Neutral Citation Number: [2022] EWHC 2079 (Ch)

Case No: BL-2019-001768

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

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 03/08/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

(1) OCADO GROUP PLC
(2) OCADO CENTRAL SERVICES LIMITED **Claimants**

- and –

RAYMOND McKEEVE **Defendant**

- -
- -

David Cavender QC and Alexander Brown (instructed by **Mishcon de Reya LLP**) for the **Claimants**
Robert Weekes QC and Gayatri Sarathy (instructed by **Foot Anstey LLP**) for the **Defendant**

Hearing dates: 28, 29, 30 June 2022, 1 and 4 July 2022

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Approved Judgment

The date and time for hand-down is deemed to be 10.30am on Wednesday 3 August 2022.

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Mr Justice Adam Johnson:

1. By this Part 8 Claim the Claimants ("*Ocado*") seek findings of contempt of Court against the Defendant, Raymond McKeeve ("*Mr McKeeve*"). At the times relevant to this action Mr McKeeve was a senior solicitor and a partner in Jones Day LLP, the well-known law firm. His expertise was in the field of private equity. In his own words, he was a transactional "*deal lawyer*".

2. Ocado is a well-known online-only supermarket and licences its technology platform for online grocery to other supermarkets. Two of the founders of Ocado were Mr Tim Steiner ("*Mr Steiner*") and Mr Jonathan Faiman ("*Mr Faiman*"). Mr Faiman left the business in 2010.

3. For a long time, Ocado had a successful commercial relationship with the supermarket chain Waitrose. By 2018, however, Marks & Spencer ("*M&S*") were also looking to enter into the online grocery arena.

4. Mr Faiman set up a new entity, Project Today Holdings Limited ("*Today*"). He held discussions with M&S. At the time, Mr Faiman was in contact with a senior employee of Ocado, Mr Jonathan Hillary ("*Mr Hillary*"). Mr McKeeve was an adviser to Mr Faiman and Today in connection with the possible M&S deal.

5. In the end, Today's discussions with M&S did not bear fruit. Instead, M&S entered into an arrangement with Ocado in February 2019.

6. Mr Faiman and Today, however, then sought to enter into an arrangement with Waitrose. Mr Faiman remained in contact with Mr Hillary in connection with the proposed Waitrose transaction. Mr McKeeve continued to advise. Discussions with Waitrose proceeded constructively, and on 15 May 2019, Mr Hillary resigned from his position at Ocado for a new role with Today. On 16 May 2019, Waitrose announced a new commercial relationship with Today. On 23 May, Mr Hillary was placed on gardening leave by Ocado. He remained an Ocado employee.

7. Ocado came to be concerned about Mr Hillary's activities in communicating with Mr Faiman. They suspected he had handed over confidential information and/or had been working for Today while still employed by Ocado, in breach of his contract of employment.

8. On 3 July 2019, Ocado obtained from Fancourt J an "*Order for Search of Premises and the Preservation of Evidence*" (the "*Search Order*"). The Search Order was in support of proceedings by Ocado against Mr Faiman, Today and Mr Hillary (the "*Underlying Action*").

9. The Search Order was executed on 4 July 2019, both at the Connaught Hotel in London (where Mr Faiman was based) and at Mr Hillary's home. A further Search Order in practically identical form was granted on the morning of 4 July by Fancourt J, which authorised a separate search of Today's new office premises, known as *the Foundry*.

10. Shortly after the Search Order was served on Mr Faiman at the Connaught Hotel, Mr Faiman contacted Mr McKeeve by telephone. Mr Faiman spoke to him briefly and so did the Supervising Solicitor present at the Connaught Hotel, Mr de Jongh.

11. Very shortly after that, Mr McKeeve sent a message via an application (the "*3CX App*") which had been installed on his telephone by Mr Martin Henery ("*Mr Henery*"), Today's IT manager. Others within Today also had 3CX accounts, including Mr Hillary.

12. Mr McKeeve's message was sent to Mr Henery. It is common ground that the message said either "*burn it*" or "*burn all*". Mr McKeeve then spoke to Mr Henery. The upshot was that Mr Henery deleted the 3CX App and all of its contents. It was irretrievably destroyed.

13. It is clear that at the time he sent his instruction to Mr Henery, Mr McKeeve had not seen the Search Order. He had only had his discussion with Mr Faiman and his discussion with the Supervising Solicitor, Mr de Jongh. Mr McKeeve was in any event not a Respondent to the Search Order. He was a third party.

14. Thus, the present action is not brought as an action in civil contempt. It is not said that Mr McKeeve was himself in breach of the Search Order as a Respondent to it, who had been served with it. Instead, the Claimants seek findings of *criminal* contempt against Mr McKeeve. Their complaint is that he intentionally interfered with the due administration of justice, in two ways:

    i) By intentionally causing the deletion of documentary materials relevant to the Underlying Action brought by Ocado, in support of which the Search Order had been obtained.

    ii) By intentionally taking steps which thwarted the purpose of the Search Order.

15. It will be critical to examine the precise Grounds of Contempt relied on. I set these out below at [124]. To begin with, however, I will make some brief comments about the trial and the evidence before me. I will then set out a more detailed summary of the background facts, many of which are undisputed. I will then examine the legal principles relevant to criminal contempt, before setting out my conclusions on the material factual issues which *are* disputed, and finally I will set out my conclusions on the individual Grounds of Contempt.

The Trial and the Witnesses

16. At trial the Claimants relied on the following factual evidence:

    i) Certain parts of the First and Fourth Affidavits of Mr Neill Abrams, sworn in connection with the Underlying Action. Mr Abrams is the Group General Counsel and Company Secretary at Ocado Group plc. Those aspects of his First and Fourth Affidavits relied on were identified in his First Witness Statement in the present Action. Mr Abrams was not called for cross-examination.

    ii) The First and Third Affidavits of Mr James Libson. Mr Libson is the Managing Partner at Mishcon de Reya, the Claimants' solicitors. Mr Libson's First Affidavit was the Affidavit relied on originally in support of the present Action. His Third Affidavit is a more recent document which, in the view of the Claimants, was intended to consolidate the different aspects of the Claimants' case into a single narrative for the assistance of the Court and in order to be fair

to Mr McKeeve, so he was entirely clear well in advance of trial what case he had to meet. Mr McKeeve however took objection to Mr Libson's Third Affidavit on two grounds. The first was on the basis that it was argumentative and included submissions, and in effect was an additional Skeleton Argument. As to this, a set of propositions was agreed in relation to Mr Libson's Third Affidavit, which the Court was invited to take into account in reviewing it, and I have duly done so. On the basis of the agreed propositions, Mr Libson was not called for cross-examination. I have included the propositions as Annex 1 at the end of this Judgment. The Defendant's second objection was that Mr Libson's Third Affidavit sought illegitimately to introduce new allegations, going beyond the Claim Form and the allegations originally set out in Mr Libson's First Affidavit. I deal with this point below at [126]-[130].

iii) The Affidavit of Ms Melanie Smith dated 2 July 2019, served in connection with the Underlying Action, and Ms Smith's later Affidavit of 27 April 2022, served in the present Action. Ms Smith is the CEO of Ocado Retail Limited, which is the Joint Venture which now exists between M&S and Ocado Group Plc. Ms Smith did not attend the trial and her evidence was admitted under a Civil Evidence Act Notice dated 6 June 2022.

iv) The Second Witness Statement of Mr James Waddilove, a former consultant to M&S. In his Witness Statement Mr Waddilove gave evidence about a meeting with Today personnel (including Mr McKeeve) in September 2018. Mr Waddilove did attend trial and was cross-examined.

v) The Report of the Supervising Solicitor, Mr Alexander de Jongh, served in the Underlying Action. Mr de Jongh's Report was supplemented by an email dated 17 July 2019 to Mishcon de Reya, in which he gave further detail of his exchanges with Mr McKeeve in particular.

17. Mr McKeeve relied on the following evidence:

i) His own Affidavit of 17 July 2019 served in connection with the Underlying Action, together with two witness statements in the present action, the first dated 18 November 2019 and the second 20 April 2022. Mr McKeeve attended trial and was cross-examined at some length.

ii) Two Affidavits (dated 17 July 2019 and 18 November 2019) served in the Underlying Action by Mr Henery, the IT specialist who worked for Mr Faiman and Today, together with a later Witness Statement in the present Action (dated 20 April 2022) also served by Mr Henery. Although Mr Henery's Witness Statement was originally served under a Civil Evidence Act Notice, by Order of Miles J dated 21 December 2021 Mr Henery was required to attend trial in person. He did so and was cross-examined.

iii) An Affidavit of Mr Hillary dated 17 July 2019 and served in the Underlying Action, together with a Witness Statement in the present Action dated 20 April 2022. Mr Hillary was formerly Group Transformation Director for the Ocado Group of Companies. As already noted, he left Ocado in May 2019 with a view to joining the Today business, and was placed on gardening leave. Like Mr

Henery, he attended Court and was cross-examined pursuant to the Order of Miles J dated 21 December 2021.

iv) The Affidavit of Mr Faiman served in connection with the Underlying Action dated 17 July 2019, together with a later Witness Statement of Mr Faiman served in the present Action, dated 10 June 2022. Mr Faiman's original Affidavit was served under a Civil Evidence Act Notice, but no application was made for his cross-examination. Mr Faiman's Witness Statement was served much later, after the scheduled date for exchange of Witness Statements in the present Action. At the beginning of the trial, I made a ruling permitting Mr McKeeve nonetheless to rely on Mr Faiman's Witness Statement. I was satisfied there was good reason for late service, in that Mr Faiman had originally been unwilling to provide a Witness Statement. The Witness Statement would have been admissible anyway without permission, under the Civil Evidence Act 1995, s.2(4). Further, I saw little real prejudice to the Claimants, given that they had earlier been given the opportunity to call Mr Faiman for cross-examination on his Affidavit but had chosen not to do so, and Mr Faiman's Witness Statement was intended only to supplement the contents of his Affidavit. To the extent the Witness Statement in substance went beyond the matters covered in the Affidavit, and introduced new points, any potential prejudice to the Claimants was outweighed by the potential unfairness to Mr McKeeve if he were not allowed to rely on the Witness Statement, in particular since submissions could in any event be made about the weight to be placed on the Witness Statement in light of Mr Faiman's non-attendance. In fact, the Witness Statement was referred to only briefly during the course of the trial.

18. It has been said that the real value in cross-examination is the opportunity it presents to assess the character and motivations of the relevant witnesses (see the well-known comments of Leggatt J (as he then was) in Gestmin SGS SA v. Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm) [2020] 1 C.L.C. 428 at [22]). In the present case, my observations on the witnesses who gave evidence are as follows:

i) Mr Waddilove: Mr Waddilove was an entirely straightforward witness who gave his evidence very clearly during the course of his short cross-examination.

ii) Mr Henery: Mr Henery gave the impression of finding his cross-examination an uncomfortable experience. At times he appeared defensive and showed a clear sense of embarrassment at his involvement in the matters presently under inquiry. That was most clearly evident in the evidence he gave about his failure to mention the 3CX App during the course of his questioning by Mishcon de Reya on 4 July 2019 (below at [255]). At the same time, however, I did not form the impression that Mr Henery was a dishonest witness. I consider that he gave his evidence truthfully. He candidly accepted what he described as his own stupidity (again see [255] below) and at times seemed bewildered by his own naivety in acting on the "*burn it*" or "*burn all*" instruction in such an unthinking way. He seemed to me plainly to regret what he had done and to wish it had never happened.

iii) Mr Hillary: I also consider Mr Hillary to have been a straightforward witness. He gave his evidence carefully and was suitably candid. He has plainly been bruised by his experiences in connection with the Today business and the

litigation which flowed from it. He gave me the impression that he considered he had little left to lose, and consequently as I see it, he had no good reason to mislead or obfuscate in giving his evidence. I think he was an honest witness.

iv) Mr McKeeve: I had the opportunity of observing Mr McKeeve at some length, during the full day or so during which he gave evidence orally, and I formed a clear impression of him.

v) Mr McKeeve struck me as an intelligent and driven individual. At the relevant time, he had a successful practice as a solicitor in the private equity field, which he was proud of. He described his role as involving the orchestration of commercial transactions. Once a deal was up and running, he would need to involve other solicitors from specialist disciplines as necessary, in order to deliver on the client's vision. His own focus was on financing and overall deal structure.

vi) As to his character and motivations, Mr McKeeve at times exhibited a degree of arrogance (for example, in the evidence he gave about his ability to "*annihilate*" complex legal documents at high speed). He was also at times combative in the evidence he gave, but not I think unduly so, and in fact in a manner which was understandable given the seriousness of the present Action for him.

vii) Rather like Mr Henery, I consider that Mr McKeeve was candid in accepting the sense of shame and embarrassment he felt at his involvement in the matters giving rise to the present Action. At one point in his evidence, Mr McKeeve said the following:

> *"Sorry, my Lord, if you would bear with me, this may sound quite combative, this exchange. I just want to make clear, because I have put it in affidavits before the court but I have not formally apologised myself, that everything that happened around this is something that I am deeply regretful of and apologetic for. The idea that I would have committed a contempt of anything just horrifies me. The word is so perfectly chosen because it is a most horrendous word. I would only show contempt where enemies of the state or people are trying to harm my family. The idea of showing contempt for the rule of law and the court is just beyond the pale. So, whilst I can engage in debate with Mr. Cavender, I want the court to appreciate that the level of my apology is absolute and sincere and continues."*

viii) My judgment is that that expression of regret was entirely genuine. The Underlying Action, and more particularly the present Action, have taken a heavy toll both personally and professionally on Mr McKeeve.

ix) At the same time, however, and although he accepted that he had been guilty of a serious error of judgment, Mr McKeeve did not feel able to admit liability for contempt in any form. As one can see from the quotation above, he exhibited an almost visceral reaction to the idea of it. Although conscious that he had done something wrong, Mr McKeeve could not quite bring himself to accept that what he had done wrong might amount to a contempt of Court.

x) Again, given the seriousness of the matter for him, that is perhaps understandable. This mindset, however, in my view coloured parts of his evidence. At times I considered him to be unduly defensive and unwilling to accept the obvious – for instance in the evidence he gave at one point that he was not aware on the morning of 4 July 2019 that mobile phones were being taken pursuant to the Search Order (below at [243(v)]), and in his evidence that when he spoke to the Supervising Solicitor Mr de Jongh he "*did not know what he was talking about*" (below at [246]). Thus, although I did not regard Mr McKeeve as a deliberately dishonest witness, I do not feel able to accept all the evidence he gave. In my judgment, his genuine sense of shame and embarrassment, perhaps taken together with the passage of time and the fact (which I accept) that the key events unfolded at high speed, have led to his recollection becoming distorted. In such a case, as I will note further below, it is appropriate for the Court to draw inferences as to what must have happened, and where necessary I will do so in stating my overall conclusions.

Relevant Background

19. In this section I will summarise the backgrounds facts. I will deal with the materially contested issues of fact below starting at [167].

Beginnings of the Today Business

20. Mr Faiman began work on the idea that became the Today business in the Summer of 2018. He retained Mr McKeeve to provide advice and assistance to Today. Another of Mr Faiman's business associates was also involved, Mr Mo Gawdat ("*Mr Gawdat*").

Mr Hillary is involved

21. It is clear that Mr Faiman was in contact with Mr Hillary at this point.

22. In his Affidavit served in the Underlying Action, Mr Steve Rowe, the CEO of M&S, gave evidence as to a meeting which took place at the M&S offices in Paddington, London on 2 July 2018. Mr Faiman asked for the attendees on his side to be assigned pseudonyms for arrival at M&S reception. In the event Mr Faiman attended with one other person, referred to as "*Jon*" or "*John*". According to Mr Rowe, at the meeting Mr Faiman made a proposal for his business to provide support for M&S in establishing an online delivery platform. Mr Faiman made clear that "*Jon*" was an employee of Ocado. Later, in February 2019, when he attended a presentation at Ocado also attended by Mr Hillary, Mr Rowe was able to identify Mr Hillary as the "*Jon*" who had previously visited M&S with Mr Faiman in July 2018.

The KPI Document

23. In his Affidavit sworn in the Underlying Action, in response to the Search Order, Mr Hillary accepted that in around July 2018, he had taken a photograph " *... of a weekly key performance indicator report from June 2018 (the 'KPI Document')*", using his iPhone, which he had then sent to Mr Faiman "*by text message from my iPhone*". As to Mr Faiman, he acknowledged having received the KPI Document in his Affidavit in the Underlying Action. In a letter to Mishcon de Reya dated 8 July 2019 Mr Faiman's solicitors, Jones Day, said the following about use of the KPI Document:

> " *... a portion of a weekly Ocado KPI sheet dated from around June 2018 was shown to Chris Backes at the Connaught in about July 2018. Mr Faiman believes the same extract was emailed to Mr Backes shortly after this meeting. Shortly after Mr Faiman sent the email, Mr Stephen Peel – the managing partner of Novalpina – telephoned Mr Faiman to inform him that he did not want the document and would be deleting it*."

