Neutral Citation [2020] EWHC 1682 (Ch)

Case No: BL-2019-001593

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
4INTELLECTUAL PROPERTY LIST (ChD)

The Royal Courts of Justice
Rolls Building
Fetter Lane
London

Date: 26 June 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) CENTEK HOLDINGS LIMITED
(2) CENTEK TECHNOLOGIES LIMITED
(3) CENTEK LIMITED

Claimants

-and-

TRISTRAM GILES

Defendant

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Mr James St Ville (instructed by **Michelmores LLP**) for the Claimants
Mr Gerwyn Wise (instructed by **TV Edwards Solicitors**) for the Defendant

Hearing dates: 15, 16 and 26 June 2020

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Approved Judgment

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

Mr Justice Marcus Smith:

1. The Claimants in these proceedings – collectively, **Centek** – design, manufacture and supply devices called "centralisers" and "stop collars" for the oil and gas industry. The Defendant – Mr Giles – was employed by Centek from 4 March 2002 until 31 August 2019, most recently as Centek's Product Development Manager.

2. Mr Giles gave notice of leaving that position on 5 August 2019. Mr Giles left Centek in order to take up employment with a Malaysian enterprise, involving Farrah, Rafek,Shaiful and Saufi as well as two companies called Floxpax and Rapax.

3. On leaving Centrex, Mr Giles took very substantial amounts of confidential and proprietary material with him, which I shall refer to as the **Centek Material**. Centek, suspecting this, sought interim relief and commenced these proceedings. The interim relief sought by Centek was granted by Norris J in an order in these proceedings dated 30 August 2019 (the **Order**). By that order, Mr Giles was ordered not to use, access or distribute Centek Material (paragraph 2 of the Order), abide by specific restrictive covenants (paragraph 3 of the Order), disclose and preserve Centek Material and the "Devices" and "Accounts" on which it was kept (paragraphs 4 and 5(a)-(b) of the Order), preserve disclosable documents (paragraph 5(f) of the Order) and facilitate the imaging of such Devices and Accounts by "Independent Experts" (paragraph 6 of the Order).

4. Mr Giles purported to comply with the Order, and swore a number of affidavits in purported compliance. In particular, Mr Giles swore the following affidavits pursuant to the Order:

   (1) His first affidavit, sworn 5 September 2019 (**Giles 1**).

   (2) His second affidavit, sworn 6 September 2019 (**Giles 2**).

   (3) His third affidavit, sworn 17 September 2019 (**Giles 3**).

   (4) His fourth affidavit, sworn 23 September 2019 (**Giles 4**).

   (5) His fifth affidavit, sworn 2 October 2019 (**Giles 5**).

5. In fact, Mr Giles breached the Order in multiple regards, including in the swearing of affidavits that were false in material respects.

6. By an application dated 7 April 2020 made in these proceedings, Centex sought an order for the committal of Mr Giles. There are multiple individual contempts alleged under 6 broad heads, as follow:

(1) **Breach of pargraph 5(b) of the Order**	Paragraph 5(b) of the Order ordered Mr Giles to deliver up all copies of all material within his control that embodied Centek Material by 4:30pm on 16 September 2019	Mr Giles did not comply with paragraph 5(b) of the Order because he did not deliver up by 4:30pm on 16 September 2019
Contempt 1		(a) the "back_up_mayay" folder (the **Malay Back Up Folder**) referred to in

		paragraphs 25 to 36 of the affidavit of Danny Howett (**Howett**) and section 9.1 of the affidavit of Charlotte Bolton (**Bolton**), but instead deleted it on about 3 September 2019
Contempt 2		(b) the contents of his WhatsApp account (the **WhatsApp Account**), but instead deleted copies of it and provided the doctored copy of it at Exhibit CB1/17 referred to in sections 6.3, 9.2 and 9.3 of Bolton
(2) **Breach of paragraph 5(f) of the Order**	Paragraph 5(f) of the Order ordered Mr Giles to preserve relevant disclosable documents and/or documents relevant to this dispute	Mr Giles failed to preserve the required documents in accordance with paragraph 5(f) of the Order because he
Contempt 3		(a) deleted the Malay Back Up Folder on about 3 September 2019
Contempt 4		(b) deleted copies of the WhatsApp Account and prvoided the doctored copy of it at Exhibit CB1/17
Contempt 5		(c) gave instructions to a third party on about 1 September 2019 to delete his email account tris.giles@rapax.com.my (including by sending messages which included “So basically I need to wipe, without any trace, most or all of my emails…so there is no way whatsoever that a specialist company can retrieve” and “That’s why I need it gone!! Thanks for your help!”) with the result that access to it was prevented and/or it was deleted (the **Rapax Account**)
Contempt 6		(d) wiped and failed to preserve the contents of the HP Laptop referred to in paragraphs 58 to 64 of Howett and sections 6.5 and 9.4 of Bolton (the **HP Laptop**) on about 8 September 2019
Contempt 7		(e) failed to preserve the missing USB memory device referred to in paragraphs 59(3) to 64 of Howett and sections 6.5 and 9.4 of Bolton (the **Missing USB Device**) between 8 September and 2 October 2019

