeeve could defend himself:

- (1) The basis upon which it was contended that the material ordered destroyed by Mr McKeeve (specifically, the 3CX app) comprised “Listed Items” within the meaning of the Search Order.
- (2) The basis upon which it was contended that Mr McKeeve knew that the material which he had ordered destroyed fell within the scope of “Listed Items” within the meaning of the Search Order.

49. At the hearing in December 2019, and as set out in the draft judgment, it seemed to me that the first of these two points prevented not only grounds 3 and 4, but also ground 1, from meeting the requisite standard for permission under CPR Part 81.14. To that, I can now add the second of these two points, which (in light of the submissions which I have heard since the draft judgment was circulated) strikes me as having equal force. Ocado contended that ground 1 sidestepped these difficulties by focussing on documents relevant not to the Search Order but to the Underlying Claim, combined with Mr McKeeve’s knowledge not of the Search Order but of the Underlying Claim.

(4) Misunderstanding of ground 1

(i) *Points of misunderstanding*

50. As is clear from the foregoing and from the draft judgment, I broadly equated ground 1 with grounds 3 and 4. According to Ocado, this was a twofold misunderstanding of ground 1. Specifically:

- (1) First, it was an error to regard the reference to “documentary material which is of relevance to the claim” in ground 1 as being a reference to the “Listed Items” in Schedule C of the Search Order.
- (2) Secondly, it was an error to have regard only to the limited information that was provided to Mr McKeeve on 4 July 2019 in the telephone call he had with Mr Faiman and Mr de Jongh. Mr McKeeve’s knowledge was far more extensive than this.

51. It is necessary to deal with these two points in turn.

(ii) “documentary material which is of relevance to the claim”

52. According to Ocado, the reference in ground 1 to “documentary material which is of relevance to the claim” is not a reference to “Listed Items” in Schedule C of the Search Order. As Ocado stressed in the Ocado Submissions, the words are intended to bear “their ordinary and natural meaning, i.e. material which relates to some matter in the claim by Ocado against Mr Faiman, [Today] and Mr Hillary”.³⁰
53. There is, of course, some ambiguity in what “claim” means: whether it refers to the claim as pleaded or whether it bears a wider meaning so as to extend to any cause of action Ocado might have against Mr Faiman, Today and Mr Hillary.
54. It would appear from paragraph 19 of the Ocado Submissions that the latter is the case:
“...Ocado’s claim against these persons existed as soon as the relevant facts took place. The claim was not (and is not) dependent upon the issuing of a claim form, or service of a statement of case, or any other formal legal step.”
55. It goes without saying that this construction of the meaning of “documentary material” is extremely wide. It embraces documents that are “of relevance to” a claim that might be entirely unformulated, provided only it could be formulated at some point in time.
56. Whilst it is true to say that, at the December 2019 hearing, I did not understand ground 1 to be capable of extending to the destruction of documentary material “of relevance” to whatever claim Ocado might be able to formulate against Mr Faiman, Today and Mr Hillary, the real question is whether the manner in which ground 1 was framed brought home to Mr McKeeve what the accusation against him was, so as to enable him to meet the charge. As to this:
- (1) It seems to me that this reading of ground 1 results in a ground of contempt that is so vague as to leave the respondent, Mr McKeeve, in complete doubt as to what material fell within ground 1. At the very least, it would be necessary for ground 1 to define the issues in the proceedings and how these issues rendered specific documents or classes of document “of relevance to the claim”.
 - (2) Moreover, it does seem to me that ground 1 needs to be much clearer in stating that the scope of the Search Order actually says nothing about the documents Mr McKeeve should not have caused the destruction of. In my judgment, reading the Part 8 claim as a whole, the better construction is that the contempts alleged are based upon a thwarting of the Search Order. The pleading in the Part 8 claim form that precedes the grounds of contempt is all about the Search Order. Yet it would appear that – at least for the purposes of ground 1 – the Search Order was no more than a trigger causing Mr McKeeve to order the destruction of documents not because they were responsive to the Search Order, but because they were relevant to the Underlying Claim. This became clear in the following exchange that I had with Mr Cavender, QC on 2 June 2020:³¹

³⁰ See paragraphs 15 to 26 of the Ocado Submissions.

³¹ Transcript for 2 June 2020 at pp.31-32.

Marcus Smith J What does trouble me is the point that really I think you're telling me – and it may be that this is the reason we are having this second hearing, effectively – I think you're telling me that Ocado's case is that the Search Order is actually really part of the background. It is simply the trigger that causes Mr McKeeve to destroy critical documents to the claim, relevant documents you say, but your thrust is that what the Search Order did effectively was act as the trigger to cause Mr McKeeve to destroy important documents. Is that right?

