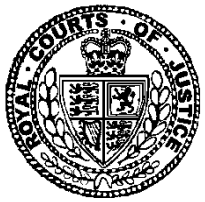

Neutral Citation [2020] EWHC 563 (Ch)

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: 18 December 2019

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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:

## A. THE FACTS

1. The Applicants, together "Ocado", are involved in a dispute with – amongst others – Mr Jonathan Faiman and his business, Project Today Holdings Limited ("Today"). On 3 July 2019, having discovered evidence of a conspiracy to misappropriate and misuse Ocado's confidential information, Ocado sought a Search and Evidence Preservation Order from the Court in proceedings under claim number BL-2019-001252 (the "Underlying Proceedings").[1]

2. Such an order – the "Search Order" – was granted *ex parte* by Fancourt J on 3 July 2019. There have been a number of subsequent *inter partes* hearings concerning the Search Order, but it is not necessary to describe these for purposes of this Judgment.

3. The Search Order was executed on 4 July 2019 on Mr Faiman by the independent supervising solicitor, as required by the Court. Upon being served with the Search Order, Mr Faiman contacted the Respondent to the present application, Mr Raymond McKeeve. Mr McKeeve was at all material times a partner at Jones Day LLP. Mr McKeeve spoke to both Mr Faiman and to the supervising solicitor.

4. Very shortly after this call, Mr McKeeve contacted the infrastructure architect – that is, the person responsible for information technology or IT – at Today, a Mr Martin Henery. Mr McKeeve contacted Mr Henery using a specialist private messaging system called "3CX". This is, as I understand it, an application or "app" permitting voice over internet communications and messaging. The message sent read (according to Mr McKeeve) "burn it";[2] according to Mr Henery, the message said "burn all".[3]

5. There may have been subsequent communications to the same effect.[4] In any event, Mr Henery deleted or caused to be deleted the 3CX app and the messages on it, as well as several email accounts. Although the email accounts were digitally recovered, the 3CX messages were irretrievably destroyed. That is why there is a degree of controversy about exactly what Mr McKeeve told Mr Henery to do and – as will be seen – considerable controversy about the content of the deleted messages.

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[1] I should make clear that, as regards the dispute between Ocado and Mr Faiman, I am simply summarising the factual contentions advanced by Ocado in both the underlying dispute between Ocado and Mr Faiman and in this application. It would be wrong – in advance of the substantive trial in the proceedings between Ocado and Mr Faiman and in advance of any substantive hearing against Mr McKeeve – to go further than this. Accordingly, save where I expressly note that a point is not controverted by Mr McKeeve, my summary of the facts should be regarded as no more than a statement of Ocado's contentions.

[2] See Mr McKeeve's first affidavit ("McKeeve 1") at paragraph 10: "Immediately after my call with Mr de Jongh [the supervising solicitor] or my subsequent brief call with Mr Faiman but before I spoke to Mr Richards [the head of Jones Day's disputes practice in London] at 8:40am (so, I believe, some time between 8:35am and 8:40am), I therefore sent a short message using the 3CX app to Mr Henery which read, I think, "burn it".

[3] See Mr Henery's first affidavit ("Henery 1") at paragraph 21: "On 4 July 2019 between approximately 8:20am and 8:50am, I received a message on the 3CX system from Mr McKeeve, saying, to the best of my recollection, "burn all"."

[4] Mr Henery refers to a subsequent message to his iPhone from Mr McKeeve: Henery 1/§21. Mr McKeeve refers to a subsequent call at McKeeve 1/§11: "What I meant by my message was that Mr Henery should get rid of the 3CX app. In case Mr Henery did not understand my (very short) message, I also called him to delete the 3CX application".