(3) **Breach of paragraph 4(b) of the Order**	Paragraph 4(b) of the Order ordered Mr Giles to disclose the name and address of everyone to whom he had disclosed, supplied or offered to supply Centek Material by providing a sworn witness statement detailing them by 4:30pm on 16 September 2019	Mr Giles failed to disclose the name and address of everyone to whom he had disclosed, supplied or offered to supply Centek Material by 4:30pm on 16 September 2919 in accordance with paragraph 4(b) of the Order because he did not do so in relation to
Contempt 8		(a) the lady identified as "Farrah" (an ex-Centek employee and current director of a Malaysian company "Flowpax" who worked on behalf of Rapax
Contempt 9		(b) the man identified as "Saufi" (an ex-employee of Centek's customer and distributor Halliburton, who worked on behalf of Rapax) to whom he had been supplying and offering to supply Centek Material from at least June to July 2019 as illustrated in the WhatsApp conversations in Exhibits AB1/2 and AB/3 to the second affidavit of Andrew Boulcott (**Boulcott**) and in other ways
(4) **Breach of paragraph 4(c) of the Order**	Paragraph 4(c) of the Order ordered Mr Giles to provide Centex with full details of every supply or offer to supply Centek Material by 4:30pm on 16 September 2019 and to provide copies of such material	Mr Giles failed to provide full details of every supply or offer to supply Centek Material by 4:30pm on 16 September 2019 or provide copies of such material in accordance with paragraph 4(c) of the Order, in that he did not do so in relation to
Contempt 10		(a) the content of the WhatsApp Account and his supply of Centek Material through it to Farrah, Saufi and the man identified as "Rafek" (who also worked on behalf of Rapax) but instead provided the doctored WhatsApp record at Exhibit CB1/17 to the Claimant
Contempt 11		(b) the Malay Back Up Folder
Contempt 12		(c) the documents obtained from the Malaysian Defendants identified in section 4 of Boulcott and sections 8 and 9.6 to 9.9 of Bolton
(5) **Breach of paragraph 3(a) of the Order**	Paragraph 3(a) of the Order ordered Mr Giles not to be engaged or concerned in a business in competition with Centrex's Restricted Business until the return	Mr Giles continued to assist Farrah, Saufi, Rafek, Shaiful, Rapax and/or Flopax with their centralizer business after the order was served on him on 31 August 2019 including by working

Contempt 13	date or 12 January 2020. On 10 October 2019, the Consent Order of Mr Justice Marcus Smith vacated the Return Date fixed for 7 October 2019 and varied paragraph 3 of the Order such that it remained in force until 12 January 2020	for Rapax remotely from 31 August 2019 on the basis that "the Malaysians" would pay him "as long as I'm still working" as set out in Exhibit DH1/19/3-4 to Howett and doing so after that including by modifying or dealing with a PowerPoint presentation called 'The_CHIEF (003)' at Exhibit AB3/8 to Bolton on about 3 November 2019 and assisting in the writing of and dealing with "The Memorandum of Understanding" between Oakenshield and Ezzytech at Exhibit AB3/9 on about 6 December 2019 B. False Affidavits
(6) **False evidence**		Mr Giles gave false evidence:
False evidence in Giles 3		(a) in Giles 3 in that
Contempt 14		(i) Centek Materials were not only supplied or offered to the people identified as "Rafek" and "Norman Mokhtar" (para 3)
Contempt 15		(ii) Centek Materials were not only forwarded to Rafek on the dates listed in paragraphs 4(a) to 4(i) (para 4)
Contempt 16		(iii) Rafek was not the only person who Mr Giles contacted regarding this and was not the only person Mr Giles sent the files to (para 7)
Contempt 17		(iv) Mr Giles had not delivered up all copies and all materials that embodied the Centek Material (para 10)
Contempt 18		(v) to the best of his knowledge Mr Giles had not done everything possible to comply with the Order (para 12)
False evidence in Giles 4		(b) in Giles 4 in that