24. Chris Backes is a Principal at Novalpina LLP, a private equity firm. He was assisting Mr Faiman with financial modelling at the time.

Incorporation of Project Today Holdings

25. The company – Project Today Holdings Limited – was incorporated on 16 July 2018.

M&S Meeting on 12 September 2018

26. In her evidence, Ms Smith of M&S referred to having attended " *... a number of meetings with Jonathan Faiman and representatives of ... Today*", between June and October 2018.

27. One such meeting was at M&S's offices on 12 September 2018. On the M&S side, the attendees were Ms Smith and Mr Waddilove. For Today, Mr Faiman was in attendance together with Mr McKeeve. In both his written and oral evidence Mr McKeeve referred to a banker from Rothschilds also being present.

28. Mr Faiman was concerned about the presence of Mr Waddilove, who had previously worked for Ocado, and who Mr McKeeve understood to have been a "*senior and trusted lieutenant of Tim Steiner*". At the beginning of the session, Mr Faiman asked to speak to Mr Waddilove. Ms Smith was in attendance for the first few minutes but then left Mr Faiman and Mr Waddilove alone. After a while, Mr McKeeve was called in, and also spoke to Mr Waddilove alone, without Mr Faiman. In his evidence, Mr McKeeve recalled talking to Mr Waddilove about the risks associated with Mr Waddilove being involved in the Today/M&S project.

The Waddilove Note

29. These exchanges are reflected in a note (the "*Waddilove Note*"), which Mr Waddilove then emailed to himself on the same evening, 12 September 2018. In his evidence Mr Waddilove explained that he was concerned, after the meetings on 12 September, about the possibility of being caught up in litigation commenced by Ocado. He wanted to record the extent of his own involvement, so it could not be said that he had acted improperly, in particular as the source of any data breach. He asked to be removed from any further involvement with the Today project, which Ms Smith agreed to.

30. It is worth setting out the Waddilove Note in full:

> "*The below were reasons why I decided to not take any further part in Project Today following my first encounter with JF on 12/09/2018*

> *- JF asked to speak with me prior to the planned kick off session. Mel Smith was in attendance. He mentioned*
>
> *- His intention was to directly compete with Ocado's UK business with similar technology to that used in their Dordon CFC [a reference to 'Customer Fulfilment Centre']*
>
> *- He explicitly said to me he was in active discussions with senior current Ocado employees (and I learned on my later discussion with Mel that he had be communicating with them on a burner phone)*
>
> *- He said his expectation was Ocado would litigate to protect their interests when his plans became public, and he told me that he had taken steps to reduce his liability in this event by having forensic check of his Ocado data and placing it in escrow.*
>
> *- However, he also said (in the presence of Mel) that he has Ocado June 2018 management data and that the Today numbers had reflected that information*
>
> *- He told me that in the event of litigation, I would be a potential weak link because of my independent status, given my prior role at Ocado and my understanding of their business model.*
>
> *- He then left the room, and his lawyer asked me a number of question about my role at Ocado, and how they would like to take steps to reduce any possible exposure for me and more particularly for them by either making me an employee of Today, or getting M&S issue me with an indemnity (which he wasn't that keen on, because he felt it implied potential liability for Project Today). He asked that he could reflect on the discussion, and present me with some options in the next 48 hours. At this point the meeting concluded*
>
> *I reflected the above and felt uncomfortable about the integrity of JF, and his intention, as well as being dragged into something in which I have no interest in being a part of. As such, I spoke at the first opportunity with Mel Smith, and we mutually agreed that it is best I stand down from any further participation in Project Today. Furthermore I have no intention of talking further with JF or anyone associated with this venture following today*."

31. In his Second Witness Statement Mr Waddilove confirmed, as regards the fifth bullet point in the Waddilove Note, that the reference to "*June 2018 management data*" was made during the first few minutes of his meeting with Mr Faiman, when Ms Smith was present but Mr McKeeve was not.

32. In expanding on the final bullet point in his Witness Statement, Mr Waddilove said:

> *"I recall that Mr McKeeve considered the indemnity might look like a bit of a 'smoking gun' in any such litigation (Mr McKeeve either used the words 'smoking gun' or words to that effect)".*

Ocado sign deal with M&S

33. Today's discussions with M&S came to an end at some point in the Autumn of 2018. According to Ms Smith, M&S took the view that they had insufficient confidence in Today's ability to deliver given its status as a new business, and thought its financial demands unrealistic. For her own part, she did not think Mr Faiman's approach to the negotiations had been appropriate.

34. Instead, M&S entered into an arrangement with Ocado in February 2019.

Today & Waitrose: Discussions with Mr Hillary

35. Mr Faiman and Today, however, then sought to enter into an arrangement with Waitrose.

36. Mr Faiman remained in contact with Mr Hillary in connection with the proposed Waitrose transaction.

37. Mr McKeeve recalled meeting Mr Hillary 3 or 4 times in total. One such meeting was in March 2019. Mr Faiman and Mr McKeeve met Mr Hillary at Mr Hillary's home. They had dinner together. Mr Hillary's evidence was that Mr Faiman was interested in obtaining information about "*contractual structure*". He had probably flagged that before the meeting. In any event, during the dinner Mr Hillary provided Mr Faiman and Mr McKeeve with certain documents. It is clear that these included a copy of a set of contract terms recently agreed between Ocado and M&S entitled, "*Agreement for the Provision of the Apricot Smart Platform*" (the "*OSP Contract*"), and operational schedules for Ocado's contract for the provision of the Ocado Smart Platform to Groupe Casino (a French Supermarket group) (the "*Operational Schedules*").

38. Mr McKeeve's recollection in his written evidence was that Mr Faiman raised with Mr Hillary the fact that he needed assistance in "*shaping the deal*" between Today and Waitrose, and Mr Hillary handed over a small pack of documents to Mr Faiman. Mr McKeeve's evidence was that Mr Faiman took the documents away. A few days later, he met Mr Faiman who gave him an A4 envelope, which he understood to contain copies of the documents provided by Mr Hillary. He took the pack of documents back to his office. He instructed his secretary to put them together into a bound pack, and asked her to make two copies, one each for his colleague at Jones Day Jonathan Little and for an associate solicitor helping Mr Little. Mr Little was a partner at Jones Day specialising in the drafting of commercial contracts.

39. I will need to come back to these documents below. On the day of execution of the Search Order, copies were recovered from Mr Faiman's rooms at the Connaught Hotel (they are referred to in his Affidavit in the Underlying Action as the "*Removed Documents*"). Copies were also located shortly after execution of the Search Order at the offices of Jones Day.

Mr Henery trials VoIP Applications

40. Also in March 2019, Mr Henery, who was carrying out IT work for Mr Faiman and Today, began trialling VoIP applications for use in the Today business. VoIP stands for "*Voice over Internet Protocol*". In non-technical language, VoIP is a method of communication by telephone using the internet.

41. On 22 March 2019, Mr Henery sent a WhatsApp message to Mr Faiman, in which he said the following:

> "*Jon. To clarify. The pbx in the cloud is effectively a burner box. I don't have sip the nod attached to it but if you distribute the client to whomever, you can have private convos and webmeetings and have the ability to destroy the pbx at short notice*".

42. A "*pbx*" is a private branch exchange, i.e. a private telephone or messaging system, which in modern applications is automatic (in that it does not require a physical switchboard or switchboard operators). "*The pbx in the cloud*" means a private branch exchange stored on an online server. In cross-examination, Mr Henery clarified that "*sip the nod*" was an auto-correct error, and should have been a reference to a "*sip trunk*", an additional piece of hardware which would enable a user to make external calls on the system, i.e. to parties who were not set up as participants in the branch exchange. The reference to distributing "*the client to whomever*" was a reference to making available to selected users "*the client app*" – i.e., the individual app installed on the phone or tablet of selected users, which would enable them to participate as part of the group covered by the branch exchange.

43. I will need to come back to the reference to "*burner box*", and to the significance of being able to "*destroy the pbx at short notice".*

44. Mr Henery's evidence was that he tested various phone systems in parallel over a 3-4 week period, including Easy PbX, Asterisk PBX and 3CX. In the end, he selected 3CX, according to his evidence on a trial basis.

Mr Hillary Resigns from Ocado

45. Meanwhile, Mr Faiman's discussions with Waitrose proceeded constructively, and in consequence, on 15 May 2019, Mr Hillary resigned his position at Ocado for a new role with Today.

46. On 16 May 2019, Waitrose announced their new commercial relationship with Today.

3CX

47. On around 17 May 2019 Mr Henery set up a 3CX account for Today. The system used a virtual server hosted by Amazon. Mr Henery created individual 3CX accounts for each of himself, Mr Faiman, Mr Gawdat, Mr McKeeve and Mr Hillary. They were each assigned extension numbers, as follows: Mr Henery – 000; Mr Faiman – 001; Mr Gawdat – 002; Mr McKeeve – 003; Mr Hillary – 004.

48. Mr Henery sent a text message to Mr Hillary on 17 May saying the following:

> "*If you need anything thing [sic] plz let me know. On the desktop you will find a link to 3CX. It's the internal pabx*".

"*Transferring Comms*" and Mr Hillary's Pseudonym

49. On 18 May 2019, Mr Henery sent two text messages to Mr Hillary. The first said:

> "*Transferring Comms to 3CX for words etc*."

50. The second said:

> *"In the interim you shall be called Belinda. I don't know why it was a joint effort of 4 egg heads round a table who couldn't even come up with a decent name".*

51. "*Belinda*" was a reference to the name of Mr McKeeve's wife, Belinda de Lucy. In other words, for the purposes of the 3CX App, Mr Hillary was to be given the pseudonym, "*Belinda de Lucy*".

Mr Hillary's Email Account and other Matters

52. On 20 May, Mr Henery set up a "*Todayuk.com*" email account for Mr Hillary, held within Google Gsuite. This account was originally set up with the username "*Jon*".

53. On 23 May, Mr Hillary was placed on gardening leave by Ocado.

54. On the same day, Mr McKeeve's wife, Belinda de Lucy, who had been a Brexit Party candidate in the European Parliamentary Elections, was successfully elected as an MEP. Mr McKeeve in his oral evidence said that his wife's election had generated considerable press coverage, some of it vitriolic.

55. On 24 May, Today announced Mr Hillary would be joining Today as its Chief Operating Officer.

56. On or about 7 June 2019, Mr Hillary's name on the "*Todayuk.com*" email account was changed to "*Belinda*", i.e., the same pseudonym used on the 3CX App.

Mr McKeeve's Concerns

57. Mr McKeeve's evidence, in his Affidavit in the Underlying Action, was that he began to develop increasing concerns at around this time about communications with Mr Hillary. This was in part because of use of his wife's name as a pseudonym but also reflected wider considerations. He said as follows:

> *"I became aware that Mr Henery had arranged for Mr Hillary's todayuk.com account and his 3CX account to use pseudonyms because I received perhaps ten emails in total from Mr Hillary from a Todayuk.com email with the username 'Belinda de Lucy', my wife's name, and a few 3CX messages from his account which had the same username. This became a source of some annoyance to me, for a number of reasons, First, on an entirely personal level, I became concerned and generally unhappy*

> *about the use of my wife's name as the pseudonym for Mr Hillary, in particular as she was at the time becoming a more public figure (as to which see paragraph 6 below). Second, I was concerned generally about TDP establishing any communication links with Mr Hillary since he was on garden leave, and I thought it was inappropriate, and potentially harmful, to do so, with little upside. I also thought that adopting pseudonyms lacked judgment, in particular gave an entirely unhelpful appearance of covertness.*
>
> *…*
>
> *I can be quite direct in the way that I communicate, and I had at various points told Mr Henery in fairly strong terms that emails involving Mr Hillary were inappropriate and should stop; and I emphasised my unhappiness about my wife's name being used".*

Mr Hillary's use of the 3CX App

58. It is now known, from call data retrieved from Mr Hillary's iPhone, which has been tabulated into a document referred to at the trial before me as the "*iPhone Call Log*", that from at least 14 June 2019, Mr Hillary was using the 3CX App to make voice calls to others at Today, including in particular Mr Faiman.

Mr Hillary's Pseudonym Changes

59. On or around 26 June 2019, Mr Henery changed Mr Hillary's pseudonym on the "*Todayuk.com*" email account from Belinda to "*Josephine*".

60. At around the same time, Mr Hillary's pseudonym on the 3CX App was also changed. This is clear from automated emails sent to Mr Faiman on 26 June and 29 June, notifying him that he had received a new voicemail message from user "*004 – Josephine Ray*". User 004 on the 3CX app was Mr Hillary (see above at [47]).

61. The iPhone Call Log shows Mr McKeeve and Mr Hillary speaking on the 3CX App after 26 June, on 28 June and 1 July 2019.

Mr Hillary's Email Account is Suspended

62. On 1 July, in light of the concerns expressed by Mr McKeeve, Mr Henery suspended Mr Hillary's "*Todayuk.com*" email account (i.e., the account which had used the pseudonym "*Belinda*", which then changed to "*Josephine*" on about 26 June 2019). This was at roughly the same time Mr McKeeve himself began to feel concerns about Mr Hillary turning up in the Today offices, which Mr McKeeve considered carried unnecessary and unwelcome risk.

63. In dealing with this in his Affidavit sworn in the Underlying Action, Mr Henery said the following:

> *"On or around 1 July 2019, following reservations expressed by Mr McKeeve about the communications between TDP and Mr Hillary, I disabled that account by 'suspending' it. 'Suspend' is*

> *a Gmail term of art, which means the account was placed in suspension by Gmail and would remain suspended until reactivated …".*

64. According to a letter from Jones Day to Mishcon de Reya dated 15 July 2019, Mr Hillary's email account *"… was placed in suspension by gmail pending permanent deletion 30 days later*".

Mr Byron and Ms Merriott

65. On 2 July, two new individuals became involved with the Today business as consultants, namely Mr Phil Byron ("*Mr Byron*") and Ms Helen Merriott ("*Ms Merriott*"). Mr Henery added them as users on the 3CX App.

Discussions on 3 July 2019

66. On 3 July, a number of persons were present at Today's new offices at 77 Fulham Palace Road – i.e., *the Foundry*. Mr Henery's evidence in his First Affidavit in the Underlying Action was that he was present, together with Mr Faiman, Mr Hillary and Mr McKeeve. At paragraphs 16 and 17 of his Affidavit Mr Henery said as follows:

> "*16. … Mr Hillary, whose [Todayuk.com email] Account had been deactivated, was concerned to have a means of contacting (by email) Helen Merriott and Phil Byron, who were both consultants to TDP.*
>
> *17. Mr McKeeve repeated his view that the communications between TDP and Mr Hillary were ill advised, given Mr Hillary's employment status, and advised against setting up any further methods of communication for Mr Hillary."*

67. In his cross-examination, Mr Henery expanded on his written evidence. He said that Mr McKeeve was not happy about Mr Hillary being on *"[a]ny of the systems*", meaning 3CX and email.

68. Mr Henery said that on 3 July, Mr McKeeve repeated his view that communications between Today and Mr Hillary were ill-advised given Mr Hillary's employment status and he advised against setting up any further methods of communication for Mr Hillary. When asked what he understood the source of Mr McKeeve's concern to be, Mr Henery said:

> "A. *I guess from a legal standpoint he was not happy that somebody who was not supposed to be in the business was actually on the internal systems*.
>
> *Q. On the internal systems and working informally for the business?*
>
> *A. Correct.*
>
> *Q. And using the 3CX App as part of that work?*

> *A. That is what I surmised, yes.* "

69. As regards 3CX, Mr Henery remembered Mr McKeeve being unhappy about it, but no direct instruction was given on 3 July to shut it down. Mr Henery said:

> "*No. It was not an instruction on that date to shut it down. He [Mr McKeeve] spoke to Jonathan Faiman and said, 'I do not like what you guys are doing, or words to that effect'*."

70. This evidence is consistent with Mr McKeeve's evidence in his Affidavit in the Underlying Action. At para. 8 he said:

> "*On 3 July 2019, I was at TDP's temporary offices in Hammersmith and overheard a discussion between Martin Henery and Jonathan Faiman during which they discussed Mr Hillary's request to have some means of emailing TDP personnel after his todayuk.com account had been disabled a few days previously. I spoke to Mr Henery and Mr Faiman and both Mr Faiman and I suggested in curt terms that that was not a good idea and any such communications should stop*".

The Slushminers Accounts

71. Despite Mr McKeeve's intervention, however, Mr Henery went ahead and set up new email accounts, as he described at paragraphs 18-19 of his First Affidavit:

> *"18. Notwithstanding Mr KcKeeve's [sic] reservations, at Mr Hillary's request, I created the three email accounts set out ... below on the evening of 3 July 2019:*
>
> *18.1. Alice@Slushminers.com;*
>
> *18.2 Bob@Slushminers.com; and*
>
> *18.3 Toby@Slushminers.com*
>
> *(together the 'Slushminers Accounts')*
>
> *19. Those accounts were created for Helen Merriott, Phil Byron and Jonathan Hillary respectively*."