## B. THE TERMS OF THE SEARCH ORDER

6. The Search Order is in largely standard form. Paragraph 7 provides:

> "The Respondents and any Controller of Access must permit the Supervising Solicitor, the Independent Computer Specialist and the Applicants' Solicitors identified in Schedule A to this order (together "the **Search Party**") to:
>
> (a) enter the Premises;
>
> (b) access any containers within the Premises such as (without limitation) safes, boxes, briefcases and suitcases ("**Containers**"); and
>
> (c) access any electronic data storage devices at or accessible from the Premises, such as (without limitation) computers, tablets, PDAs, mobile telephones, server data (including fileshares and email), backup media (whether cloud-based, hard drive or tapes), USB storage devices, cloud-based IT Systems (including fileshares and email), online storage/data sharing platofrms such as (without limitation) Dropbox and web-based email accounts (not including anything which is the property of the Connaught Hotel, but otherwise irrespective of whether such items are the property of the Respondents or not) ("the **Electronic Data Storage Devices**"),
>
> so that they can search for, inspect, photograph, electronically copy or photocopy, and deliver into the safekeeping of the Applicants' Solicitors all the documents and articles which are listed in Schedule C to this order ("**Listed Items**") or which the Supervising Solicitor believes to be Listed Items."

7. The Listed Items in Schedule 3 all relate to Ocado's confidential information: it is unnecessary, for present purposes, to set out the definition of Listed Items in any greater detail in this Judgment.

## C. THE APPLICATION

8. This is an application for permission to make a committal application in respect of Mr McKeeve made pursuant to CPR Part 81.14. The application is thus for committal for interference with the due administration of justice, and the contempt alleged is a criminal contempt. (Had the Search Order been directed to Mr McKeeve as a party, doubtless Ocado would have considered proceedings under Part II of CPR Part 81, which would have been a civil contempt.)

9. Applications under CPR Part 81.14 must be made under CPR Part 8 (which the present application is) and include or be accompanied by:

> (1) A detailed statement of the applicant's grounds for bringing the committal application; and
>
> (2) An affidavit setting out the facts and exhibiting all documents relied upon.

10. In this case, the application comprises the Part 8 claim form itself, supported by an affidavit of Mr James Libson ("Libson 1"), a partner in the firm of Mishcon de Reya LLP, the solicitors retained by Ocado.

**11.** The CPR Part 8 claim form contains a penal notice, followed by the following details of claim:

> "As set out in the Affidavit of Mr James Lewis Libson dated 24 September 2019, on 3 July 2019, the Claimants obtained a search and preservation of evidence order from Mr Justice Fancourt against Mr Jonathan Faiman, Project Today Holdings Limited ("**Today**") and Mr Jonathan Hillary (the "**Search Order**").
>
> On 4 July 2019, having been informed of the Search Order and the search being executed thereunder of Mr Faiman, the Defendant contacted Mr Martin Henery of Today and instructed him to delete communications between inter alia Mr Faiman, Mr Hillary and the Defendant. Mr Henery acted upon the instructions given to him by the Defendant.
>
> The Claimants subsequently issued a claim against Mr Faiman, Today and Mr Hillary with claim number BL-2019-001252 (the "**Underlying Claim**"). As the contempt set out below was in connection with the Underlying Claim, the Claimants rely on documents and evidence from that claim.
>
> The Claimants seek:
>
> (a) permission to make and pursue a committal application against the Defendant; and
>
> (b) to the extent necessary, permission to rely in these proceedings on documents disclosed, and Affidavits sworn, in the Underlying Claim.
>
> …
>
> **PARTICULARS OF CONTEMPT**
>
> In the circumstances summarised above and set out in the Affidavit of James Lewis Libson, the Defendant intentionally interfered with the due administration of justice by:
>
> 1. Intentionally causing the destruction of documentary material which is of relevance to the claim by the Claimants against Mr Faiman, Today and Mr Hillary.
>
> 2. Intentionally causing destruction of documentary material which is of relevance to a potential claim by the Claimants against the Defendant.
>
> 3. Intentionally causing the destruction of documents which constituted a "Listed Item" within Schedule C of the Search Order.
>
> 4. Intentionally causing the destruction of information which constituted "confidential information" within Schedule C of the Search Order."