Contempt 19		(i) he had not only disclosed Centek Material to Rafek (para 4)
Contempt 20		(ii) he had not taken all reasonable steps to recover possession of copies of the Centek Material supplied to third parties (para 9, 1st sentence)
Contempt 21		(iii) he had given Rapax or Flowpax Centek Material (para 9, 2nd sentence)
Contempt 22		(iv) he had not done everything possible to comply with the Order and knew that to be so (para 12)
False evidence in Giles 5		(c) in Giles 5 in that
Contempt 23		(i) it was not true that no Centek Material was transferred on to any type of device or passed on to any third party (para 8)
Contempt 24		(ii) he had not done everything he could to comply with the Order and Michelmores' requests (para 9)
		Those false statements interfered with the course of justice and were likely to interfere with the course of justice because they undermined the recovery, preservation and disclosure of the information and materials which the Order was intended to protect and Mr Giles had no honest belief in the truth of the statements set out above and knew of the likelihood that they would interfere with the course of justice

7. To his credit, Mr Giles has admitted all of these contempts. In his sixth affidavit (**Giles 6**), which was sworn on 26 May 2020, Mr Giles states at paragraph 2:

> "I accept the contempt as set out in [Centek's] Application Notice dated 7 April 2020. I apologise to the Court and Centek for breaching the Order of Mr Justice Norris dated 30 August 2020 and for giving false evidence in my third, fourth and fifth affidavits as set out in [Centek's] Application Notice dated 7 April 2020. Unfortunately, I am unable to purge the contempt for the reasons set out below…"

8. Thus, the application that came before me on 15 and 16 June 2020 was not concerned with the question of whether Mr Giles had committed the contempts alleged against him.

Through his counsel, Mr Wise, Mr Giles made clear – as he had done in his sixth affidavit – that he admitted all of the contempts alleged against him, and that I was only concerned with the question of the appropriate punishment and the question of mitigation. In this regard, Mr Giles relied on the content of Giles 6 and a further affidavit (**Giles 7**) sworn 2 June 2020.

9. Notwithstanding the admissions made by Mr Giles, I should say that I have considered closely the evidence against Mr Giles, as this has been adduced by Centek. I am satisfied, so that I am sure, that each of the contempts alleged has, indeed, been committed by Mr Giles and I am satisfied that it is appropriate to accept the admissions made by Mr Giles through his counsel.

10. In these circumstances, this Judgment is concerned with the question of the appropriate sentence for Mr Giles' admitted contempts. In the course of argument, I was referred to a number of authorities, most importantly *Financial Conduct Authority v. McKendrick*, [2019] EWCA Civ 524, which sets out (including by reference to other cases) the factors that should be taken into account.

11. I begin with the trite, but important, proposition that court orders are meant to be obeyed and that – when they are not – the rule of law is undermined. In this case – and this is implicit in the fact that I have accepted Mr Giles' admissions – the Order contained a clear penal notice; was clear and unequivocal in its terms; and was prospective in that both in its terms, and in terms of when it was served, it was capable of being complied with.

12. I am afraid that I cannot regard Mr Giles' multiple breaches of the Order as anything other than deliberate. In this regard, Mr Giles' evidence was that he "did read the Order, but I just did not realise how serious it was" (Giles 6 at paragraph 11). I am afraid I do not believe this evidence: as I have noted, the Order is clear in its terms, and the penal notice makes clear beyond doubt the importance of the Order and the seriousness of any breach of it.

13. The reality of the situation is that Mr Giles had left Centek and was looking to make his fortune in Malaysia. He admits as much in Giles 6, where he states at paragraph 11:

> "What was going round in my mind was that I could be about to lose my new position and the security and lifestyle I had hoped my family would get through my working in Malaysia."

That, I think, puts Mr Giles' dilemma very well. He had burnt his boats with Centek by extracting the Centek Material from the company, resigning, and committing to the Malaysian venture. When he was caught, there was no going back. The choice Mr Giles had was either to proceed with the Malaysian venture or to forgo the money he would thereby derive from it by complying with the order, in circumstances where there was no prospect of a return to Centek.