Mr Cavender, QC My Lord, yes, that's one way of articulating it, destroying documents that are relevant to the claim.

Marcus Smith J So if the trigger – let me try to follow this through, because it may be that this is why we had some ships passing in the night – if one had a trigger different to the Search Order, let's suppose, instead of getting a search order, Ocado simply said: we are commencing proceedings; and that fact had been communicated by Mr Faiman to Mr McKeeve, and Mr McKeeve had at that point deleted the email accounts and the 3CX platform, would we be in exactly the same position?

Mr Cavender, QC My Lord, yes, in my submission, that would also be a contempt because there would be proceedings on foot, a solicitor acting for one of the people that were involved or connected to those proceedings, albeit not a defendant, acts to destroy evidence. Now, the fact that the proceedings have commenced, so justice is engaged, and no solicitor who knows that is allowed to destroy relevant documents.

I do not wish to say that such a ground of contempt could not be framed as against Mr McKeeve. I only say that if this was the intent of ground 1, it has been framed with a hopeless lack of specificity as to the nature of the documents that Mr McKeeve should not have ordered the destruction of. Obviously, clarity is required in this regard – otherwise, it is impossible to determine whether Mr McKeeve intended the destruction of these documents. This is a point to which I shall revert.

- (3) If “claim” was intended to bear the wide meaning described in paragraph 54 above, it is very difficult to understand why Ocado elected to withdraw ground 2 in the course of the December 2019 hearing. It seems to me that the word “potential” in ground 2 is actually redundant, given the meaning that Ocado attaches to the word “claim”; and it is very difficult to understand how ground 1 can be tenable, when ground 2 is not. Save that the claim, in the case of ground 2, is against Mr McKeeve personally, whereas the claim in the case of ground 1 is against persons other than Mr McKeeve, there appears to be no material difference between ground 1 and ground 2.

(iii) *Mr McKeeve's knowledge and intention*

57. Simply causing the destruction of documentary material “of relevance” to a claim or potential claim is not enough to constitute a breach of ground 1. The destruction of this material must be “intentionally” brought about.
58. It is plain – and Ocado did not contend otherwise – that it is not sufficient to show the intentional destruction of any document. In this case, for example, it can readily be inferred that Mr McKeeve intended the destruction of the 3CX app. But that is insufficient: what must be shown is the intentional destruction of “documentary material which is of relevance to the claim...”.
59. This brings us back to the problem of what Mr McKeeve knew. As has been described, Mr McKeeve appears not to have known of the terms of the Search Order; neither did he know of the terms in which the Underlying Claim had been pleaded.
60. I do not understand Ocado to contend that Mr McKeeve had this knowledge; and, in any event, if that was Ocado’s case, it should have been pleaded.
61. The question, therefore, is how Ocado alleges Mr McKeeve’s intention to destroy relevant documentation arose. Ocado’s answer appeared in the Ocado Submissions:
- “27. The difficult question in this case is not whether or not Ocado had asserted a claim, but precisely what Mr McKeeve understood as at 4 July 2019 and in particular whether he knew that the documents destroyed on his instructions were of relevance to that claim:
- a. *If he did*, then he can be liable for contempt of court as alleged.
 - b. *If he did not*, then he cannot have acted intentionally so as to delete material of relevance to that claim, and so will not be liable for contempt of court as alleged.
28. It is for this reason that the third question set out below (How would Mr McKeeve have understood what was “*of relevance*”?) is the crucial one in this case. Ocado readily accepts that Mr McKeeve did not have a statement of case when he issued his deletion instruction, and so one cannot simply refer to such a document so as to identify a matter that Mr McKeeve knew about. Instead, one must carry out a painstaking analysis of Mr McKeeve’s knowledge and involvement in this matter so as to understand what he knew about Ocado’s claim when he issued the deletion instruction on 4 July 2019.”
62. I am not going to be drawn on whether this is or is not a “difficult question”. All that needs to be said is that if ground 1 seeks to establish an intention to destroy relevant documentation on the part of Mr McKeeve by reference to his knowledge of the claim prior to 4 July 2019 (the date on which he was informed of the Search Order) then particulars of this knowledge must be set out in the Part 8 claim itself. The Ocado Submissions set out a wealth of detail in regard to Mr McKeeve’s alleged knowledge;³²

³² Thus, paragraphs 42 to 53 of the Ocado Submissions set out Ocado’s position as regards Mr McKeeve knowledge prior to 4 July 2019; paragraphs 54 to 78 set out Ocado’s position as regards Mr McKeeve’s understanding on 4 July 2019; and paragraphs 79 to 89 state what can be inferred from Mr McKeeve’s subsequent conduct.

but for the reasons given in Section C above, this particularity is too late to sustain ground 1.