72. Early the following morning, 4 July 2019, Mr Hillary sent an email from his Slushminers Account (*Toby@Slushminers.com*) to Ms Merriott and Mr Byron, attaching a spreadsheet setting out amendments to Today's business plans with Waitrose.

The Search Order

73. The Search Order was made by Fancourt J on 3 July 2019. It permitted searches to be conducted at 2 sets of premises – namely at any set of rooms occupied by Mr Faiman at the Connaught Hotel, and at Mr Hillary's home address in Ascot.

74. By para. 5, the Order was directed at the Respondents and any "*Controller of Access*". "*Controller of Access*" was defined in para. 5(c) as follows:

> " *... any other person (other than employees of the Connaught Hotel) having responsible control of the premises (as listed in Schedule B to this Order ... (the 'Premises') or who has the knowledge or ability to give access to documents on any Electronic Data Storage Device (as defined in paragraph 7(c) below) situated on or remotely accessible from the Premises (hereinafter referred to as a 'Controller of Access')*".

75. The core provision in the Search Order was para. 7, which set out the basic parameters of the permitted search, as follows:

> "*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 platforms 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*."

76. A number of individuals were identified as Independent Computer Specialists under the Order, including Mr Tony Joy, who attended at the Connaught Hotel.

77. I will come back to Schedule C below.

78. By para. 11, the Respondents or any Controller of Access were entitled to ask the Supervising Solicitor to delay starting the search for up to 2 hours (or such longer period as the Supervising Solicitor might agree), in order to take legal advice, but in such event (para. 11(d)) were not to:

> " *... switch on, disturb or remove any Electronic Data Storage Device or erase or modify any documents stored on them (whether or not such documents are Listed Items or not), including (without limitation) by causing any function to be performed on or in relation to such device save for the purpose of complying with this Order or with the prior permission of the Supervising Solicitor, until the search is completed*."

79. Paras 21 to 27 then contained a series of provisions dealing with the searching of computers and other electronic equipment. In summary:

i) Under para. 21, any Respondent or Controller of Access was immediately required to:

> " *... hand over to and permit the Independent Computer Specialist to make up to two electronic copies (or images) of any or all of the documents (whether they are Listed Items or not) held on any or all of the Electronic Data Storage Devices situated on or accessible from the Premises or to which the Respondent has access, including but not limited to his email accounts*."

ii) Under para. 22, any Respondent or Controller of Access was required to supply all email addresses, passwords and other information necessary to give access to Electronic Data Storage Devices.

iii) Under para. 23, any Respondent or Controller of Access was required immediately to give access to all computers or other Electronic Data Storage Devices and to cause any Listed Items to be displayed or printed out.

iv) Para. 24 permitted the imaging process to be completed off-site or remotely, if necessary.

v) Para. 25 prohibited (*inter alia*) deletion or amendment of any information or documents until the imaging exercise was complete.

vi) Para. 26 set out a protocol for the ongoing review of imaged data. This provided for further searches to be conducted on notice to the Respondents, under the supervision of the Supervising Solicitor, but with the Applicants and their solicitors present in order to identify and copy any Listed Items found.

80. Paragraphs 32-34 then set out the following "*Prohibited Acts*":

> "*32. Except for the purpose of obtaining legal advice, the Respondents and any Controller of Access must not directly or indirectly inform anyone of these proceedings or of the contents*

> *of this order, or warn anyone that proceedings have been or may be brought against it by the Applicants until 4.30 p.m. on the return date or further order of the court or such earlier time as agreed in writing by the Applicants.*
>
> *33. Until 4.30 p.m. on the Return Date, the Respondents and any Controller of Access must not destroy, tamper with or part with possession, power, custody or control of any Listed Items otherwise than in accordance with the terms of this order provided that, after the making of the electronic copies as set out in paragraph 21 above, the Respondent is permitted to make use of any Electronic Data Storage Devices in the ordinary course of business or personal use.*
>
> *34. Until the Return Date or further order of the Court, the Respondent must not use, disclose or in any way deal with the Confidential Information (as defined in Schedule C), save for the purposes of receiving advice from the Respondent's legal advisers or as provided for in this Order*."

81. The definition of "*Listed Items*" in Schedule C to the Search Order is important. Most relevantly for present purposes, the definition of Listed Items includes (1) documents containing information confidential to Ocado ("*Confidential Information*" is specifically defined), and (2) documents evidencing "*any work*" carried out by Mr Hillary for Mr Faiman or Today.

82. Schedule C provides in full as follows:

> "*For the purposes of this order, Listed Items shall constitute:*
>
> *1. Any document, in hard or soft copy, (i) created by or on behalf of either of the Intended Claimants and (ii) containing Confidential Information, including:*
>
> > *a. Any reproductions of the 'dashboard' summary of the performance of the Ocado business;*
> >
> > *b. Any reproductions of the Ocado businesses' weekly or monthly key performance indicator (KPI) summaries;*
> >
> > *c. Any reproductions of documents relating to the projects entitled Ocado "Zoom" or Ocado 'Orbit';*
> >
> > *d. Any of the underlying information or data used to produce any document in category (1) a, b or c above;*
>
> *2. Any document, in hard or soft copy, incorporating or reproducing information from a document in category (1);*
>
> *3. Any document, in hard or soft copy, incorporating or reproducing information about the Ocado business (i) which was*

obtained directly from a person who was at the time an employee of an Ocado company and (ii) which was not also publicly available at the time of its receipt by the Respondent;

4. Any document evidencing:

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

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

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

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

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

For the purposes of this order:

'Confidential Information' shall constitute:

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

> *b) Any information described at a) above that was, at the time of its provision or disclosure to the Respondent, confidential to the Applicants or any Group Company.*
>
> *'Group Company' shall mean the Applicants, their Subsidiaries or Holding Companies from time to time and any Subsidiary of any Holding Company from time to time.*
>
> *'Subsidiary and Holding Company' shall mean in relation to a company, "subsidiary" and "holding company" as defined in section I 159 of the Companies Act 2006 and a company shall be treated, for the purposes only of the membership requirement contained in subsections 1159(1)(b) and (c), as a member of another company even if its shares in that other company are registered in the name of (a) another person (or its nominee), whether by way of security or in connection with the taking of security, or (b) a nominee.*"

Service of the Search Order on Mr Faiman

83. 4 July 2019 was the date of execution of the Search Order. Mr Faiman was at the Connaught Hotel on the morning of 4 July. Mr McKeeve was at his office at Jones Day, preparing for a meeting with Waitrose, which was due to commence at 9am. He was expecting Mr Faiman to attend.

84. According to the Supervising Solicitor, Mr de Jongh, he served Mr Faiman with a copy of the Search Order at approximately 8.20am on the morning of 4 July. Mr Faiman's initial suggestion was that since he was on his way to a meeting with his lawyers, he use that as an opportunity to take advice on the Search Order, but when it was explained to him that the Search Order required a search of his rooms at The Connaught Hotel, he agreed a better idea would be to have his lawyers come to him. At approximately 8.25am, Mr de Jongh began to explain the terms and effect of the Order to Mr Faiman as they walked around the block, along Mount Street and back along Adam's Row. Mr de Jongh introduced Mr Faiman to Mr Tony Joy of KLDiscovery Limited, one of the Independent Computer Specialists appointed under the Search Order. Mr de Jongh, "*... explained that the Order also permitted the search party to search for Listed Items on the Respondents' electronic devices and accounts and that for this purpose Mr Joy would take forensic images of those devices and accounts*". Mr de Jongh also explained to Mr Faiman that "*except for the purpose of taking legal advice, he must not (directly or indirectly) inform anyone of the existence of these proceedings, or that proceedings had been or may be brought against them, or of the contents of the Order, until after the return date hearing*".

85. Mr de Jongh's Report then goes on to say, relevantly:

> "*16. At approximately 8.30am, as we were standing on Adam's Row, Mr Faiman told me that he would like to call Raymond McKeeve of Jones Day. We agreed that Mr Faiman would pass his phone to me so that I could explain the situation, including the prohibition under paragraph 32, which I did. I said to Mr McKeeve that I would email him, copying in the Mishcon de*

> *Reya team, so that he could obtain a copy of the Order and related documents from them, which I did at 8.59am.*
>
> *17. Mr Faiman spoke to Mr McKeeve until about 8.38am …*
>
> *18. Mr Faiman then made calls to Lord David Gold, the former senior partner of Herbert Smith (now Herbert Smith Freehills: 'HSF'), and Alan Watts of HSF. Neither was available but at approximately 8.48am Mr Faiman missed a call from Mr McKeeve. He returned the call and spoke to Mr McKeeve for a few minutes.*
>
> *19. I explained to Mr Faiman that the Order required him to give me immediate access to any Premises, as defined in the Order, and asked him to show me up to his room. He agreed to do so but then (as we stood on Adam's Row, at the corner with Carlos Place) received a call from Sion Richards of Jones Day. Mr Faiman passed his phone to me and I introduced myself and explained what had happened since service of the Order. I made Mr Richards aware of the paragraph 32 prohibition and answered a number of questions from him".*

86. In an email dated 17 July 2019 to Mishcon de Reya and Jones Day, Mr de Jongh amplified his recollection of these events, as follows:

> "*Mr Faiman called Mr McKeeve at or very shortly after 8.30am, while I was with him and Tony Joy (the ICS) on Adam's Row next to the Connaught. Before doing so, Mr Faiman suggested that I speak to Mr McKeeve first, and after speaking briefly to Mr McKeeve he passed his phone to me. I noted that the call ended at approximately 8.38am, so I estimate that it lasted for about seven minutes in total.*
>
> *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 Limited 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. As noted in my report (paragraphs 18 - 19) Mr Faiman spoke to Mr McKeeve again at about 8.48am, and shortly after that Mr Faiman and I both spoke to Mr Richards.*"

87. Relevantly for present purposes, therefore, Mr McKeeve was engaged on the telephone between approximately 8.30am and 8.38am (speaking to Mr Faiman and to Mr de Jongh); and he then called Mr Faiman back approximately 10 minutes later, at 8.48am.

Mr McKeeve's Message to Mr Henery

88. Two things happened in that 10 minute period. One is that Mr McKeeve spoke to a litigation partner at Jones Day, Mr Sion Richards. The other is that, immediately after his call with Mr Faiman, and before speaking to Mr Richards, Mr McKeeve sent a message on the 3CX App to Mr Henery. He gave evidence about this in his Affidavit in the Underlying Action at paras 9, 10 and 11:

> *"9. ... I then spoke to someone called Alex (whom I now know to be Alex de Jongh, the Supervising Solicitor), who told me that there was a Search Order against Jonathan, and that Jonathan had a short window (I believe Mr de Jongh mentioned a time period of two hours) to take legal advice. I believe he also made reference to a meeting that I had attended and said something to the effect that that meeting 'may be of interest.' ...*
>
> *10. I had no idea what the Search Order related to or what in practice it meant. However, I was immediately concerned about the fact that there were people from outside the TDP business who might be able to get access to an app which had my wife's name in it. Given the sensitivity of her new role, and particularly since it now looked like there might be a high profile investigation or dispute regarding TDP, I was concerned to contain the exposure of Belinda's name. Immediately after my call with Mr de Jongh or my subsequent brief call with Mr Faiman but before I spoke to Mr Richards at 8:40am (so, I believe, some time between 8:35am and 8:40am), I therefore sent a short message using the 3CX app to Mr Henery which read, I think, 'burn it'.*
>
> *11. What I meant by that message was that Mr Henery should get rid of the 3CX app. In case Mr Henery did not understand my (very short) message, I also called him to tell him to delete the 3CX application ... ".*

89. Mr McKeeve gave further evidence in his First and Second Witness Statements in the present action. In his First Witness Statement he said that although he did not recall Mr de Jongh mentioning to him the prohibition on Mr Faiman discussing the Search Order with anyone, that might be true. He said he did recall being told that Mr Faiman had only two hours to take legal advice, which he (Mr McKeeve) was concerned about. Mr McKeeve went on:

> "*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.*
>
> *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 as set out at paragraph 10 of my Affidavit*."

90. Mr McKeeve also gave further evidence about his telephone call with Mr Henery, after having sent him his message:

> "*Shortly afterwards I made a follow up call to Mr Henery regarding the deletion of the 3CX system. As far as I am aware, Mr Henery did not respond to the earlier message and, when we then spoke on the telephone, he simply responded by saying 'OK' or something similar. That was the extent of our call, which would have lasted for about 20 seconds. I did not ask Mr Henery to take any other action (including, for example, to disable or delete the email accounts with the domain name 'slushminers.com', of which I was at that time unaware and only became aware of a number of days later)*."

91. In his Second Witness Statement at para. 50, Mr McKeeve developed his point about telephones and other devices being taken, as follows:

> "*It was the fact that Mr Faiman was having to hand over his phones and devices to third parties that caused me to immediately panic (i.e. about others getting access to those devices and about seeing what might look like my wife's involvement in something that she knew nothing about) and which in turn caused me to ask Mr Henery to 'burn' the 3CX app (something which I did within seconds of speaking to Mr Faiman and Mr de Jongh). It was Mr Faiman telling me that he was having to hand over his devices - and not the existence of the search order or the claim - that triggered my concerns and my actions, and it was never my intention to breach any court order or to destroy documents which might be relevant to court proceedings*".

Mr Henery Reacts

92. Henery gave this brief account in his First Affidavit in the Underlying Proceedings:

> "*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'. At that time I was on a bus travelling from Richmond to TDP's offices at the Foundry …*
>
> *Given Mr McKeeve's clear frustrations, expressed on the morning of 3 July 2019, I inferred from his message that I should prevent any further use of Mr Hillary's accounts. Therefore, on arriving at the Foundry at between approximately 9.00am and 9.30am I promptly 'disabled' the Slushminers Accounts and 'terminated' the 3CX Accounts*".

93. Mr Henery went on to explain the effect of the Slushminers' Accounts being disabled. As he describes it, they were suspended and a timescale set for their permanent deletion. It was open to Mr Henery to select a time period for deletion, with the shortest period being one day. Mr Henery selected that they should automatically delete after 3 months. Once Mr Henery came to learn of the Search Order, he took steps to ensure the data on the Slushminers Accounts was preserved and any ultimate deletion process halted.

94. The position as regards the 3CX App was different:

> *"The position in relation to the 3CX Accounts is a little more complicated. As I have explained above, the 3CX account to which I had subscribed was a free account, which lacked effective functionality. It also lacked a deletion protection function, such that there was no option, as such, to 'unsubscribe' or 'disable' the accounts pending deletion. The 3CX account offered two options: to 'stop' or 'terminate'. Had I selected the 'stop' option the IP addresses would have been lost and the accounts disabled. However, it may have been possible to re-establish the accounts with a new IP address which I now understand may have meant that the messages sent and received via the 3CX Accounts would have been preserved or at least recoverable. However, on the morning of 4 July, I did not give much consideration to whether I should 'terminate' or 'stop' the 3CX Accounts. I was of course aware of the general dissatisfaction with its functionality and, given I did not consider that any of the account holders would wish to maintain it as a method of communication, I simply 'terminated' it."*

Execution of the Search Order at the Connaught Hotel

95. A copy of the Search Order was emailed to Mr McKeeve by Mishcon de Reya at 10.02am. Mr McKeeve's evidence was that he did not read it himself: he left that to Mr Richards and the litigation team. By then, a team from Jones Day, including Mr McKeeve and Mr Richards, had arrived at the Connaught Hotel.

96. There then followed a long period, ending at about 4.10pm, during which Mr Faiman met with his advisers from Jones Day in his rooms at the Connaught Hotel. According to his evidence given in cross-examination, Mr McKeeve was present during some of this time, but recalled being out of the room for 2 to 3 hours, attending to other matters.

97. At approximately 4.10pm, a team from Mishcon de Reya were allowed to enter Mr Faiman's room at the Connaught Hotel, to begin the physical search contemplated by the Search Order.

98. Mr Faiman was eventually interviewed by Mishcon de Reya pursuant to the Search Order later in the evening, starting at about 9.15pm and concluding at about 11.13pm. Mr McKeeve was present during this interview.

99. In his Affidavit made in the Underlying Action, Mr Faiman said as follows in relation to the 3CX App:

> "*I did not use 3CX very much at all, as I found it cumbersome and unreliable. As a result, sometime in late June or early July 2019 (but in any event prior to being served with the Search Order) I deleted the 3CX app from my phone. At the time of providing answers to the Applicants' solicitors' questions on the evening of the search I did not think that my 3CX account would constitute a Device as I had deleted the app from my phone a few days beforehand*."