14. It is very clear from the contempts he has admitted that Mr Giles chose to carry on in Malaysia, and as an inevitable result he breached the Order in the respects he has now admitted. Those breaches occurred over time. By way of example, the Order is dated 30 August 2019, yet the false affidavits – which represent contempts 14 to 24 – were made between 17 September 2019 and 2 October 2019. Having (I am sure rightly) recognised that there was no way back to his old life at Centek, Mr Giles elected not to abandon

Malysia, but to pursue that venture. In so doing, he elected to breach the Order. He can only have done so deliberately. His conduct involved deception of a high order. Not only did Mr Giles lie in Giles 3, 4 and 5, he also quite deliberately failed to abide by the restrictive covenants he had been ordered to comply with and neither preserved nor disclosed the Centek Material he had taken.

15. The breach of any court order is serious; breach of one with a penal notice, to which the contempt jurisdiction attaches, particularly so. Here, Centek emphasised the extent to which Mr Giles' failure to comply with the Order had damaged Centek. Essentially, it was Centek's evidence that in the competitive market in which it (Centek) operated, Centek's business had been materially damaged by Mr Giles' conduct.

16. I do not consider that this is a factor that should augment the seriousness of Mr Giles' infringements. I have no reason to doubt Centek's evidence and – to be clear – Mr Giles did not seek to challenge this evidence: but it cannot be said, save in a generalised sense, that Mr Giles would have known precisely what harm would befall Centek in terms of lost business opportunities in Malysia. Of course, in general terms he would have appreciated that breaching the order in the manner he did had the potential of seriously damaging Centek.

17. But it seems to me that courts are to be presumed to make orders for good reason. Where such an order is breached, the harm lies in the material and deliberate breach of the order. The harm lies in the damage to the authority of the court and the rule of law. Thus, just as a defendant's evidence that a court order "did not matter" would, rightly, be discounted, so too ought a claimant's evidence that the order in this case was – by reason of facts specific to the claimant – particularly important. If I may take a hypothetical example: the destruction of documents protected by a search and preservation of evidence order would be no less egregious if it could be shown that the documents destroyed were in fact of minimal or no relevance.

18. I turn to Mr Giles' mitigation. There are, I consider, three aspects to this:

(1) First, there is the fact that Mr Giles has admitted all of the contempts alleged against him, and so has saved the time and expense that would have been involved in proving these. He has done so without qualification. Although it was clear some time before Giles 6 that Mr Giles was not going to dispute the allegations against him, it was really only in Giles 6 that that intention was clearly and unequivocally articulated. It follows that Mr Giles' admissions have come fairly late in the day. The Order, as I have described, was made on 30 August 2019, and Mr Giles' breaches of the Order took place over a considerable period of time thereafter. On the other hand, Giles 6 was sworn on 26 May 2020, some time after the application to commit was made on 7 April 2020. In short, whilst I accept that Mr Giles is entitled to a significant discount in his sentence by reason of his "guilty plea", I have to recognise that that plea came relatively late in the day, well-after the case against him had been articulated.

(2) Secondly, there is Mr Giles' apology for breaching the Order, which he made in person from the witness box and in Giles 6. Whilst I accept that Mr Giles <u>is</u> sorry, I am afraid that I regard his apology as amounting to no more than an acknowledgment that he has breached the Order and has been caught doing so, rather than as a genuine reflection of remore. I have considered the terms of Giles

6 very carefully, and listened most carefully to Mr Giles' evidence in the witness box. Even now, Mr Giles fails to acknowledge the true significance of his breach of the Order. By way of example, Mr Giles has yet to accept that his conduct in breaching the Order was done in furtherance of a scheme to use the Centek Material against Centek by benefiting Centek's competitors. There is no other way to regard Mr Giles' conduct, yet he maintained his denial that he was not assisting Centek's competitor. Thus, paragraph 12 of Giles 6 states:

> "I had worked for Centek for so many years and had a particular way of designing and using data and I did not want to start from scratch but use what I already knew. I never had any intentions of using the data against them and did not believe we would be in competition with them as my understanding was at the time they would not have been eligible for the VDP contracts as they are not a Malaysian company."

I am afraid I regard this as incredible. It is one thing to deploy abstract skills one has learned with one employer to the benefit of another, subsequent, employer. It is quite another to take the former employer's information, and use that information to further another's business. I consider that this essential failure on the part of Mr Giles to acknowledge the true nature of his conduct explains that regrettable lack of detail – amounting in some cases to serious omissions – in his account of his Malaysian dealings. I am afraid that Mr Giles has been neither full nor frank with the court in his evidence, and that is a factor that affects his plea in mitigation. I say this, fully recognising two factors that will have affected the drafting of Giles 6:

(a) First, Mr Giles was very frank that he so did not want to remind himself of his past conduct, that he simply could not bear to look at the detail of the documents that he had "in the back of his car". I can sympathise with this denial, but this does not obscure the partial nature of Mr Giles' mitigation.