## D. PERMISSION UNDER CPR PART 31.22(1)(b)

**12.** Ocado was, quite properly, concerned that the present CPR Part 8 claim constituted proceedings separate and distinct from the Underlying Proceedings (i.e. "collateral"). Accordingly, Ocado sought permission (for both Ocado and Mr McKeeve) to use such material pursuant to CPR Part 31.22(1)(b).

**13.** The parties suggested that an order pursuant to CPR Part 31.22(1)(b) was <u>not</u> necessary because the present CPR Part 8 claim could not be regarded as "collateral" to the

Underlying Proceedings, and that use of the documents in the Underlying Proceedings in these proceedings was for the purpose of the Underlying Proceedings.

**14.** In support of this proposition, the parties relied upon the decision of the Court of Appeal in *Dadourian Group International Inc v. Simms (No 2)*,[5] which itself refers to the decision of the House of Lords in *Crest Homes plc v Marks*,[6] where Lord Oliver stated:

> "My Lords, although I have, for my part, found the appellants' arguments less than convincing, they can and do fairly say that it is not for them to advance reasons why the implied undertaking should not be released but rather for the respondents to demonstrate cogent and persuasive reasons why it should be released. To that I now turn. Mr Henderson, on behalf of the respondents, whilst accepting the importance, as a matter of general policy, of preserving the integrity of undertakings given to the court as the price of discovery, submits that there is an equally important countervailing consideration of public policy that orders of the court should be obeyed. I accept that, but if what was in issue here was the revelation of a civil contempt in some wholly unrelated proceeding I would not for my part consider that the importance of ensuring obedience to the court's orders outweighed that of ensuring the continued observance of an undertaking given to the court by the party obtaining discovery. Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under Anton Piller orders or on general discovery for the purpose of proceedings other than those in which the order was made. Examples were *Halcon International Inc v. Shell Transport and Trading Co*, [1979] RPC 97 and *Sybron Corporation v. Barclays Bank plc*, [1985] Ch 299. I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse LJ observed in the course of his judgment in the instant case…each case must turn on its own individual facts. In the instant case, the determinative point to my mind is that it is purely adventitious that there happened to be two actions. That has been brought about partly by purely technical considerations and partly, as Crest allege, by the appellants' failure to make full and frank disclosure under the 1984 order, and the fact that the parties to the two actions are not identical is quite immaterial. The cause of action is the same in each and the first and second appellants are defendants in both. The remaining defendants could equally well have been joined as defendants in a single set of proceedings. Thus it is a pure technicality that the 1985 order happens to have been made in proceedings other than those in which Crest seek to move to enforce the undertakings. It has been submitted that proceedings for contempt of court are always to be regarded, for the purpose of the implied undertaking on discovery, as "collateral" to the action in which they are launched, so that even if the 1985 order had been made in the 1984 action it would still have been necessary to seek the leave of the court to use the material thus discovered for the purposes of the motion for contempt in that action. My Lords, I find myself quite unable to accept that submission. The proper policing and enforcement or observance of orders made and undertakings given to the court in an action are, in my judgment, as much an integral part of the action as any other step taken by a plaintiff in the proper prosecution of his claim. The normal procedure where the contempt complained of is that of a party to the action is to apply for committal by motion in that action as an incidental step in the action. There is, in my judgment, nothing "collateral" or "alien" about enforcement of the court's order in the action in which discovery is obtained and I do not entertain any doubt at all that documents disclosed on discovery in the action can perfectly properly be used for the purpose of taking such a step

[5] [2006] EWCA Civ 1745 at [12].

[6] [1987] AC 829 at 859-860.

without in any way infringing the implied undertaking and without the necessity of obtaining the prior leave of the court."

**15.** It seems to me that Lord Oliver was not going so far as to say that where, as here, separate proceedings have had to be commenced because the alleged contemnor was not party to the original proceedings in which the order giving rise to the alleged contempt was made, those separate proceedings are (without more) to be regarded as incidental to or the same as the original proceedings and not collateral. Rather, Lord Oliver was saying that where the separate proceedings constitute an application for committal relating to an order made in other proceedings, the court should not be slow in releasing a party from its implied undertaking. He was not saying that the implied undertaking did not have to be released.