100. At a certain point in the interview, Mr Faiman was asked whether he had given any documents to Mr McKeeve. After a short break in order to confer with Mr Richards, Mr Faiman's response (conveyed by Mr Richards) was that to the best of his recollection, he had not provided any documents to Mr McKeeve. In his Affidavit in the Underlying Action, however, Mr Faiman later said the following (his reference to "*Removed Documents*" is to documents found in his possession at the Connaught Hotel, i.e. the OSP Contract and the Operational Schedules: see above at [37]-[39]):

> "*At the time of the search, I did not recall providing the Removed Documents to Raymond McKeeve of Jones Day, a private equity partner with legal oversight of Today's negotiations with Waitrose (and previously with Marks & Spencer). I still do not recall this, but if I did so, I believe it must have been at a similar time to when I gave them to Q5 Partners*."

101. Neither did Mr McKeeve make any mention of the 3CX App during the long meeting with Jones Day, or during the later meeting at which Mr Faiman was interviewed.

Service on Mr Hillary and at the Foundry

102. While these events were unfolding, a separate team from Mishcon de Reya were responsible for executing the Search Order at Mr Hillary's home. In addition, the Claimants had applied for (and obtained) a separate Search Order in effectively the same terms on the morning of 4 July 2019, permitting a search to be conducted of Today's offices at the Foundry.

103. In the event:

i) Mr Hillary was interviewed pursuant to the Search Order, beginning at about 4.30pm. His interview concluded at approximately 8.20pm.

ii) Mr Henery and a Ms Laura Phillips, who were present at the Foundry, were interviewed pursuant to the second Search Order between 9.35pm and approximately 10pm.

104. Neither Mr Hillary nor Mr Henery made reference to the 3CX App during their interviews. Mr Hillary's evidence was that he did not think it relevant. During his interview, Mr Henery was asked expressly about deletion of any items (HP is Mr Plowman, a solicitor from Mishcon de Reya):

> "*HP: Ok. Paragraph 21 [of the search order] we've done, paragraph 22 we've done, and we've done 23. You've provided passwords to Richard. Paragraph 25 [read out]. This provision requires you not to amend or delete any information or documents – and have you complied with that? You've not deleted anything today?*
>
> *Martin: No.*"

105. Neither did Mr Henery disclose the existence of the Slushminers Accounts during his interview.

Documents located at the offices of Jones Day

106. At 2pm on Friday, 5 July (the day after execution of the Search Order), Jones Day had a telephone call with Mishcon de Reya. During that call, Jones Day informed Mishcon de Reya that Mr McKeeve had recalled Mr Faiman providing him with an incomplete Ocado draft contract in hard copy at the Connaught Hotel in Easter 2019, but Mr McKeeve was no longer in possession of that document. On Monday 8 July, however, Jones Day then sent a letter to Mishcon de Reya correcting the position, and indicating that Mr McKeeve had not discarded the contract referred to, but instead had stored it in Jones Day's offices. After a thorough search, Jones Day had located three hardcopy documents and a softcopy document which appeared to be copies of certain of the Removed Documents (see above at [39]), taken during the search of the Connaught Hotel. On Wednesday 10 July, Jones Day wrote again to say they had identified a further copy of a Removed Document in their possession. The documents located at Jones Day included copies of the OSP Contract and the Operational Schedules, handed over by Mr Hillary to Mr Faiman in March 2019 (above at [37]).

The 3CX App is Revealed

107. A few days later, on 9 July 2019, during the course of a discussion with a representative of Jones Day, Mr Henery mentioned the 3CX App. Mr Richards then contacted Mr McKeeve, who came back to the office (he had been at Wimbledon) for a discussion. According to Mr McKeeve's oral evidence, Mr Richards was "*really angry*".

108. In their letter to Mishcon de Reya of 15 July, Jones Day addressed a number of points:

i) They referred to Mr Hillary's "*Todayuk.com*" email account (the one which originally had the username "*Jon*", then "*Belinda*", then "*Josephine*"), which Mr Henery had suspended on 1 July 2019, pending permanent deletion after 30 days. Jones Day explained that following service of the Search Order, steps had been taken to ensure preservation of the account and to ensure that any deletion process was halted.

ii) They referred to the Slushminers' Accounts. They said that Mr Henery had been involved in helping KL Discovery to obtain images of those Accounts. The deletion process started by Mr Henery in relation to the Slushminers' Accounts had been halted and steps taken to ensure that data on the Slushminers' Accounts was preserved.

iii) They referred for the first time to the 3CX App, and described, on instructions, the circumstances which had led to that App being deleted by Mr Henery on the morning of 4 July 2019. They explained that the same events had resulted in Mr Henery beginning a deletion process in relation to the Slushminers' Accounts, although that had been halted. They explained that the situation was different in relation to the 3CX App, which was now "*no longer available*". They explained that Mr McKeeve would shortly file evidence relating to the relevant events. Mr McKeeve filed his Affidavit in the Underlying Proceedings a few days later, on 17 July 2019.

The Underlying Action

109. The Claim Form issued on 4 July 2019 named the following three Defendants: (1) Mr Faiman, (2) Project Today Holdings Limited, and (3) Mr Hillary.

110. The Claim Form gave the following brief details of claim:

> "*The Defendants have obtained confidential financial and operational information about the business of the Claimants, and have misused and/or disclosed it for their own benefit, in breach of:*
>
> *(1) equitable obligations of confidence owed by each of them; and,*
>
> *(2) in the case of the Third Defendant, contractual obligations of confidence owed to his employer, the Second Claimant.*
>
> *The Third Defendant has breached his contract of employment with the Second Claimant in other respects, in particular by working with the First and Second Defendants in competition or potential competition with the Claimants' business.*
>
> *The First and/or Second Defendants have unlawfully induced or procured breaches by the Third Defendant of his contract of employment with the Second Claimant.*

> *The Defendants or each of them have unlawfully induced or procured breaches by other employees of the Claimants of their contracts of employment.*
>
> *The Defendants have conspired to injure the Claimants by unlawful means.*
>
> *The Claimants seek (i) injunctive relief, (ii) damages, equitable compensation and/or an account of profits at their election; (iii) interest, and (iv) costs*."

111. More detailed Particulars of Claim were served only later, on 22 July 2019.

112. An issue which proved controversial in the Underlying Action was precisely how the information collected via the Search Order would be reviewed. A detailed search protocol was first introduced by means of an Order of Mann J dated 2 August 2019. A further Order was made by Master Bowles in October 2019, which was later amended by consent in September 2020. Eventually, a Disclosure Review Document was approved by Mrs Justice Bacon at a CMC on 25 May 2021. Among the electronic devices listed in the Disclosure Review Document were no fewer than 6 mobile telephones whose custodian was Mr Faiman, plus an iPad whose custodian was Mr Faiman.

113. In the event, although certain data that was agreed to constitute Listed Items was produced from Mr Faiman's phones, the Underlying Action settled before disclosure was completed. Consequently any further information as may have been retrievable from Mr Faiman's various phones and his iPad was not produced during the trial before me.

114. Data was however made available from Mr Hillary's iPhone. This includes the material tabulated into the iPhone Call Log (above at [58]), showing calls made by Mr Hillary on the 3CX App beginning on 14 June 2019 and ending on 3 July 2019.

115. As part of the settlement terms in the Underlying Action, the parties produced an Agreed Statement of Facts. This included the following:

> "*4. Ocado obtained and executed search orders against Mr Faiman at the hotel where he was staying, against Today at its office and against Mr Hillary at his home in early July 2019. The searches revealed that:*
>
> > *4.1. Mr Faiman was on his way to a meeting with Waitrose with a significant number of confidential documents belonging to Ocado in hard copy, including (among several other things) documents relating to the running of Ocado's automated warehouses, and the key agreement under which Ocado would provide its online grocery technology to the joint venture with M&S; and*
> >
> > *4.2. Mr Hillary, despite having confirmed upon his resignation that he had retained no confidential*

> *information belonging to Ocado, was also in possession of a significant amount of Ocado's confidential information.*
>
> *5. Mr Hillary disclosed that, in around March 2019 (two months before giving notice of his resignation), he knowingly provided Mr Faiman, at Mr Faiman's request, with various confidential documents relating to Ocado's business, including documents relating to Ocado's Smart Platform and the documents that Mr Faiman had with him when on his way to the meeting with Waitrose. The reason for obtaining these confidential documents was to use them for the purposes of Today's business. Mr Faiman also provided some of these documents to Today's advisors.*
>
> *6. In so doing, Mr Faiman, Today and Mr Hillary breached their obligations of confidence to Ocado. Mr Hillary breached certain contractual and fiduciary duties owed to Ocado, and Mr Faiman induced Mr Hillary's breaches of contract*."

The Present Action

116. The Claim Form in the present Action was issued on 25 September 2019. Permission to continue the Action was initially refused by Marcus Smith J (see [2020] EWHC 563 (Ch) and [2020] EWHC 1463 (Ch)), but subsequently granted by the Court of Appeal (see [2021] EWCA Civ 145).

117. After the Judgment of the Court of Appeal, the Grounds of Contempt were amended by Order of Miles J in December 2021, in the manner identified below at [124].

118. Among the directions given by Miles J at the same hearing were the following:

    i) Orders requiring the Claimants to conduct a reasonable search for Listed Items as defined in the Search Order (para. 18), and then to disclose such Listed Items together with any known adverse documents or further documents on which they relied (para 19).

    ii) An Order (para. 21) for the Claimants then to file the following:

    > "*a. An updated version of Mr James Libson's first affidavit dated 25 September 2019, excluding those matters which are no longer relied upon by the Claimants;*
    >
    > *b. A further affidavit of Mr James Libson (or, if he is unavailable, then from another partner at the Claimants' solicitors, Mishcon de Reya) provided that such affidavit does not make any new allegations or address any new evidence (other than those documents disclosed pursuant to paragraph 19 above) …* "

119. An updated version of Mr Libson's First Affidavit was duly served on 21 February 2022 in accordance with para. 21(a).

120. On the same day, Mr Libson's much longer Third Affidavit was also served. As noted, this was intended to be a compendious restatement of the Claimants' position. Mr Libson said at para. 9: "*My intention … is to ensure that Mr McKeeve and the Court can refer to this single document as setting out Ocado's case, rather than needing to refer to various witness statements, judgments and Court orders which this case has produced*."

121. Among other matters, Mr Libson's Third Affidavit referred to the iPhone Call Log, compiled using data from Mr Hillary's iPhone, which by then had been produced in accordance with para. 19 of the Order made by Miles J.

122. At para. 215 of Mr Libson's Third Affidavit, Mr Libson referred to a number of "*specific 3CX documents*" which he said could be identified as having been deleted on the instruction of Mr McKeeve. Five were set out, as follows:

> "*215.1 Mr McKeeve sent a 3CX message to Mr Henery on 4 July 2019 at around 8.38am which stated 'burn it' or 'burn all'.*
>
> *215.2 The 3CX Today Account was itself a document, as it contained the login details of each of the Today 3CX users.*
>
> *215.3 Further, the 3CX application on each user's electronic device was itself a 'document', as it consisted of electronic code on those devices.*
>
> *215.4 The 3CX application had a call log, which would have identified the calls made and received by each of the five Today users.*
>
> *215.5 The 3CX application stored any voicemail messages which had been left (including those left by Mr Hillary for Mr Faiman, described at paragraph 111.3 above)."*

123. During the trial before me, Mr Weekes QC made a specific objection to paragraphs 215.4 and 215.5 of Mr Libson's Third Affidavit, which he said sought impermissibly to expand the scope of the contempt application, because deletion of any call log or of voicemails had not been referred to in Mr Libson's First Affidavit. That had referred only to text messages on the 3CX App and to the Slushminers email Accounts. Thus, said Mr Weekes QC, it was not proper or fair for what were effectively new Grounds of Contempt to be raised by means of Mr Libson's Third Affidavit. Raising new Grounds of Contempt would require permission, and no permission had either been sought or given.

The Grounds of Contempt

124. The Grounds of Contempt are those set out in the Claim Form, as follows (Ground 2 was abandoned at an earlier stage and deleted):

> "*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 (in the form of the 3CX application and the email accounts as set out in the affidavit of James Libson and the material contained therein) which is of relevance to the claim by the Claimants against Mr Faiman, Today and Mr Hillary.*
>
> *2. [deleted].*
>
> *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 constitutes 'confidential information' within Schedule C of the Search order.*
>
> *5. Intentionally causing the destruction of documentary material (in the form of the 3CX System and the email accounts as set out in the affidavit of Mr James Libson, and the material contained therein) stored on Electronic Data Storage Devices (as defined in the Search Order)."*

125. The underlined words (i.e., the addition to Ground 1, and new Ground 5), were added by amendment, pursuant to an Order of Miles J dated 21 December 2021.

126. It is convenient at this point to deal with the issue raised by Mr Weekes QC in relation to Mr Libson's Third Affidavit.

127. In my view Mr Weekes' argument is misconceived. I do not regard the points mentioned at paras 215.4 and 215.5 of Mr Libson's Third Affidavit as impermissible new Grounds of Contempt.

128. The reason is a simple one. Mr Libson's Third Affidavit was served on 21 February 2022. By then the Claim Form had been amended by Order of Miles J in the form identified at [124] above. The amendments to Grounds 1 and 5 refer to "*the 3CX application and the email accounts as set out in the affidavit of James Libson and the material contained therein"* (my emphasis). I agree that the reference here is to Mr Libson's First Affidavit, but in my opinion it is also entirely clear that in referring to "*the material contained therein*", the Amended Grounds of Contempt were referring to whatever material was contained in the 3CX App (including records of voice calls and voicemails), and not only to the materials referenced in Mr Libson's First Affidavit.

129. Thus, the intention was not (as Mr Weekes QC suggested) to limit the scope of Grounds 1 and 5, so far as they concern the 3CX App, only to those features of the 3CX App referenced in Mr Libson's First Affidavit. The complaint, very obviously to my mind, and very clearly put, was that the 3CX App had been lost and everything on it. Moreover, specifically as to the iPhone Call Log, by February 2022 this had been

disclosed under para. 19 of the Order made by Miles J, and it was entirely permissible for Mr Libson's Third Affidavit to comment on it, in light of the permission in para. 21(b) of the same Order.

130. I therefore reject Mr Weekes' argument on these points, and proceed on the basis that both records of voice calls and voicemails are within the scope of the Claimants' case.

The Law of Criminal Contempt

Matters of Common Ground

131. Some basic points were uncontroversial:

i) Criminal contempt is different to civil contempt. Liability for civil contempt involves a Respondent disobeying an Order of the Court. Liability is strict in the sense that, as long as it is shown that the Respondent (i) knew of the terms of the Order, (ii) acted in a manner which involved a breach, and (iii) knew of the facts which made his conduct a breach, then he is liable: see Masri v. Consolidated Contractors International Company SRL [2011] EWHC 1024 (Comm) at [150], per Christopher Clarke J., and Varma v. Atkinson [2021] Ch 180 at [54], per Rose LJ (as she then was).

ii) Criminal contempt is different. The essence of this form of contempt is wilful intention to interfere with the due administration of justice. There are two elements. The *actus reus* involves the Claimant showing that the Defendant's acts have in fact interfered with the due administration of justice. The *mens rea* is contingent on proof of a specific intention to interfere with the administration justice, although intent may be inferred and is different to motive (in the sense that the Defendant may still intend to interfere with the due administration of justice even if motivated by a legitimate and strong moral imperative: see A-G v. Crosland [2021] 4 WLR 103).

iii) In a passage in his judgment in the Court of Appeal in A-G v. Times Newspapers [1988] Ch. 333 (at pp. 374-375), later cited with approval and adopted by Lord Bingham in AG v. Newspaper Publishing A-G v. Newspaper Publishing [1997] 1 WLR 926 at p. 936H, Sir John Donaldson MR said that to show contempt, the Claimant must establish to the criminal standard of proof that:

> " *... the conduct complained of is specifically intended to impede or prejudice the administration of justice. Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. An intent is to be distinguished from motive or desire: see per Lord Bridge of Harwich in Reg. v. Moloney [1985] A.C. 905, 926.*"

132. There was nothing between the parties as to the correct approach to the burden of proof. The main points are as follows:

i) The burden of proof lies at all times on the Claimant. The presumption of innocence applies (Article 6(2) of the European Convention on Human Rights). The burden of proof lies on the Claimant to establish the facts constituting an alleged contempt beyond reasonable doubt, so that the court is sure of those facts: see, e.g., Daltel Europe Ltd v. Makki [2005] EWHC 749 (Ch) at [30] per David Richards J.).

ii) Although inferences may be drawn in order to establish criminal contempt, if, after considering the evidence, the court concludes that there is more than one reasonable inference to be drawn, and at least one of them is inconsistent with a finding of contempt, then the claimants must fail: Daltel, as approved by Teare J in JSC BTA Bank v. Ablyazov [2012] EWHC 237 (Comm) at [8].

iii) If and insofar as an applicant's case depends on the Judge drawing an inference as to a Defendant's dishonest state of mind, the Claimant's case can only succeed if the inference of dishonesty is the only possible inference that can reasonably be drawn: see, e.g., JSC BTA Bank v. Ereshchenko [2013] EWCA Civ 829 at [40] per Lloyd LJ.