(iv) *Conclusion*

63. I am not going to seek to construe the true meaning of ground 1. I do not need to do so. The short answer to Ocado’s application for permission in relation to ground 1 is that if it relates (as I considered it did) to the documents protected by the Search Order, it fails for the reasons set out in the draft judgment. If, on the other hand, it bears the construction advanced by Ocado, then it falls so far short of what a properly framed ground of contempt should look like that it should not be permitted to proceed unless and until it is completely re-framed so as to deal with the *lacunae* that I have identified.

F. THE EMAIL ACCOUNTS

64. Although the email accounts were deleted by Mr Henery at about the same time as the 3CX app, the deleted accounts have been recovered and restored. However, due to the disclosure process on-going in the Underlying Claim, no emails were available to Ocado for review and so none could be produced before me at the December 2019 hearing. I understand that still to be the position.
65. Although, therefore, the ultimate position as regards the emails may end up as very different to the position in relation to the 3CX app, the significance of the email accounts for purposes of the draft judgment – and this supplemental judgment – is exactly the same. Mr McKeeve says that the content of the email accounts was entirely innocuous, and Ocado is not in a position to gainsay that statement.
66. Unlike the position with the 3CX app, that position might change. However, Ocado did not seek an adjournment for this purpose at the December 2019 hearing, and indeed opposed Mr McKeeve’s (alternative) argument for an adjournment.³³
67. Accordingly, it seems to me (i) that the reasoning in the draft judgment stands both in relation to the 3CX app and the emails; and (ii) all that I have said in this supplemental judgment regarding the grounds of contempt as they relate to the 3CX app applies also to the email accounts.
68. There are, however, some additional points that need to be stressed:

- (1) First, in paragraph 25(1) of the draft judgment, I stated:

“...Ocado have been able to reinstate the email accounts deleted by Mr Henery. However, Ocado did not take me to a single email supporting the assertions as to the content of the deleted material, and Libson 1 contains no such instance.”

Ocado (quite rightly) considered that there was an implication in these words that Ocado could have produced emails for my attention at the December 2019 hearing, but (deliberately) did not (no doubt because they did not support Ocado’s case). In my letter of 23 March 2020 I accepted that “my thinking could have been better put, and this will be corrected in a revised draft”. That was because

³³ Mr McKeeve’s primary position was that the application should be dismissed, as indeed it was.

Ocado did not have the emails to show me. However, my thinking – which was that “no positive weight in support of the particulars of contempt could be attached to the fact that the emails were deleted” – was not gainsaid by Ocado.

- (2) Secondly, although Mr McKeeve accepted that he directed the deletion of the 3CX app, he did not do so as regards the email accounts. As to this:
- (a) It was Mr McKeeve’s evidence that he was actually unaware of the email accounts on 4 July 2019.³⁴ He was not involved in their set up, nor was he able to access them.³⁵
 - (b) It was Mr McKeeve’s evidence that his instructions to Mr Henery related only to the 3CX app.³⁶
 - (c) The timing of the creation of the email accounts – the evening of the 3 July 2020 – reinforces and supports these two points.
 - (d) It was the evidence of Mr Henery that he acted on his own account in deleting the email accounts.³⁷

I do not say that these points render the grounds of contempt impossible to make. But it would be necessary to articulate Ocado’s case as to how Mr McKeeve intentionally directed the destruction of the email accounts.

- (3) Thirdly, whilst it does seem to me that the better construction of the Part 8 claim is that it extends only to the 3CX app, and not to the email accounts, this is precisely the sort of point that can be dealt with by way of an amendment for the sake of clarity. However, for the reasons given in my 23 March 2020 letter and above, the point makes little if no difference to the substance of the points made before me.

G. CONCLUSIONS

69. I conclude that the draft judgment deals in substance with the points that were properly before me in December 2019, and that the judgment ought (subject to the limited correction identified in paragraph 68(1) above, and to typographical and other minor corrections) to stand.
70. I do not think it is profitable to go into the question of whether I misunderstood the thrust of Ocado’s submissions in relation to ground 1 or not. The fact is that, had I understood Ocado to have been advancing the contentions that it unequivocally did argue after the circulation of the draft judgment, those arguments would (for the reasons I have given) have received very short shrift. It seems to me that Ocado’s contentions were built upon an extraordinarily flawed foundation. I consider that – if

³⁴ First affidavit of Mr McKeeve at paragraph 15.