(b) Secondly, although Mr Giles was, if I may say so, outstandingly well-served by his counsel, Mr Wise, and those instructing Mr Wise, there was an inequality of arms between the time and expense lavished on Centek's evidence (all of which was helpful) and the fact that the budget for legal assistance does not run to a similar attention to Mr Giles' evidence. I have no doubt that if money were no object, Giles 6 might have become (subject to Mr Giles' willingness) a more detailed account of his Malaysian misdoings.

Even recognising these two factors, I consider that there is a deliberate lack of frankness in Giles 6, which serves to undercut the apology and regret that Mr Giles seeks to convey.

(3) Thirdly, and finally, there is the more general mitigation that is contained in Giles 7. Giles 7 seeks to articulate the devastating effect that imprisonment would have on Mr Giles' family – his wife, his children, his mother, the community around him. I accept this evidence, and there is no doubt in my mind that it is genuine and true. I accept that Mr Giles is of good, unblemished character; I take account of his character references, which I accept; I take particular account of the evidence from his family, as to the suffering they are presently undergoing because of Mr Giles' conduct and to what would happen were Mr Giles to be imprisoned. Mr Giles is

not only an important emotional support for his family, he is also the only breadwinner. I also accept that these proceedings – from the date of the Order to date – have been remarkably unpleasant for Mr Giles and that he is suffering – including medically – as a result.

19. I turn then, to the sentence that is appropriate in all these circumstances. Given the inter-connected nature of the various contempts alleged against and admitted by Mr Giles, it is impossible to seek to allocate specific sentences for each contempt. Instead, I shall seek to arrive at a single sentence for all contempts. As to this:

(1) The nature of Mr Giles' contempts is such that the custody threshold is met. This was quite rightly recognised by Mr Wise on Mr Giles' behalf.

(2) I consider that the starting point for contempts of the gravity of Mr Giles must be 20 months imprisonment. That is towards the maximum of 24 months. Whilst I would not go so far as to say that this was the "very worst sort of contempt", it does not (in terms of the extent of Mr Giles' breaches, the significance of the Order, and Mr Giles' protracted and deliberate flouting of the rules) fall far short. Recognising, as I do, that my sentence must reflect the minimum necessary, 20 months seems to me the appropriate starting point. I note what the Court of Appeal said at [40] of *McKendrick*:

> "…because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

(3) Turning, then, to the question of mitigation, I consider that the first and third factors warrant a significant deduction in sentence, and I propose to reduce my 20 month starting point to a period of 14 months.

(4) In *McKendrick*, the Court of Appeal made clear that, in an appropriate case, it was important, when sentencing, to differentiate between the punitive/deterrent and coercive aspects of the sentence. This is undoubtedly the case here. I consider that, in this case, there are significant elements of both in play. The punitive/deterrent element of the 14-month period is 8 months; and the coercive element 6 months. There is a significant coercive element because – for the reasons I have articulated – I do not consider that Giles 6 comes anywhere near to purging Mr Giles' contempt, nor do I accept Mr Giles' assertion that his contempt cannot be purged. Of course, there are things done by Mr Giles that cannot be undone. But that makes Mr Giles' obligation – if he is to purge his contempt – to make a full and candid disclosure of his wrongdoing all the more important.

20. That brings me to the question of whether the sentence I am minded to impose can be suspended. Naturally, the effect of an unsuspended prison sentence on Mr Giles and his family has weighed heavily on me, but I do not consider – giving due weight to this effect – that I can appropriately suspend the sentence for the following reasons:

(1) The Order is an important one, and it is essential that breaches of such orders are properly butressed by sanctions that are and are seen to be appropriately serious.

(2) In this case, Mr Giles has not merely breached the Order, he has flouted it over a period of time and with a deliberation that, in my judgment, must be marked by an unsuspended sentence.

(3) Moreover, Mr Giles has had the opportunity of being very frank in seeking to purge his contempt. He has not availed himself of that opportunity, and I do not consider that suspending his sentence, on condition that he now be full and frank, is in any way appropriate. Rather, Mr Giles must serve his punishment and – if he does choose to purge his contempt in the manner I have suggested – the coercive element of my sentence (6 months) can be remitted.

21. Mr Giles is sentenced to 14 months imprisonment, unsuspended, and I order that Mr Giles be committed to prison for this period. Mr Giles will be entitled to unconditional release after serving half his sentence, by virtue of section 258 of the Criminal Justice Act 2003.