133. So far so good, but beyond these basic propositions there was disagreement about the precise elements of the contempts alleged in this case. The debate arose largely because of the way the case was put in relation to Grounds 3, 4 and 5.

Grounds 3, 4 and 5: Frustrating the purpose of an Order of the Court

134. First of all to distinguish Grounds 3, 4 and 5 from Ground 1, Ground 1 in a sense is the odd one out because it is a free-standing contempt arising from the destruction of documents relevant to a claim. It does not depend on the Search Order. Grounds 3, 4 and 5, however, *are* dependent on the Search Order. As to those Grounds, the precise manner in which Mr McKeeve is said to have interfered with the due administration of justice needs to be closely examined by reference to the key authorities.

135. That is because Mr McKeeve was not a Respondent to the Search Order. Neither was any case advanced that he was a "*Controller of Access*", within the meaning of that phrase in the Search Order. Instead, liability was sought to be imposed on Mr McKeeve as a third party.

Z Ltd v. A-Z and AA-LL

136. In what way may a third party be in contempt as regards an Order of the Court not addressed to him? An Order directed at a Respondent, X, does not in terms inhibit a third party, Y, from doing anything. On the face of it, Y remains free to act.

137. The authorities are clear, however, that Y may be liable in contempt in two ways, which are sometimes overlapping.

138. The first way is if Y aids or abets X to breach the Order. That form of liability involves X assisting Y in Y's own breach. A good example is the case where a freezing order is obtained against a Respondent and then served both on the Respondent and on the bank where the Respondent's assets are held. If the Respondent then gives instructions for his assets to be released, and the bank honours the instruction, then both are in contempt

of Court; the Respondent for breaching the Order directed to him, and the third party bank for aiding and abetting that breach by following the Respondent's direction while knowing of the Order.

139. The second way involves the third party acting independently of the Respondent. The liability of the third party is not dependent on any breach of the Order by the Respondent to the Order, or on assisting in such breach. It arises from the third party's own actions.

140. In exploring this point, one can again start with a banking case. The point was relevant in the early days of the Mareva or asset freezing jurisdiction. A problem case was that where a freezing order was obtained and was served on a bank in the jurisdiction but before it was served on the Respondent, who might be out of the jurisdiction or perhaps evading service. In such a case a bank which paid out on the Respondent's instruction was in one sense assisting the Respondent, but could not be guilty of aiding and abetting a breach of the Order by the Respondent, because the Respondent, not having been served, could not himself be in breach: see Z Ltd v. A-Z and AA-LL [1982] 1QB 558, per Lord Denning MR at p. 572F-G. But could the bank be liable in such a case, and if so, what was the basis of the liability?

141. The Court of Appeal in Z Ltd v. A-Z and AA-LL considered that the bank could be liable, not for aiding and abetting a breach by the Respondent, but for itself acting in a manner calculated to interfere with the due administration of justice.

142. At p. 574D-E, Lord Denning MR described the relevant principle as follows:

> "*The juristic principle is therefore this: As soon as the bank is given notice of the Mareva injunction, it must freeze the defendant's bank account. It must not allow any drawings to be made on it, neither by cheques drawn before the injunction nor by those drawn after it. The reason is because, if it allowed any such drawings, it would be obstructing the course of justice—as prescribed by the court which granted the injunction—and it would be guilty of a contempt of court*."

143. At p. 578D-E. Eveleigh LJ advanced the following two propositions:

> *"I think that the following propositions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction."*

144. Note that proposition (2) is still dealing with the case where the third party has *knowingly assisted* the Respondent to the Order. That will obviously be the case where a bank pays out on a customer's instruction. But as Eveleigh LJ went on to explain, in the case where the Respondent himself has not been served, although the bank may

have *assisted* the Respondent, the basis of the bank's liability does not arise from aiding and abetting the Respondent's breach. Instead the bank's liability is an independent one, which arises because the bank has knowingly caused the purpose of the order to be thwarted. Eveleigh LJ put the point as follows at p. 578F-H, relying on the old case of Seaward v. Paterson [1897] 1 Ch 545:

> "*I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (i.e. he was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted*."

145. The Claimants were very clear in their closing submissions to the Court that this was the way they put their case against Mr McKeeve in relation to Grounds 3, 4 and 5. They said that Mr McKeeve's liability rested on his own conduct in having intentionally acted to thwart the purpose of the Search Order.

Attorney-General v. Times Newspapers ("Spycatcher")

146. The principle in Z Ltd v. A-Z has been applied in a number of well-known cases where a third party has acted entirely independently of the Respondent to the Order.

147. Perhaps the best-known example is the infamous Spycatcher case, Attorney-General v. Times Newspapers [1992] 1 AC 191. In that case injunctions were obtained against the Observer and Guardian newspapers, restraining them from publishing information obtained by the former spy, Mr Peter Wright, while a member of the British Security Service. While those injunctions were still in force, and before trial of the action, another newspaper, the Independent, published summaries of parts of Mr Wright's book, "*Spycatcher*". Later, yet another newspaper, the Sunday Times, began serialising Spycatcher and published a first instalment. Proceedings for contempt of Court were brought by the Attorney-General against both the Independent and the Sunday Times.

148. Those newspapers were not themselves Respondents to any Order. Neither did they act in order to assist the Observer and the Guardian, against whom the Orders had been obtained. They acted independently.

149. In the House of Lords, the Defendants accepted that they had acted deliberately and (per Lord Oliver at p. 217E), "*were fully aware*" of the Orders made against the Observer and the Guardian. They conceded the question of *mens rea*. However they disputed that the necessary *actus reus* was made out, because (again per Lord Oliver at

p. 217E), they were not themselves Respondents to any order and neither had they assisted in or procured or incited any breach by those who were Respondents.

150. The House of Lords held that the *actus reus* of the contempt was made out even absent any assistance being provided to the Respondents. The reason was that the actions of the Independent and the Sunday Times had the effect of thwarting or frustrating *the purpose* of the Orders made, which was (per Lord Oliver at p. 223E):

> *"…to preserve, until the trial of the action, the plaintiff's right to keep confidential and unpublished the information obtained by Mr. Wright in the course of his employment … ."*

151. Where this form of contempt is relied on, it is thus necessary to identify the *purpose* of the relevant Order. Not every purpose will be thwarted by independent action taken by a third party. In his speech in the House of Lords, Lord Brandon gave contrasting examples (p. 206A-D):

i) In an action by A against B, A obtains an interim injunction against B restraining B from trespassing on A's land. A third party, C, of his own volition but being aware of the order goes onto A's land. There is no contempt, because the purpose of the Order – to prevent trespass by B - is not thwarted or frustrated.

ii) In an action by A against B, in which B claims to be entitled to demolish A's house, A obtains an interim injunction against B, preventing B from demolishing the house pending trial. C enters onto the land and demolishes the house. C is in contempt because the purpose of the Order – to maintain the house *in situ* pending trial – is thwarted or frustrated.

152. Certain other points follow from this. One is that the purpose of an order is not the litigant's purpose in pursuing the action or obtaining the Order, but is instead (per Lord Oliver at p. 223A-B):

> " *… the purpose which, in seeking to administer justice between the parties in the particular litigation of which it had become seized, the court was intending to fulfil*."

153. A further point is how one identifies *purpose*. One of the Appellants' arguments in AG v. Times Newspapers was that it would be unfair to require a third party to try and divine the purpose of an Order other than from the text of the Order; and if that is right, then the purpose of the Order will always be to preserve the position as between the parties to it; and that purpose will always be achieved whatever independent actions are taken by third parties.

154. Lord Oliver's response to this point was as follows, at p. 223D-F:

> "*I can see the force of this in a case where the court's purpose is not manifest from the mere making of the order and this was, indeed, one of the matters which troubled Lord Edmund-Davies in the Leveller Magazine case [1979] A.C. 440. But the difficulty is more imaginary than real. None of their lordships who decided the Leveller Magazine case experienced any difficulty*

> *where the purpose of the order or ruling is obvious and manifest. Where there is room for genuine doubt about what the court's purpose is, then the party charged with contempt is likely to escape liability, not because of failure to prove the actus reus but for want of the necessary mens rea, for an intention to frustrate the purpose of the court would be difficult to establish if the purpose itself was not either known or obvious. In the instant case, there could never have been any doubt in anybody's mind what the court's purpose was in making the order*."

155. Lord Oliver then identified the purpose in the terms already set out above at [150].

Attorney-General v. Newspaper Publishing

156. The same ground of contempt was later relied on in another case arising against the background of a well-known public scandal, the Matrix-Churchill affair: A-G v. Newspaper Publishing [1997] 1 WLR 926. There, certain documents subject to public interest immunity certificates were ordered to be disclosed in edited and summary form to the appellants in an ongoing appeal. Disclosure was ordered on the basis that the documents could be used only for the purposes of the appeal and were to be returned when the appeal was resolved. The appeal was determined and the documents returned, and at the conclusion of the hearing the Lord Chief Justice warned that breach of the order would result in the matter being referred to the Attorney-General. Meanwhile, a newspaper had obtained copies of documents relevant to the case from another source, and wished to use them. They were used and this resulted in an article being published which quoted from certain of the documents which had been disclosed in the appeal, in a manner which was marginally more extensive than reflected in the Judgment delivered in open court. An application to commit the publisher of the newspaper and editor for contempt was dismissed on the grounds that neither the *actus reus* nor the *mens rea* was made out.

157. The Judgment of the Divisional Court was delivered by Lord Bingham CJ. As to *actus reus* Lord Bingham had to deal with an argument by the Defendants that in a case where the contempt was said to be thwarting the effect of an Order, the conduct " *... had in a substantial way to defeat, frustrate, undermine, nullify or set at nought the object which the court had sought to achieve by making its order*". The Court did not go that far, but did consider that something more than a trivial or technical infringement was necessary:

> "*We do not accept that any conduct by a third party inconsistent with an order of the court is enough to constitute the actus reus of contempt. Where it is sought to impose indirect liability on a third party, the justification for doing so lies in that party's interference with the administration of justice. It is not in our view necessary to show that the administration of justice in the relevant proceedings has been wholly frustrated or rendered utterly futile. But it is, we think, necessary to show some significant and adverse effect on the administration of justice. Recognising that the restraints upon freedom of expression should be no wider than are truly necessary in a democratic society, we do not accept that conduct by a third party which is*

> *inconsistent with a court order in only a trivial or technical way should expose a party to conviction for contempt.*"

158. On the facts, the *actus reus* was not made out, because the infringements committed by the Respondents were in truth very minor (p. 936D).

159. Neither was the *mens rea* made out. That was essentially because the Respondents had not been aware of the "*full terms of the order or of any restrictions imposed upon the appellants*", when the documents were originally disclosed in the appeal (see p. 937B), and because, although they were aware of a statement having been made by the Lord Chief Justice at the conclusion of the hearing, they were uncertain what precisely had been said and what the effect of it was (although they had sought clarification), and genuinely believed there was no inhibition on publishing (p. 937D-938A).

Attorney-General v. Punch

160. The question of defining the purpose of the Order came up again in Attorney General v. Punch [2003] 1 AC 1046. This was again a publication case, involving another former member of the security services, David Shayler. Mr Shayler had worked for MI5. When he left, he took confidential information with him. Some of this was then disclosed to Associated Newspapers Ltd, and found its way into articles in the Mail on Sunday and the Evening Standard. Injunctions were then obtained against both Mr Shayler and Associated Newspapers. Mr Shayler was restrained from disclosing to any newspaper or anyone else:

> *" ... any information obtained by him in the course of or by virtue of his employment in and position as a member of the Security Service (whether presented as fact or fiction) which related to or which may be construed as relating to the Security Service or its membership or activities or to security or intelligence activities generally".*

161. Mr Shayler was then engaged by Punch magazine. The editor, Mr Steen, was aware of the interlocutory orders and indeed had obtained copies of them (per Lord Nicholls at [11]). Notwithstanding that, Mr Shayler wrote a number of pieces for Punch containing references to material falling within the scope of the Orders. An action was brought against Punch and against Mr Steen, who were found in contempt and fined. Mr Steen appealed. His point was that he had not thwarted or frustrated the purpose of the orders. That was because their purpose was to protect national security. He argued that, even if the *actus reus* was made out, the *mens rea* was not, because his intention had not been to damage national security in any way and he did not consider he was doing so.

162. This argument was rejected. The question of purpose was a more straightforward matter. It was not a question of the ultimate purpose of the party to the litigation who sought the order. The relevant purpose was the purpose the Court sought to achieve in making the order. As to that (per Lord Nicholls at [40]):

> *" ... the purpose of the court in making an interlocutory order means no more than the effect its terms show it was intended to have between the parties to the action in which it was made. Normally there will be no difficulty in gleaning this purpose from*

> *a reading of the order. The purpose of the order and its terms are co-extensive. It is right that this should be so. If third parties are bound to respect the purpose of an order made in an action between other persons, it is essential they should be able to perceive the purpose readily from reading the order."*

163. Generally as to the terms of interlocutory Orders (again per Lord Nicholls at [43]):

> "*The reason why the court grants interim protection is to protect the plaintiff's asserted right. But the manner in which this protection is afforded depends upon the terms of the interlocutory injunction. The purpose the court seeks to achieve by granting the interlocutory injunction is that, pending a decision by the court on the claims in the proceedings, the restrained acts shall not be done. Third parties are in contempt of court if they wilfully interfere with the administration of justice by thwarting the achievement of <u>this</u> purpose in <u>those</u> proceedings*".

164. Turning then to the Orders in question, Lord Nicholls identified their purpose as follows (at [47]):

> "*Self-evidently, the purpose of the judge in making the order was to preserve the confidentiality of the information specified in the order pending the trial so as to enable the court at trial to adjudicate effectively on the disputed issues of confidentiality arising in the action. This is apparent from merely reading the order*."

165. Thus (at [48]):

> " *... the actus reus of contempt lies in thwarting this purpose by destruction of the confidentiality of the material which it was the purpose of the injunction to preserve*."

166. The *mens rea* was made out. On the facts, so was the *actus reus*. It was nothing to the point that Mr Steen did not consider he was acting in a manner damaging to national security because (see at[52]):

> "*He must, inevitably, have appreciated that by publishing the article he was doing precisely what the order was intended to prevent, namely, pre-empting the court's decision on these confidentiality issues. That is knowing interference with the administration of justice.*"

Disputed Facts

167. Before turning to the individual Grounds of Contempt, I think it useful to address the following key disputed areas of fact, namely:

i) What was the purpose of the 3CX App? In particular, have the Claimants shown beyond reasonable doubt that its purpose was to act as a covert communications system adopted for communications with Mr Hillary, which could be destroyed if inquiries came to be made by Ocado?

ii) What was on the 3CX App? In particular, have the Claimants shown beyond reasonable doubt that the App contained documentary materials which were either (a) relevant to Ocado's claim against Mr Faiman, Today and Mr Hillary, and/or (b) Listed Items within the meaning of that phrase in the Search Order?

iii) What was Mr McKeeve's state of mind at the time he sent the "*burn it*" or "*burn all*" message? In particular, have the Claimants shown beyond reasonable doubt that he acted with the intention of interfering with the due administration of justice?

168. I will address these three topics in turn.

What was the purpose of the 3CX App?

169. The Claimants' case on this point was that the 3CX App was set up specifically to enable Mr Hillary (after he had handed in his notice of resignation to Ocado) to communicate covertly with Today personnel in relation to the Today business and his work at Today.

170. I do not accept that that point has been proven beyond any reasonable doubt.

171. In his evidence, Mr Henery described a broader purpose. He said that as the IT person within Today, it had been his choice to install the 3CX App having had discussions with Mr Faiman about the functionality he required. Mr Henery described Mr Faiman as "*a very paranoid man*" who had an abiding concern about data security. The point had particular significance given the fact that those involved with Today – including in particular Mr Faiman – were often travelling. Other communication systems – including at the time WhatsApp – were not regarded as secure from hacking. Mr Henery said he was influenced in selecting 3CX by the fact that it suited the needs of a group who were largely mobile, and who required confidence that their data was secure. Thus, he said during his cross-examination:

> *"The 3CX thing which is here came from a requirement because everybody in the senior team at that stage was floating around the world, attempting to do deals, and they needed to make phone calls back home or to each other."*

172. At another point Mr Henery said:

> *"The reason that I got people off of WhatsApp in the first place is, from a security point of view back then, WhatsApp was not secure. These guys were floating around in countries where it was easy to trawl their data. Hence, the 3CX, as far as actually transferring it there for a specific purpose, it was up to them for whatever purpose they wanted to use it for".*

173. Mr McKeeve also mentioned Mr Faiman's fixation with data security:

> "*Mr Faiman was paranoid about data security and data integrity. There were two dimensions to this, I think a personal paranoia he had that people were digging around and constantly trying to get into his systems … Secondly, I think correctly, as a tech company he wanted to ensure that given people were moving around with mobiles and laptops and tablets with IP of Today Partners on it, that IP was secure*."