**16.** In these circumstances, it seems to me entirely right that Ocado made the application under CPR Part 31.22(1)(b). It is also right that, on the facts of this case, the application be granted. Here, the allegation is that a critical order in the Court's armory was wilfully flouted by a third party to the Underlying Proceedings. There was no choice but for Ocado to commence separate proceedings, and it is obviously necessary that both parties have access to the documents in the Underlying Proceedings for the purposes of this application, which is a not unimportant one: the Court necessarily attaches great weight to the due execution of search orders like the present.

## E. ELEMENTS OF CRIMINAL CONTEMPT

**17.** As I have noted, the present application is for committal for interference with the due administration of justice, and the contempt alleged is a criminal one.

**18.** There was little (albeit some) difference between the parties as to the relevant principles to be applied. Essentially, to establish the contempt, it must be shown that the respondent, the alleged contemnor, had:

**(1)** Knowledge of the order;

**(2)** Committed an act – the *actus reus* – which, objectively analysed, either *(i)* aided or abetted the respondent in his own breach of the order or *(ii)* frustrated or thwarted the purpose of the order, with the result that there has been a significant and adverse effect on the administration of justice; and

**(3)** An intention – the *mens rea* – either *(i)* to aid or abet the respondent's breach or *(ii)* to frustrate or thwart the purpose of the order.

This case, of course, is one where Mr McKeeve did not breach an order directed to him, but rather, it is alleged, frustrated or thwarted the purpose of the order.

**19.** The burden of proving these elements is *(i)* on the applicant and *(ii)* to the criminal standard. Although, of course, we are only at the permission stage, the court must have well in mind the question of whether these elements can, in due course, properly be satisfied.

**20.** Here, there was a difference between the parties as to the standard to be applied when considering an application for permission to make a committal application. Mr McKeeve contended that a strong *prima facie* case was required, whereas Ocado

contended that it must show at least a *prima facie* case. The distinction, and the reason for it, was considered by the Court of Appeal in *Solicitor General v. Holmes*.[7] Coulson LJ articulated the following points:

**(1)** That the case law showed the use of both tests.[8]

**(2)** That the higher test – strong *prima facie* case – was confined to cases concerned with false statements of truth.[9] This was because, in such cases, it was necessary to discourage frivolous applications.[10]

**(3)** On the other hand, in other cases, the test of strong *prima facie* case might set the bar too high.[11]

**21.** I can see the force in this reasoning and, although the reasoning in *Holmes* is strictly *obiter*,[12] at least a *prima facie* case is the standard that I propose to apply here.

**22.** In addition to being satisfied that there is a *prima face* case, I must be satisfied that it is in the public interest that an application to commit should be made.

**23.** Both elements – *prima facie* case and the public interest – can be broken down into other factors, which tend to overlap.[13] In this case, Mr McKeeve contended that Ocado had failed to demonstrate a *prima facie* case both as regards the *actus reus* and *mens rea* for the contempts alleged. He also contended that the public interest requirement was not satisfied. I shall consider these three points in turn.

## F. *ACTUS REUS* AND *MENS REA*

**24.** The problem faced by Ocado is that each of the particulars of contempt alleged makes very specific averments regarding the content of the material deleted or caused to be deleted by Mr Henery at the instance of Mr McKeeve. I set out below the four grounds of contempt averred, highlighting the assertions being made:

**(1)** *Ground 1.* Intentionally causing the destruction of documentary material **which is of relevance to the claim by the Claimants against Mr Faiman, Today and Mr Hillary**.

**(2)** *Ground 2.* Intentionally causing destruction of documentary material **which is of relevance to a potential claim by the Claimants against the Defendant**.[14]

[7] [2019] EWHC 1483 (Admin).

[8] At [43].

[9] At [43].

[10] At [44].

[11] At [45]-[45].

[12] See [45]: "…we do not need to decide the point…".

[13] See *Patel v. Patel*, [2017] EWHC 1588 (Ch), where the relevant case law is set out fully.