³⁵ First affidavit of Mr Henery at paragraphs 18 and 20.

³⁶ First affidavit of Mr McKeeve at paragraph 11.

³⁷ First affidavit of Mr Henery at paragraphs 21-22. It was Mr Henery’s evidence that he deleted the accounts because of the communication from Mr McKeeve, in the sense that he inferred that this was what Mr McKeeve wanted, rather than because this is what the communication said in terms.

this was Ocado's case – there is no way Mr McKeeve could have understood the true nature of the contempt alleged against him, and would have had no real ability to defend himself properly. In short, it would have been entirely improper to allow ground 1 to proceed if this was its meaning.

71. It follows that the application must be dismissed. I have considered whether I should produce a synthesised (single) version of the draft judgment, expanded to include the points made in this supplemental judgment. I have concluded that I should not. Given the manner in which the submissions have developed before me – with, effectively, two rounds of submissions, and two hearings – I consider it better reflects the process that took place before me (and enables better understanding of that process) that I hand down two judgments (the draft judgment and this supplemental judgment) disposing of this application.
72. It remains for me to deal with three final points. First, the question of amendment:
- (1) During the course of the December 2019 hearing, Ocado informally invited me to amend the grounds of contempt so as to make clear that they extended to the email accounts.³⁸ As I have noted, this appears to me to be a minor point in the overall scheme of the difficulties the grounds of contempt face, and I did not hear from Mr McKeeve on the point. Without expressing a concluded view, it is likely that I would have permitted this amendment at the time had a formal application been made, on the basis that it made the grounds clearer, and did not prejudice Mr McKeeve. However, this amendment, if allowed, would have made no difference to the outcome.
 - (2) To the extent that this amendment is formally moved now, it is too late. It cannot and should not affect the outcome of the application, as stated in the draft judgment, namely that the application be dismissed. Any other conclusion would, effectively, amount to a re-argument of the application, which (given the conclusions I have reached in this supplemental judgment) should not be permitted.
 - (3) In the course of the Ocado Submissions, Ocado also invited me (if there were any confusion in relation to ground 1) to permit the amendment of ground 1 “so as to ensure that there is no lack of clarity”.³⁹ In the alternative, I was invited to suggest alternative wording, which Ocado could consider.⁴⁰ As to this:
 - (a) It is not for the judge to formulate the grounds of contempt. In applications for permission to proceed with a committal application, the judge acts as the “gatekeeper”, permitting only proper applications to proceed. In the course of testing grounds of contempt, and as a way of testing them, it may very well be that alternative ways of putting the case are mooted. But it is for the applicant to frame the grounds and – if they need amendment – to frame the terms of the amendment.

³⁸ See paragraphs 117 to 120 of the Ocado Submissions.

³⁹ See paragraph 104 of the Ocado Submissions.

⁴⁰ Footnote 62 of the Ocado Submissions.

- (b) There was no effort on the part of Ocado to formulate an amended ground 1 and – for the reasons given in this supplemental judgment – I consider that ground 1 would require a wholesale re-framing to make Ocado’s case clear. I say nothing about whether, that process having been gone through, the draft amended ground 1 would be arguable. Suffice it to say that it would warrant close scrutiny.
 - (c) Had there been a properly articulated amendment before the court in December 2019, I would, of course, have considered it. Fairness to Mr McKeeve would almost certainly have required an adjournment. It is far too late for Ocado to moot the possibility of an amendment now: that would be to re-argue the application. Had even a fully formulated amendment to ground 1 now been put forward by Ocado, I would not have entertained it.
73. Secondly, Ocado invited me, instead of dismissing this application, to adjourn it. I can see no point in doing so. It also seems to me that this, too, amounts to an attempt to re-argue the December 2019 application. For these reasons I decline to adjourn the application.
74. Thirdly, and finally, as I have noted, Ocado stressed that it would be a serious miscarriage of justice were Mr McKeeve to escape liability, and that the court’s (extremely important) search order jurisdiction would be undermined. I entirely accept that the search order jurisdiction is an important one, and that flouting of or improper interference with search orders is a serious matter, often triggering an application to commit. That is as it should be. But due process requires that the case against an alleged contemnor be clearly put, so that where there is a defence, it may be articulated. It is to wrongly pre-judge the outcome of a committal application to say that a failure to permit that application to proceed would “be a serious miscarriage of justice”.⁴¹

⁴¹ To quote from paragraph 104 of the Ocado Submissions.