174. It seems to me perfectly credible that Mr Faiman would have had a legitimate concern about data security, and that given the working patterns of those involved with Today at the time, the 3CX App would have been chosen by Mr Henery in light of the service it offered of internet-based but secure communications. Consequently, I am not persuaded beyond a reasonable doubt that the 3CX App was installed solely in order to act as a means of covert communication with Mr Hillary.

175. Certain further points must be noted, however.

176. First, both Mr Henery and Mr Hillary accepted that, in the circumstances, a particular benefit of the 3CX App was the facility it offered for secure and confidential communications to take place with Mr Hillary. Mr Hillary put it this way during the course of his cross-examination, when asked about setting up the 3CX App on 17 May:

> "*Discussion was mainly driven by Jonathan, nervous about me communicating and no doubt that was part of the decision, sir. Also, overall security of various applications that Jonathan would be forever paranoid about*".

177. Second, there was the "*burner box*" feature of the 3CX App. Again, Mr Henery's evidence was that 3CX was not specifically chosen because this facility could be used if Ocado commenced inquiries; but he accepted it had the potential for use in such circumstances:

> "*Q. The burner box was used so that if Ocado did come knocking on the door, you could permanently destroy those communications with Mr Hillary easily?*
>
> *A. That was not the intention. The intention was he was supposed to be out of the office.*
>
> *Q. But it had that facility?*
>
> *A. Yes, potentially. We could have done exactly the same thing with WhatsApp.*
>
> *Q. It had that facility, and it was set up in that way with that facility in mind, that you could do that if you needed to?*
>
> *A. If you needed to, just as with any other app we could have put together*."

178. Third, and relatedly, Mr Henery accepted in the course of his cross-examination, that he had been asked on a previous occasion by "*Jonathan Faiman and crew*" permanently to delete "*a whole communications system*" (although he gave no details beyond that).

179. Fourth, there is the fact that Mr Hillary was assigned a pseudonym on the 3CX App – Belinda de Lucy. The evidence was clear (and it is in any event obvious) that this was done in order to disguise Mr Hillary's identity, and to give the impression that the relevant user of the App was not Mr Hillary at all, but instead Mr McKeeve's wife.

180. Mr Hillary accepted in terms that part of the reason for use of a pseudonym was to try and prevent people knowing that he was communicating with Today. He went on to say, however, that Today also had its own legitimate commercial reasons for secrecy and caution:

> *" ... there was also an appreciation that Ocado would love to know what we were doing, and that was just as strong a motivation behind use of secure mechanisms and aliases*."

181. Again, I accept that evidence which seems to me credible and consistent with the inherent probabilities. It is also consistent with the fact that, when it came to organising disclosure in the Underlying Action, the disclosure protocol included a mechanism for screening out Today's own confidential information.

What was on the 3CX App?

182. This topic involves looking at two issues: (1) what was the App used for, and (2) has it been proven that the App contained either documents relevant to Ocado's claim or documents which qualified as Listed Items under the Search Order.

What was the 3CX App used for?

183. Helpfully, the parties agreed a series of propositions (the "*3CX Propositions*") in relation to the functionality of the 3CX App. I set those out at the end of this Judgment as Annex 2.

184. The parties were agreed that the App had only limited functionality, in the sense that it could not be used to upload and transmit attachments.

185. I am satisfied beyond a reasonable doubt on the evidence that the App was used for three purposes, namely (a) voice calls, (b) text messages and (c) voicemail. There are examples of the App being used in all three ways.

186. Voice Calls*:* For voice calls, we now have the calls tabulated in the iPhone Call Log, taken from Mr Hillary's phone.

187. The iPhone Call Log shows the following for the period 14 June 2019 to 3 July 2019 (I take the summary largely from the Defendant's own Opening Submissions):

i) There were 46 calls between Mr Hillary and Mr Faiman. All were between 14 June and 1 July. 11 were unanswered. 14 lasted for under 10 seconds. 10 calls were for more than 5 minutes.

ii) There were 14 calls between Mr Hillary and Mr McKeeve. All were between 20 June and 1 July. 5 were for less than 1 minute. The longest call was for 5 minutes.

iii) There was also a conference call involving Mr Hillary on 3 July for a total of 1 hour 20 minutes.

188. The same information would have been available from the call log on the 3CX App (see 3CX Proposition (b)). I am also sure that the 3CX call log would have included records of calls made prior to 14 June – i.e., in the period immediately after the 3CX App was installed by Mr Henery, including on Mr Hillary's iPhone, and following Mr Henery's email dated 18 May 2019, referred to at [49] above ("*Transferring Comms to 3CX for words etc*.")

189. Text messages: It is common ground that the 3CX App was used for sending text messages. Both Mr Hillary and Mr McKeeve gave evidence to that effect. In cross-examination, Mr Hillary said that he thought he had stopped using WhatsApp and conventional text messaging from about the time of Mr Henery's 18 May 2019 "*Transferring Comms*" message, in favour of 3CX. The 3CX App had thereafter become the preferred method of communication for voice calls and text messaging, although it was only part of a "*package of communication methods*", alongside face-to-face meetings and email.

190. The difference between the parties was rather one about the content of such messages and whether they were relevant to Ocado's claim or qualified as Listed Items.

191. Voicemail messages*:* As to voicemail messages, the documents in the case include several automated email messages sent to Mr Faiman, notifying him that he had received voicemail messages from Mr Hillary (see above at [60]). So there is no doubt that 3CX was used for that purpose.

Did the 3CX App include documents relevant to the claim or Listed Items?

192. Confidential Information: It is convenient first to consider whether the 3CX App contained any Ocado Confidential Information, within the meaning of that phrase in the Search Order.

193. On this point, I am not persuaded beyond reasonable doubt that it did. My reasons for doubting it are as follows.

194. To begin with, I do not consider that a record of a call shown on a call log could qualify as Confidential Information, within the definition in the Search Order. What this issue must really be concerned with is what may or may not have been reflected in written form.

195. As to this, there is the App's limited functionality, which does not make it an obvious means of communicating or storing confidential information. It could not have been used, for example, to send a copy of the KPI Document (above at [23]), or copies of the OSP Contract or the Operational Schedules (above at [37]).

196. The 3CX App did allow for a URL link to an online file to be sent by text message, which could then be opened by clicking on the link in the App. However, all the users of the system – Mr Faiman, Mr Hillary and Mr McKeeve – specifically confirmed they had never sent or received any messages containing a URL link, and there is no evidence to the contrary.

197. When asked expressly about it in cross-examination, Mr Hillary could not recall using the 3CX App for the transmission of Ocado confidential information:

> *"It was a main means of communication for text and phone calls, not for e-mail and for meetings, obviously, yes. I am not aware, can I recall, including any 3CX communication, any Ocado confidential information."*

198. That summary seems to me entirely plausible, and I accept it.

199. The App was used for sending text messages. However, the evidence is that the messages were short and functional, and did not contain matters of substance. I will mention certain aspects of this further below.

200. In any event, there is also this further evidence which Mr Hillary gave in cross-examination as to his use of email, and the dividing line between matters he would have reflected in an email and matters he might have addressed via a 3CX text message or call. Mr Hillary said:

> *"I am sure it happens to us all every day, right. We have a decision to make and if it is a more formal thing that you want to be able to say, 'but I told you that', or something that might be used for a design perhaps or something more formal, or that one might need to get back to via a much more searchable e-mail mechanism and it is recorded when it arrived and all of the others, I am not sure even what my criteria would be, I am making it up as I am going along, but we are all doing it every day I am sure in this room. We are WhatsApping people at work and we are all sending e-mails. And probably particularly in this room more than ever, there is a very quick dividing line about what is formal and therefore goes on an e-mail and what goes on WhatsApp. I am struggling with the definition there, but it is a matter if it is more formally recorded if it is an e-mail, and the receipt of it by a user commands more response if it is an e-mail, rather than a WhatsApp or a 3CX message."*

201. I accept that evidence as an account of the practice followed by Mr Hillary in relation to the division between emails and use of the 3CX App, and I am prepared to accept that others would have done the same. Mr Hillary's division is perhaps imprecise, but appears perfectly plausible as a pattern of activity since it reflects an entirely recognisable practice. It is also consistent with (a) his desire to set up the Slushminers Accounts on 3 July, so he would have a means of communicating by email with Mr Byron and Ms Merriott; and (b) the fact that the comments he sent on the morning of 4 July to Mr Byron and Ms Merriott were sent by email not by message on the 3CX App, although by then they had been given 3CX accounts.

202. All of that seems to me inconsistent with the idea that the 3CX App would have been used for the transmission of Confidential Information. Anything of real substance, if reflected in writing, is more likely to have been reflected in an email.

203. At least, I am not persuaded beyond a reasonable doubt that the 3CX App was so used. I must give Mr McKeeve the benefit of the doubt. Indeed, the point was not pressed very strongly by the Claimants, who in their closing submissions invited a finding by the Court that Mr McKeeve thwarted the purpose of the Search Order by causing the deletion of documents constituting Listed Items, "*especially paragraph 4(d) of Schedule C … i.e., documents evidencing … any work*". I think the Claimants were correct to approach matters in that way.

204. Documents Evidencing Work/ Documents relevant to Ocado's Claim: I move on then to consider whether the 3CX App included Listed Items falling within para. 4(d) of Schedule C, or documentary materials relevant to Ocado's claim.

205. I am satisfied beyond a reasonable doubt that it did. It seems to me clear that text messages on the 3CX App, the call log on the App and the records of voicemails on the App fell within both of these categories.

206. On this question, the key point made by Mr Weekes QC, for Mr McKeeve, was that there was no evidence that any 3CX messages were any more than preparatory steps for future competition, which were perfectly permissible (see Balston Ltd v. Headline Filters Ltd [1990] FSR 385 at 413). He also said that the content of the calls made using the 3CX App could not be inferred from calls recorded on any call log or logs, and so neither did they evidence "*work carried out …*".

207. These submissions reflected points made by Mr McKeeve himself, to the effect that he was not really concerned about anything Mr Hillary was doing, because there was nothing inherently wrong in him preparing himself for his new job. Mr Hillary said something similar. In discussing the sending of text messages on the App, and when questioned about the contention in his written evidence that text messages on the App concerned only "*administrative matters*", he said:

> *"Perhaps we need a definition, do we? I am trying to say some examples that I have given, which is, 'I am going to be at a certain place in time, I need to meet this candidate, have you got an offer of employment?', not, 'We are going to design a warehouse with N-robots' and, 'We are going to respond to this legal document of Waitrose's, using this point, this point, this point.' That is the point I am trying to make."*

208. To similar effect, Mr Hillary was cross-examined about the following passage in his Affidavit in the Underlying Action about use of the 3CX App:

> *"I have a 3CX account in the name of 'Belinda de Lucy', which is accessible from my iPhone and silver MacBook. This account contained documents containing information which was confidential to [Mr Faiman] and [Today] or the 'Today Development Partners' business but which may also have been documents falling within Schedule C to the Order. While I retain*

> *access to the account, I can see that all communications have been wiped remotely. I confirm that I was not involved in clearing the data"."*

209. Questioned about this, Mr Hillary agreed that he was referring to the App being used in relation to work for Today. He clarified that in referring to information which was confidential to Today, what he meant was information about routine matters which was private to Today, rather than confidential in the sense of containing IP or the like. He was pressed on whether that included matters of substance, and said:

> "*Definitely work material. If you give me a definition of 'substance', maybe we can agree to differ, but definitely work material, but not technical data. I am just trying to make sure you follow. I am going to interview somebody or are we meeting there, that is all that was on 3CX, right. So, maybe I agreed to the wrong word in 'confidential', but actually if it is Today business, it is nobody else's, so it is confidential to me anyway ...*".

210. Consistent with these general observations, on Mr McKeeve's case, was the limited evidence available as to specific text messages sent using the 3CX App. Mr Hillary recalled (a) asking about a letter of appointment for Phil Byron, and (b) informing someone that he was going to look at Hammersmith (as a potential location for an office). Mr McKeeve's evidence was that he could specifically recall only two text messages, namely (a) one from Mr Hillary concerning the location and proximity of The Foundry office to an underground station, and (b) one concerning a request from Mr Hillary for his daughter to be employed as a junior administrative assistant. These messages, it was argued, were not evidence of "*work*" within Schedule C to the Search Order and neither were they relevant to Ocado's claims.

211. I disagree. My reasons are as follows.

212. To begin with, Mr Weekes QC rightly agreed with the proposition that Schedule C, para. 4(d) of the Search Order should be construed as referring to documents which would fall to be produced on disclosure, which would include any document adversely affecting a party's case. More precisely, as Mr Weekes again rightly accepted, any document which would support an argument that work was going on by Mr Hillary would qualify as a Listed Item. It is plain, I think, that the same basic test would apply in determining whether information on the 3CX App was relevant to Ocado's claims – I understand relevant to mean disclosable.

213. The problem with Mr Weekes' argument, it seems to me, is that it proceeds on the footing that documents could qualify as Listed Items, or could be relevant to Ocado's claim, only if they showed clearly on their face work of a competitive nature actually being carried out by Mr Hillary. I do not think that is right. Documents would also be Listed Items, and would be relevant in the required sense, if they tended to support an argument to that effect, or tended to undermine the argument that what Mr Hillary was doing was no more than preparation. Such documents would have relevance not only to any claim for breach of contract against Mr Hillary, but also to the claims against Mr Faiman and Today for having procured that breach, and to the claim in conspiracy against all three Defendants (see above at [110]). Which side of the line the activity

actually fell on would be a matter for trial. But the material would be relevant and disclosable in the meantime, because it would help define the issues between the parties and so structure the shape of the action and the trial. It needed to be there for that purpose. Its ultimate importance would be a matter for another day; but in the meantime, it was to be preserved and produced.

214. Looking first then at the question of text messages, in my opinion the available evidence makes it clear that many (or perhaps all) of them would have been disclosable in the Underlying Action. While not definitive, they would have tended to support an argument that what Mr Hillary was doing was more than merely preparing for his new role. Recruiting new personnel would tend to support such an argument; so would locating a new office (and attending at a new office). The accumulation of such points taken together, looked at in the context of other evidence (such as the email message he sent on his Slushminers' Account on the morning of 4 July (above at [72])) would have tended to support a case that Mr Hillary was going further than was permitted. Such materials would have been relevant and disclosable for that reason, and for the same reason, in my judgment, fell within the definition of documents "*evidencing … any work*", in Schedule C to the Order.

215. I think the same logic applies to calls reflected in the 3CX call log and to records of voicemails.

216. Mr Weekes QC submitted that one could not infer anything about the content of voice calls merely from a log showing that calls were made. That may be true, looked at as a narrow proposition; but it does not mean that any such call log would not have qualified as a Listed Item or as a disclosable document in Ocado's claim. That is because the mere fact that calls were made by Mr Hillary to Mr Faiman, together with their duration and frequency, would have been relevant matters, as would the fact that Mr Hillary – while on gardening leave from Ocado – had permitted himself to become part of a messaging and call system with Mr Faiman and others from Today. The same is true of records of voicemails.

217. Such matters in and of themselves, in my judgment, would have been legitimate ground for investigation and (in due course) cross-examination in the Underlying Action. Thus, I think the documentary materials available on the 3CX App showing such basic facts would have been disclosable, and so qualified as both Listed Items and as documents relevant to Ocado's claim.

<u>What was Mr McKeeve's state of mind when he sent the "*burn it*" or "*burn all*" message?</u>

218. This has a number of aspects.

Was there a pre-arranged plan to delete the 3CX App?

219. To begin with, I am not persuaded beyond reasonable doubt that Mr McKeeve was party to a pre-arranged plan which required him to delete the 3CX App if Ocado (to use Mr Cavender QC's expression) "*came knocking*".

220. On this point, I agree with Mr Weekes QC that such an explanation is implausible. Mr McKeeve and Mr Henery denied it in cross-examination. Involvement in such a conspiracy would have involved an enormous risk for Mr McKeeve, an experienced

and successful solicitor. It is difficult to see what motive Mr McKeeve would have had to assume such a level of risk for a sole client, when he had a thriving practice as a finance specialist which plainly motivated him and which he was proud of. The idea of such a conspiracy is also inconsistent with other facts, including in particular the fact that, when given the opportunity to do so on the day of the Search Order, after he left the Connaught Hotel for a 2 or 3 hour period, Mr McKeeve did not go back to his office at Jones Day and shred the copies of the OSP Contract and Operational Schedules he had there.

221. In argument, Mr Cavender QC said that one should examine the question of motive by asking oneself what must have been on the 3CX App to warrant Mr McKeeve taking steps to have it deleted – if he was willing to ignore the documents in his office, then the material on the App must have been much more serious and incriminating.