[14] During the course of submissions, it was accepted that Ground 2 could not be maintained, not least because no claim has (to date) be brought against Mr McKeeve.

(3) *Ground 3.* Intentionally causing the destruction of documents **which constituted a "Listed Item" within Schedule C of the Search Order**.

(4) *Ground 4.* Intentionally causing the destruction of information **which constituted "confidential information" within Schedule C of the Search Order**.

25. Thus, as part of the *actus reus*, it is averred that material of a specific sort was destroyed. Yet it is extremely difficult to see how Ocado could make good this very specific averment:

(1) As I have described, it has been possible to reinstate the email accounts deleted by Mr Henery.[15] However, these are in the process of being reviewed (as part of the disclosure in the Underlying Claim) and Ocado did not have access to any of the emails contained in the email accounts. Accordingly, Ocado could not take me to emails in order to demonstrate to me the nature of the material deleted.

(2) Ocado have not been able to reinstate the messages on the 3CX app.[16] Accordingly, it is impossible to point to any communications showing that documents of the nature alleged to have been destroyed were in fact destroyed.

(3) Mr Libson is driven to rely on inference, namely that the very deletion of the 3CX app justifies finding a *prima facie* case that material of the sort alleged to have been destroyed was in fact destroyed. Thus, Libson/§47.1 states that "the 3CX messaging system was expressly set up to provide a secure means of communication between the key individuals who were part of the unlawful conspiracy to harm Ocado, including Mr Hillary, Mr Faiman and Mr McKeeve. It was also set up for the express purpose of allowing that contact to take place during the period of Mr Hillary's gardening leave, while he was still an Ocado employee, and therefore in breach of his terms of employment. It also allowed Mr Hillary to have an account (under a pseudonym) to store documents that evidenced he had in fact started work for [Today] and which contained information confidential to Ocado."

(4) There is, in this paragraph, a great deal of assertion as to what was contained in the 3CX app. But, in the absence of any content from the 3CX app, that assertion can only be based upon:[17]

(a) The persons who were party to the 3CX app, who were (I accept) party to the conspiracy alleged by Ocado. I note, in this regard, that Mr McKeeve accepts that the 3CX app was set up because "Mr Hillary wanted to have a means of communicating with [Today] personnel while he was inactive and on garden leave".[18]

[15] See paragraph 5 above.

[16] See paragraph 5 above.

[17] There was further material relied upon, but this was based on a misquotation of the material, as Ocado accepted. See Mr McKeeve's written submissions at paragraphs 5-7.

[18] McKeeve 1/§4.

**(b)** The fact that Mr McKeeve messaged Mr Henery, causing him to delete the messages on the 3CX app.

**(5)** The problem is that Mr McKeeve alleges that the messages on the 3CX app were innocuous:[19]

> "4.3 Mr Henery set up five users on the 3CX system: Jonathan Faiman, Jonathan Hillary, Martin Henery, Mo Gawdat, and me. In the event, the messaging function was used very rarely indeed not only because of its limited functionality (i.e. it could not be used to transfer files or images) but also because of its poor user interface. On my own phone, I was not even alerted when I received messages and, once within the app, messages were difficult to read. As a consequence, as far as I am aware, it was only ever used for short, casual/conversational messages.
>
> 4.4 In fact, I can only recall two series of messages: one from Mr Hillary concerning the location of The Foundry office to an underground station – he was concerned that The Foundry was too far from Hammersmith – to which I responded by suggesting that he look at Google Maps; and another concerning a request by Mr Hillary for a progress update about the proposed employment of Mr Hillary's daughter by [Today] as a junior administrative assistant. Mr Hillary noted that she had not received her draft employment contract, but it transpired that she had provided an incorrect email address, which Mr Hillary corrected via a 3CX text message. To the best of my knowledge and belief, there were no more substantive messages than that relating to [Today's] business activities."

**(6)** Furthermore, Mr McKeeve contends that the reason he was so concerned that the 3CX app should not see the light of day, was because his wife's distinctive name had been used as a username, and that this might cause her embarrassment when standing in the elections for the European Parliament and as a representative thereafter:[20]

> "10. I had no idea what the Search Order related to or what in practice it meant. However, I was immediately concerned about the fact that there were people from outside the [Today] business who might be able to get access to an app which had my wife's name in it. Given the sensitivity of her new role, and particularly since it looked like there might be a high profile investigation or dispute regarding [Today], I was concerned to contain exposure of Belinda's name…
>
> …
>
> 12. I appreciate that that may sound somewhat naïve but I have been a deal lawyer for 25 years and did not even do a litigation seat as part of my training contract with Dickson Minto in Edinburgh and London. I can only emphasise that I was not driven in any way by a desire to destroy evidence and did not consider that I was doing so. My gut reaction was to try to protect Belinda and my sole concern was to avoid having my wife dragged into a potentially embarrassing, high profile investigation, where her name had been used without her consent and without her knowledge. I was concerned about the reputational harm it could

[19] McKeeve 1.

[20] See McKeeve 1 generally, and particularly McKeeve 1/§10 and 12.

> cause her. I panicked, and in the heat of the moment committed a serious lapse of judgment, in order to do what I could to protect her. I am devastated that as a result of my action that there may be risk of her name now being involved in this dispute.
>
> 13. I am prepared to swar on oath that, to the best of my recollection, I do not believe that any of the messages that were deleted were of material relevance to the current dispute and I apologise sincerely and wholeheartedly to the Court and to the Applicants for my actions."

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

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

**(1)** In the first place, as I have described, Mr McKeeve denies that it was his intention to cause the destruction of documents of the type alleged in the particulars of contempt. Rather, he claims an altogether different intention – keeping his wife's name out of damaging publicity.

**(2)** In the second place, the plausibility of Mr McKeeve's case in this regard depends on showing that documents of the type alleged to have been destroyed were in fact destroyed. Clearly, if Mr McKeeve could be shown to be wrong about the nature of the material that was destroyed, that would at least serve to undermine his explanation as to his intention when speaking to Mr Henery. But, as I have described, it is unlikely that there will be further evidence in this regard.

**28.** For these reasons, I consider that the grounds of contempt do not disclose a *prima facie* case, and that for this reason alone I should refuse the application.

## G. THE PUBLIC INTEREST REQUIREMENT

**29.** I do not consider that it would be appropriate to consider this requirement further. It is obvious that the public interest is coloured by the requirement that there be a *prima facie* case. Had I been persuaded that there was a *prima facie* case, then it is likely that I would have considered that ensuring that the search order regime is upheld and respected would have rendered this application in the public interest. However, I do not consider that it is either appropriate or necessary to consider in any detail the points made in relation to the public interest requirement where I have found the requirement of a *prima facie* case not to be satisfied.

## H. CONCLUSION

**30.** It follows that the application must be refused.

**31.** In the course of submissions, two other points were raised, which I consider it appropriate briefly to address:

**(1)** It was submitted that a course open to me was to adjourn the application for future consideration by the judge determining the Underlying Proceedings (after judgment, in what is likely to be a couple of years' time). There might be further material (going one way or the other) that might affect the outcome of the application. Whilst I consider this to be possible, I have reached a clear view in relation to the application, and it seems to me that the order that I make must reflect that view. However, nothing in this Judgment is intended to say anything (either way) about a second application to commit based on fresh evidence. The permissibility or appropriateness of such a course is not for me.

**(2)** During the course of submissions, I raised the point with counsel that the particulars of contempt against Mr McKeeve might be very differently framed, along the lines that paragraph 7 of the Search Order (which I have set out in paragraph 6 above) protected the data on all Electronic Data Storage Devices so that they might be searched after the data had been secured from potential destruction. 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. Counsel for Mr McKeeve forcefully – and I consider rightly – submitted that the case against Mr McKeeve could not be amended "on the hoof": that would be entirely unfair to Mr McKeeve. I agree. However, nothing in this Judgment is intended to say anything (either way) about a second application to commit based on a different case. The permissibility or appropriateness of such a course is not for me.