222. With respect, I consider this to be an entirely speculative line of argument. In his own cross-examination based on the documents handed over by Mr Hillary, Mr Cavender QC characterised them as highly confidential and commercially sensitive and referred to them as "*gold dust*". An arrangement to secure or destroy materials of concern to Ocado would surely have included such documents. Moreover, the argument ignores the evidence I have analysed above as to what the 3CX App was in fact used for. There is no evidence to suggest it was used as a repository for Ocado Confidential Information, and in closing their case, Ocado did not press the point that it was. It also ignores the conclusions to be derived from the other available evidence which I set out below.

223. Before moving on, I should briefly mention two further, related points which the Claimants said were consistent with their theory on Mr McKeeve's overall motive. One was their submission that Mr McKeeve must have been aware of the KPI Document, obtained by Mr Faiman from Mr Hillary in June 2018 (above at [23]). Another is the Claimants' argument that the OSP Contract and Operational Schedules were in fact of real practical importance to Mr McKeeve. I accept neither submission. As to the KPI Document, Mr McKeeve's evidence was that he was not aware of it. I accept that evidence; or at any rate, I do not consider the contrary to have been shown sufficiently clearly. The KPI Document was plainly of interest to Mr Faiman himself, and he admitted providing it to Mr Backes of Novalpina (see above at [23]-[24]); but I am not persuaded it would necessarily have been of interest to Mr McKeeve given his role as legal adviser. It is referred to in the Waddilove Note (see above at [30]), but was mentioned by Mr Faiman during one of the meetings described in that Note that Mr McKeeve did not attend. I am thus not satisfied that Mr McKeeve was aware of it.

224. As to the OSP Contract and the Operational Schedules, Mr McKeeve accepted having had them, and accepted that they should not have been made available in the way that they were. His evidence, however, was that in fact they were of limited utility to him, because the possible deal structure Today would have needed with Waitrose would have been different to that which Ocado had recently signed up to with M&S. That seems to me plausible evidence, in the sense that I consider it might be true. There is little to suggest that Mr McKeeve actually made use of the OSP Contract or the Operational Schedules. For example, I was shown no work product by him which obviously reflected the content of such documents. In the circumstances, although I accept the proposition that they contained information confidential to Ocado – i.e. *Confidential Information* within the terms of the Search Order – I am unpersuaded that

Mr McKeeve made any material use of them or found them of real assistance in performing his role as adviser.

What was the immediate background to the deletion instruction?

225. What *is* clear however is that by 4 July 2019, Mr McKeeve was frustrated with his clients and with Mr Hillary, because he thought they were taking unnecessary risks, both as regards Mr Hillary being on Today-related communications systems, and as regards Mr Hillary's attendance at Today's new offices.

226. That is plain from Mr McKeeve's own evidence (see [57] above), corroborated by Mr Henery, that Mr Hillary's use of email was inappropriate – hence the suspension of the "*Todayuk.com*" email account on 1 July 2019, and Mr McKeeve's later warning on 3 July 2019 against any further email accounts being set up, and indeed his concerns expressed on the same day to Mr Faiman about 3CX (as Mr Hillary put it, Mr McKeeve "*spoke to Jonathan Faiman and said "I do not like what you guys are doing'"*: see [69] above). This of course was roughly at the same time Mr McKeeve had begun to feel concerns about Mr Hillary turning up in the Today offices, which Mr McKeeve considered carried unnecessary and unwelcome risk.

227. In cross-examination, Mr McKeeve emphasised the latter, and said that he was not concerned as such about Mr Hillary communicating with others from Today (since he was entitled to), but was rather more concerned about the impression created by Mr Hillary turning up at Today's offices. As it seems to me, however, the concerns are inter-related. They are both examples of Mr Hillary and Mr Faiman being incautious and failing to heed Mr McKeeve's advice, and therefore needlessly increasing the risk profile of their venture. Mr McKeeve, who is a forthright and direct character, was obviously annoyed about this.

228. As Mr McKeeve described it, and as I accept, he was not seriously concerned about what Mr Hillary was actually doing (because in Mr McKeeve's mind that was preparing for his new role). But Mr McKeeve was concerned that what was happening was foolish, might give the impression of wrongdoing (in his evidence he referred to the use of pseudonyms giving "*an unhelpful appearance of covertness*"), and moreover carried at least some risk of muddying the waters, because as Mr McKeeve also accepted, Mr Hillary might "*stray slightly over*". In any event, for Mr McKeeve, Mr Hillary's coming into the Today office was "*not helpful*" and "*not cool*".

229. This was the backdrop to the events of the morning of 4 July.

230. As to this, the critical evidence was that from the Supervising Solicitor, Mr de Jongh, and that from Mr McKeeve and Mr Henery.

231. As to Mr McKeeve and Mr Henery, the evidence from each of them was sketchy in certain respects, but in my judgment a sufficiently clear picture emerges for me to be sure about what happened for the purposes of the present Action.

232. Mr McKeeve's evidence was that he was shocked and surprised to find that Ocado had brought a claim. Although Mr Faiman, and he, had been concerned at an earlier stage about the prospect of Ocado bringing a tactical claim to disrupt the potential deal with M&S, that concern had passed, because Ocado – not Today – had won the deal with

M&S, and that was very much the major prize. I accept that evidence. Although it seems to me that Mr McKeeve must have had at the back of his mind the possibility of a claim, I do not consider he thought it a major threat at the time. That is consistent with the fact that he had to brief Mr Richards at short notice on the morning of 4 July. Mr Richards and his team were not on standby.

233. Thus, I accept that the situation was unexpected and led to a sense of panic and concern. In his cross-examination, Mr McKeeve described the situation overall as "*complete chaos*". He also said he was annoyed with Mr Faiman for not turning up at his offices to what was intended to be an important meeting with Waitrose. That again rings true and I accept it as an explanation. Or at any rate, it seems to me sufficiently plausible that it might be true, and so I accept it on that basis.

What was Mr McKeeve's motive?

234. As to Mr McKeeve's motive in sending his message to Mr Henery, he gave the following background as to his wife's position, and his feelings about it:

> *"A. Yes, so Belinda was successfully elected as an MEP. It was late May, 28th or 29th May. I recall at the time two things. One, I had been not a particularly supportive husband in the build-up to her election and found some of her campaigning irritating and thought it was a waste of time. Then, when she was elected, I think to her's and a lot of people's surprise, the media attention to everyone in and around the Brexit Party dialled up significantly. It was really vitriolic. The media was completely against that entire campaign and it became -- you know, I flagged that and told them to stop using her name."*

235. That seems to me a candid piece of evidence from Mr McKeeve, and I accept that a concern over his wife's position was a motivating factor for him at the time. In my judgment, in light of the points made already above, it reflected the wider sense of frustration Mr McKeeve felt about his clients' and Mr Hillary's irresponsible behaviour, and a sense of frustration and annoyance at himself for having permitted the line between his personal and professional lives to have become blurred. He saw this mix of factors presenting a potential source of embarrassment to his wife and possibly to himself. Mr McKeeve is a direct and forceful man and he wanted to do something about it. His solution, which I accept was arrived at impulsively, was to get rid of the 3CX App.

236. Although I will come on below to deal with the question of Mr McKeeve's intention (which must be distinguished from his motivation), I accept that his motivation was not to implement some pre-arranged plan to destroy potentially relevant documents. His act was not inspired by a conspiracy; instead, as it seems to me, it was Mr McKeeve's own spontaneous act of colossal stupidity.

237. Of course by 4 July 2019, the Belinda de Lucy pseudonym had changed both on the *Todayuk.com* email account and on the 3CX App. In cross-examination, Mr McKeeve accepted that he would have known about the change in relation to the 3CX App, because he had several calls with Mr Hillary after about 28 June (when the name on the account was changed), and would have seen the caller's name come up not as Belinda

de Lucy but instead as Josephine Ray. Nonetheless, Mr McKeeve said he was uncertain what that change meant as regards any historic records, which might still feature his wife's name. In his re-examination he said:

> "*So, if you go into your phone and look at your call log, you would have typically a name, a date and a time that the call was made, and sometimes the duration of the call. Not that I gave it this level of thought, but I could not have been certain that because a name had been changed, that there was no record of Belinda's name on that phone or on his other device*."

238. Again, that seems to me to be a plausible account, which I am willing to accept for present purposes.

What was Mr McKeeve's instruction to Mr Henery?

239. As to the content of Mr McKeeve's message to Mr Henery, I am persuaded that the message said "*burn it*" rather than "*burn all*". I say that because as far as Mr McKeeve was aware, the 3CX App was the only means of communicating with Mr Hillary that still needed to be dealt with. The "*Todayuk.com*" email account had already been suspended, and as far as he was aware, the new email accounts for Mr Hillary and others discussed the previous day had not been set up at all, after he had warned against it. Mr Henery interpreted the message more widely, because what he knew, but Mr McKeeve did not, was that in defiance of Mr McKeeve's direction the day before, he had set up the Slushminers Accounts for Mr Hillary and others. As Mr Henery put it:

> *"When I got that, the only thing I could think of was what Mr McKeeve had been saying the day before in the office, when he specifically stated that it was ill-advised to have Jonathan (Mr Hillary) on the network and when I got that, I assumed what he wanted was to delete both systems."*

240. And as Mr Henery later said, in response to a line of questioning about why he had not asked for clarification before acting:

> "*A. … Under normal circumstances, I would have asked. Over there, I was assuming the conversation that had happened the day before. It came from legal counsel so I assumed that I deleted what was the bone of contention the day before*."

Was Mr McKeeve aware of the status of 3CX as a "burner box"?

241. Relatedly, there is the question whether Mr McKeeve knew what was meant by the phrase, "*burner-box*". In cross-examination Mr Henery confirmed that he explained to Mr McKeeve that the 3CX App was a burner-box and could be deleted at short notice. Mr McKeeve's evidence was initially that he was not aware of the meaning of the phrase "*burner box*", but when pressed he had the following exchange with Mr Cavender QC:

> "*Q. You were never aware of that feature?*

A. Prior to the deletion message?

Q. Correct.

A. I cannot be specific on that. I do not know.

Q. Well, try.

A. I am, and I cannot be specific on it. I am sorry.

Q. So it is possible that you did know by the time of the deletion message?

A. Is it possible? It is entirely possible, yes".

242. I am sure on the evidence that Mr McKeeve was aware of the 3CX App's burner-box feature. His suggestion that he was not so aware was equivocal. Whether through discussion with Mr Henery or otherwise, I am sure he must have become aware of the status of 3CX as a burner box which could be deleted instantly. There is no other sensible or plausible explanation for his choice of words in his message to Mr Henery, which he expected to be acted upon. Mr McKeeve described the choice of words in his evidence as a coincidence, but I do not find that a reasonable or rational alternative explanation.

What factors are relevant to determining Mr McKeeve's intention?

243. As to other factors relevant to what Mr McKeeve intended by sending his message to Mr Henery, and then speaking to Mr Henery, Mr McKeeve accepted in cross-examination that:

i) He was told by the Supervising Solicitor Mr de Jongh about the existence of the Search Order, that he should not tell anyone about it and that his clients were allowed 2 hours to take legal advice.

ii) He was told by Mr de Jongh that he (Mr de Jongh) was an independent solicitor, but Mr McKeeve did not understand exactly what that meant – he assumed it meant independent of Ocado.

iii) He was told by Mr de Jongh that it was Ocado which had obtained the Search Order against Mr Faiman, Today and Mr Hillary.

iv) He was told or inferred that there was a Court claim underway between Ocado, Mr Faiman, Today and Mr Hillary.

v) He was told by someone – in his Second Witness Statement Mr McKeeve identified that person as Mr Faiman – that mobile phones and other devices were being taken under the Search Order. (Elsewhere in his cross-examination, Mr McKeeve said that Mr Faiman did not say that expressly – he had said only, "*I am having to hand over my phone".* But even if that is all that was said, it must have been entirely obvious that that was pursuant to the Search Order).

244. These points are consistent with the account given by Mr de Jongh himself, both in his Report and in his later email (see above at [85]-[86]). There can be no real doubt about them.

What was Mr McKeeve's intention?

245. On the basis of this evidence, I am satisfied beyond a reasonable doubt that at the time he sent his message to Mr Henery, and then when he spoke to Mr Henery, Mr McKeeve knew that the Search Order had been made and knew that mobile telephones and other devices were being taken pursuant to the Search Order for the purpose of being searched. Of course he also knew that the 3CX App was a communications system accessible via mobile telephone.

246. I therefore consider that Mr McKeeve knew the purpose of the Search Order included searching information on the 3CX App. Indeed, that was the very source of his concern and the inspiration of his stated motive to protect his wife. I do not accept Mr McKeeve's evidence that when he spoke to Mr de Jongh and said he would need to see the Search Order, "*I was buying time because I did not know what he was talking about*". That may have been true in one way, i.e. in that Mr McKeeve was not familiar, as a "*deal lawyer*", with the idea of search orders in a technical sense. At the same time, however, Mr McKeeve is an intelligent and capable man. He was sufficiently astute at the meeting with M&S in September 2018 to be able to recognise the litigation risk which might arise from Mr Waddilove seeking an indemnity in case of any wrongdoing (above at [30] and [32]). I think he plainly must have appreciated the basic gist of what he was being told about the Search Order on the morning of 4 July 2019, which was free from any real doubt.

247. I am also satisfied beyond a reasonable doubt that when Mr McKeeve sent his message to Mr Henery, and spoke to Mr Henery, Mr McKeeve's intention was to secure the deletion of material (the 3CX App and its contents) which, but for his intervention, would have been accessible to those conducting the search authorised by the Search Order. Indeed, Mr McKeeve effectively accepted as much. In his Affidavit in the Underlying Action, he said at para. 10 (above at [88]) that his concern was about people from outside the Today business getting access to the 3CX App. In cross-examination during the trial, Mr McKeeve again accepted that the intention behind his instruction was to prevent the 3CX App getting into the hands of those taking phones at the Connaught Hotel by deleting it. He had the following exchange with Mr Cavender QC:

> "*Q. That is what you wanted him to do, though, to burn it immediately so that the people taking the phones under the order would not get hold of it?*
>
> *A. Yes, and would not see Belinda's name*."

248. In describing his later call with Mr Henery, Mr McKeeve was quite explicit about what he meant:

> "*A. … I called him up and said, 'That message, I meant get rid of the 3CX system'.*
>
> *Q. That is all you said?*

A. Yes".

249. Elsewhere Mr McKeeve accepted he was aware that the consequence of his instruction was that the 3CX App would not be available to be imaged as part of the process underway on the morning of 4 July:

> "*Q. You knew that if you had not issued the deletion instruction to Mr Henery, the 3CX Application would have been revealed as part of the search order and imaging process, it would have been part of that process and it would have been discovered?*
>
> *A. I guess it would be, in the imaging, yes*".

250. Mr McKeeve also had the following, rather telling exchange with Mr Cavender QC:

> "*Q. You wanted that to be done permanently, out of harm's way permanently?*
>
> *A. I did not think about it on that level of detail. The immediate response was, somebody is handing over a phone, that phone has an app that has my wife's name on it, get rid of it. It was that simple and that stupid.*
>
> *Q. To be clear, your intention in giving the burn instruction was the contents of the 3CX system should not come into the hands of Ocado or the court?*
>
> *A. No. The intention was for my wife's name not to come up.*
>
> *Q. That was the motive.*
>
> *A. I do not know the difference. Is it not the same?*
>
> *Q. The intention was that the contents would not come into the hands of Ocado or the court, because if they did then your wife's name would be revealed.*
>
> *A. Yes.*"

251. What is significant about this exchange, it seems to me, is the confusion in Mr McKeeve's mind between motive and intention. I accept that his motives included, as an important factor, a desire to protect his wife, but his manner of implementing that motive was intentionally to take steps to put the 3CX App out of reach to those conducting the search permitted by the Search Order.

252. I am fortified in my conclusion as to Mr McKeeve's intention by what happened later in the day, during execution of the Search Order. Mr McKeeve's evidence was that he did not himself read the terms of the Search Order, because Mr Richards became involved with his team, and that was their role: he remained involved only as client relationship partner. I accept it might be true that Mr McKeeve did not read the Order, but he was present during much of the day with Mr Faiman when Mr Richards was taking instructions from him; and he was also present during the session in the evening

of 4 July 2019 when Mr Faiman was questioned under the terms of the Search Order by Mishcon de Reya. During the course of that questioning, Mr Faiman was reminded that he had provided electronic devices for imaging, and was asked to confirm that from the time the Search Order was served, he had not used any of those devices. He was also reminded of the obligation to deliver up for imaging any devices held by third parties on his behalf. During this period, however, Mr McKeeve made no mention of the 3CX App.

253. When asked in cross-examination why he had not done so, and had made no mention of his instruction to Mr Henery, Mr McKeeve had no real answer. He had the following exchange with Mr Cavender QC:

> "*Q. Exactly, but you were aware, and becoming more and more aware, I suggest, of the nature and scope of the search order?*
>
> *A. I was certainly present. I would not say I was -- I was aware that it was a hell of a legal tool, yes.*
>
> *Q. You know what an electronic device is, do you not?*
>
> *A. Yes, like an iPad or a phone.*
>
> *Q. You know that they were being taken and documents on them were being preserved and copied?*
>
> *A. Yes.*
>
> *Q. You knew if the 3CX system had not been deleted by you, that would have been one of the platforms that they would have copied and had access to?*
>
> *A. I do now, yes.*
>
> *Q. You would have at the time?*
>
> *A. It did not dawn on me*."

254. I am afraid I cannot accept that evidence. I am sure that Mr McKeeve must have known at the time that the process of imaging authorised under the Search Order would, absent his intervention, have captured the 3CX App and its contents, which would then have been available for review. Indeed, he conceded just that elsewhere in his evidence (see, e.g., [249] above). I accept that Mr McKeeve did not consider anything on the 3CX App to be that important, and it seems that others thought the same (see above at [104]: Mr Hillary's evidence was that he did not mention the App on 4 July because he did not think it relevant). But all the same, I find it inescapable that part of Mr McKeeve's ongoing thinking as the events of 4 July unfolded, must have been that he would not draw attention to the 3CX App because he did not want to risk it being available for review.

What of Mr Henery?

255. Neither did Mr Henery mention the 3CX App on 4 July. As I have already noted above, he in fact responded to a direct question about whether he had deleted anything by saying no. When asked about that and related points, Mr Henery accepted that he had concealed the fact of the 3CX App. When asked why, and whether he had been instructed to say nothing, his reply was as follows:

> "*I honestly cannot answer that. That was stupidity on my part. It was more a – I do not know, was it embarrassment, it was stupidity, it really was*."

256. I accept that evidence from Mr Henery. In my judgment it is entirely plausible, looked at in light of the overall picture as I see it, that Mr Henery would have felt a sense of shame and embarrassment at having deleted the 3CX App as he did, and did not mention it at the time of the Search Order for that reason. That is not remotely to excuse the failure, but merely to explain it in a manner which is inconsistent with the idea that there was a pre-arranged plan in relation to the 3CX App or with the idea that Mr Henery was told not to say anything about it. I accept his evidence that that was his own decision, and stemmed from his own sense of embarrassment about what he had done, the potential significance of which was only just beginning to become clear to him.

What did Mr McKeeve know about the contents of the 3CX App?

257. Finally, there is a discrete factual point, it seems to me, about what Mr McKeeve knew, or can be taken to have known, about what was actually on the 3CX App.

258. As to this, Mr McKeeve's evidence was that the 3CX App was primarily a voice call app, although it was also used for short casual/conversational messages. He said he was not aware of the 3CX App ever being used to send information which would qualify as *Confidential Information* belonging to Ocado. Again, he was not challenged on that, and indeed I have already concluded above that the 3CX App was not so used. I also accept the proposition that although Mr McKeeve would have been aware in a general sense of the way in which the 3CX App was used by others, he would not have had detailed knowledge of how they had used it – in the sense that, for example, he would not have seen copies of text messages sent between Mr Faiman and Mr Hillary, or been aware of the frequency and duration of calls between Mr Faiman and Mr Hillary. At any rate, I am not sure about such matters and so they have not been proved beyond a reasonable doubt.

259. At the same time, however, and although his own view was that Mr Hillary was on the right side of the line, Mr McKeeve nonetheless had concerns in late June and early July 2019, consistent with his concern that Mr Hillary's coming into the office was "*not helpful*" and "*not cool*", that Mr Hillary might "*stray slightly over*" the line of acceptable conduct (see above at [228]). Thus, although I accept that Mr McKeeve did not know precisely what was on the 3CX App, he knew enough to be aware that it *might* contain information which was at least unhelpful to Today's position, and might support an argument that Mr Hillary had in fact gone beyond what was permissible in carrying out work for Today.

Are the Grounds of Contempt made out?

260. It is necessary to approach this systematically, taking each of the Grounds in turn: see Sage v. Hewlett Packard Enterprise Company [2017] EWCA Civ. 973 at [87] per Henderson LJ.

261. For reasons which will become apparent, it is convenient to deal with the Grounds out of order. I will address Ground 1, but then deal with Ground 4 before coming back to Grounds 3 and finally dealing with Ground 5.

Ground 1: Did the Defendant intentionally interfere with the due administration of justice by intentionally causing the destruction of documentary material (in the form of the 3CX application and the email accounts as set out in the affidavit of James Libson and the material contained therein) which was of relevance to the claim by the Claimants against Mr Faiman, Today and Mr Hillary?

Actus reus

262. I find as follows:

i) 3CX App: The *actus reus* is made out as regards the destruction of the 3CX App. The App and its contents were permanently deleted. The contents – the "*material contained therein*" within the language of Ground 1 – included documents relevant to the Claimants' claim, because such material included both messages, records of voice calls (the call log) and records of voicemails, which would have been disclosable in the course of that claim.

ii) Slushminers Accounts: The *actus reus* is not made out as regards the email accounts set out in Mr Libson's First Affidavit – i.e., the Slushminers' Accounts – because those email accounts were not, in fact, destroyed. They were only suspended on the basis that they would be automatically destroyed after 30 days; but that destruction protocol was interrupted before it took effect.

Mens rea

263. I find as follows:

i) 3CX App: The *mens rea* is not made out as regards the 3CX App and its contents. That is because the specific charge levelled against Mr McKeeve by Ground 1 was that he intentionally caused the destruction of documents which he knew to be relevant to Ocado's claim. I am not satisfied beyond a reasonable doubt that he did intend to do so. In my judgment, looking at the facts, there is too much ambiguity as to Mr McKeeve's state of mind for the *mens rea* element to be satisfied.

ii) It is obvious and well settled that precision is required. Albeit in the context of contempt taking the form of a third party acting in a manner inconsistent with the terms of an Order, in A-G v. Newspaper Publishing, Lord Bingham said at p. 934H-935A:

> "*More specifically, Mr. Gray submitted that a third party should not be held liable for contempt in acting inconsistently with an*

> *order of the court unless the order is clear and precise both in its effect and its scope. He relied on statements of principle in In re L. (A Minor) (Wardship: Freedom of Publication) [1988] 1 All E.R. 418; P.A. Thomas & Co. v. Mould [1968] 2 Q.B. 913 and The Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245. We find it unnecessary to cite from these authorities. It seems to us clear that no one should be in peril of suffering a criminal penalty for contempt unless the order which he is said to have infringed is clear*."

iii) It seems to me the same basic principle must apply here. The nature of Ocado's claim was not explained to Mr McKeeve. He was told only that there was a claim. He did not know clearly what it was about, and in fact a number of different causes of action were asserted.

iv) It does not follow that the material on the 3CX App would have been relevant to all of them. On the facts now found, it *was* relevant to the claim that Mr Hillary was working in breach of his employment contract, but arguably not relevant to the claim for misuse of confidential information belonging to Ocado (because as I have held, I am not satisfied that the 3CX App was used for the storage or transmission of such information).

v) In those circumstances, the position is simply too unclear for me to be sure that Mr McKeeve had the requisite state of mind.

vi) One perfectly plausible permutation, for example, is that Mr McKeeve assumed that Ocado's claim was for misuse of confidential information only. That would have been an entirely reasonable assumption for him to have made. At the same time, however, since (as I have held) Mr McKeeve considered that the 3CX App contained only documents and information that might evidence *work* being carried out by Mr Hillary, and not confidential information, he could not, in giving his delete instruction, have intended to destroy documents relevant to a claim for the misuse of confidential information. Indeed, in this permutation, he would not have intended to destroy documents relevant to *any claim* of which he was aware.

vii) In summary, and taking Ground 1 on its own terms, I am not persuaded beyond a reasonable doubt that Mr McKeeve intentionally sought to destroy documents relevant to Ocado's claim. On the facts, an intention in that form would have required greater knowledge than Mr McKeeve in fact had of what Ocado's claim was actually about.

viii) Slushminers Accounts: The *mens rea* element is not made out in relation to the Slushminers Accounts. For the reasons I have already given (see [71] and [239] above), McKeeve did not know about them and so cannot have intended to destroy them.

Ground 4: Did the Defendant intentionally interfere with the due administration of justice by intentionally causing the destruction of information which constitutes "*Confidential Information*" within Schedule C of the Search order?

264. As I have explained above, the Claimants' remaining Grounds rely on the principle that, as a third party, Mr McKeeve interfered with the due administration of justice by frustrating or thwarting the purpose of an Order of the Court.

265. In light of my earlier findings, Ground 4 can be dealt with straightforwardly.

Actus reus

266. I find as follows:

i) 3CX: The *actus reus* of Ground 4 is not made out in relation to the 3CX App, because I am not satisfied that it was used as a system for transmitting or storing Ocado's Confidential Information, within the meaning of that phrase in the Search Order.

ii) Slushminers' Accounts: Neither is the *actus reus* made out in relation to the Slushminers' Accounts. Even if they did contain Confidential Information, they were not in fact destroyed but instead were recovered and preserved.

Mens rea

267. I find as follows:

i) 3CX: The *mens rea* element is not made out as regards the 3CX App or the material thereon. The App did not, in fact, contain Confidential Information, and so Mr McKeeve in giving his instruction did not intend to destroy it.

ii) Slushminers Accounts: Neither is the *mens rea* made out in relation to the Slushminers Accounts, because when he gave his instruction Mr McKeeve was not aware of their existence and so cannot have intended to destroy them.

Ground 3: Did the Defendant intentionally interfere with the due administration of justice by intentionally causing the destruction of documents which constituted a "*Listed Item*" within Schedule C of the Search Order

268. As explained above (see [81]), for present purposes two forms of Listed Item under Schedule C to the Search Order are relevant. One is any document containing Confidential Information (as defined). The other type of Listed Item is that mentioned in Schedule C, para. 4(d), i.e., "*Any document evidencing … any work carried out directly or indirectly by any current employee of an Ocado company for or on behalf of [Mr Faiman] or [Today] or the 'Today Development Partners' business.*"

269. I have already dealt with documents containing Confidential Information in considering Ground 4 (above). It remains to consider Ground 3 by reference to documents covered by Schedule C, para. 4(d), i.e., documents evidencing work by Mr Hillary.

270. Again, Mr McKeeve's alleged liability is as a third party, on the footing that by his actions he thwarted or frustrated the purpose of the Order. More specifically, in the

context of Ground 3, the allegation must be that the purpose of the Order was to require a search to be conducted for Listed Items - that is, for documents evidencing any work by Mr Hillary; and Mr McKeeve's intention was to frustrate that purpose.

Actus reus

271. I find as follows:

i) 3CX: I consider that the *actus reus* element is made out as far as the 3CX App was concerned. As it happened, it *did* contain documents which evidenced work by Mr Hillary in the relevant sense. As a result of Mr McKeeve's actions, those documents were destroyed. That involved an interference with the administration of justice, because the purpose of the Order (or at least one of its purposes) was to allow them to be identified by means of a search. That did not happen and as a result of Mr McKeeve's intervention was in fact rendered impossible.

ii) Slushminers Accounts: I consider that the *actus reus* element is not made out, for the reasons already given above. The Slushminers Accounts were not destroyed.

Mens rea

272. I find as follows:

i) 3CX: I do not consider that the *mens rea* element is made out. That is because it would require proof beyond a reasonable doubt that Mr McKeeve acted with the specific intention of frustrating the narrow purpose of allowing documents relevant to work by Mr Hillary to be identified through a search. I am not satisfied beyond a reasonable doubt that Mr McKeeve *did* act with that intention in mind, because he did not know about that particular purpose.

ii) This follows from the fact that Mr McKeeve was not aware of the detailed terms of the Search Order. He did not know that part of its purpose was to facilitate a search for documents evidencing "*any work*" by Mr Hillary. It is not enough to say that he might have been able to work out for himself what Ocado was searching for. Again, in my opinion, a person in Mr McKeeve's position might equally well have thought that the purpose of the Order was only to search for confidential information belonging to Ocado. Mr McKeeve was not told enough to be certain what was being searched for were also documents evidencing work by Mr Hillary. A third party to an Order charged with criminal contempt for frustrating one of the detailed purposes of an Order should not have to guess what those detailed purposes are or might be.

iii) The need for precision, in cases where a third party is charged with frustrating a specific purpose reflected in an Order of the Court, was emphasised by Lord Denning MR, in the following passage from his judgment in Z Ltd v. AZ, setting out one among a number of points designed to moderate the basic unfairness which might otherwise arise from a principle which imposes a form of indirect liability on third parties:

> *"Secondly, precise notice*
>
> *The bank, or other innocent third party, should be told, with as much certainty as possible, what he is to do or not to do. The plaintiff will, no doubt, obtain his Mareva injunction against the defendant in wide terms so as to prevent the defendant disposing, not only of any named asset, but also of any other asset he has within the jurisdiction. The plaintiff does this because he often does not know in advance exactly what assets the defendant has or where they are situate. But, when the plaintiff gives notice to the bank or other innocent third party, then he should identify the bank account by specifying the branch and heading of the account and any other asset of the defendant 'with as much precision as is reasonably practicable: see Searose Ltd. v. Seatrain U.K. Ltd. [1981] 1 W.L.R. 894, 897c*".

iv) That being so, I am not persuaded beyond a reasonable doubt that Mr McKeeve acted intentionally so as to frustrate the purpose of searching for documents evidencing *work* carried out by Mr Hillary. He was not aware of, or focused, on such a specific target. His intention was much cruder. It was simply to get rid of the 3CX App, to prevent it being searched at all.

v) Slushminers Accounts: In my judgment the *mens rea* element is not made out, for the reasons already given. Mr McKeeve was not aware of the existence of the Slushminers Accounts and in sending his message to Mr Henery did not intend to destroy them.

Ground 5: Did the Defendant intentionally interfere with the due administration of justice by intentionally causing the destruction of documentary material (in the form of the 3CX System and the email accounts as set out in the affidavit of Mr James Libson, and the material contained therein) stored on Electronic Data Storage Devices (as defined in the Search Order)?

273. In my opinion, however, the position under Ground 5 is different. That is because, as I read it, Ground 5 is concerned with the purpose of the Search Order expressed in a more general sense – i.e. the purpose of requiring a search to be conducted of electronically stored data, including in particular data stored on, or accessible from, mobile telephones or other devices. Whatever his underlying motive, Mr McKeeve acted with the precise intention of preventing that from happening.

274. Again, I will take the relevant elements in turn.

Actus reus

275. I find as follows:

i) 3CX App: I find the *actus reus* element is made out as regards the 3CX App. It was, in fact, an "*Electronic Data Storage Device"* within the terms of the Search Order because (at the least) it was accessible via a mobile telephone (mobile telephones are specifically mentioned in the definition), and in any event it is a "*cloud based IT system*". As a result of Mr McKeeve's intervention,

it was destroyed and so was not available to be imaged or searched as it should have been.

ii) That, in my judgment, was a sufficiently serious interference with the due administration of justice for the *actus reus* to be made out. In his submissions, Mr Weekes QC argued that in assessing whether the due administration of justice has been interfered with, in a case where documents have been destroyed, it is necessary to consider whether the documents were important, and (in effect) would have had some bearing on the outcome of the proceedings in which they would otherwise have been deployed: see, e.g., the comments of Warren J in Dadourian Group International v. Sims [2007] EWHC 2634 (Ch) at [61(b) and (c)], and of Patten LJ in Hugh Jarvis Ltd v. Searle [2019] EWCA Civ. 1, [2019] 1 WLR 2934 at [35]. For my own part, however, I consider that the question of what constitutes interference with the due administration of justice has to be looked at in the circumstances of each case. I accept, of course, as Lord Bingham said in A-G v. Newspaper Publishing, that trivial or technical matters will not engage liability (above at [157]); but to my mind, preventing a search of electronic data which the Court has ordered to be searched is not a trivial or technical matter, especially where (as here) the search would have yielded results, even if Mr McKeeve was not clear at the time that it would. Instead it is conduct which, to adopt the language of Lord Bingham, as later endorsed by Lord Nicholls in the Punch case at [4], has a "*significant and adverse effect on the administration of justice*". That is because it is conduct which prevents a course of conduct being followed which the Court has already determined is what the administration of justice requires.

iii) Slushminers Accounts: The *actus reus* is not made out in relation to the Slushminers Accounts because they were not destroyed only suspended, and so remained available for search.

Mens rea

276. I find as follows:

i) 3CX: The *mens rea* element is made out as regards the 3CX App. I have already held (above at [245]-[254]) that McKeeve's intention was to prevent the 3CX App being searched. He accepted as much. That is sufficient to satisfy the *mens rea* element, because a relevant purpose of the Search Order was to require the contents of the 3CX App to be searched. That was the purpose Fancourt J sought to achieve in granting the Search Order, and is thus what the due administration of justice required. Mr McKeeve knew that the purpose of the Search Order was to require a search to be carried out of the 3CX App, and indeed his own stated intention was to prevent it being searched. He thus interfered with the due administration of justice, as reflected in the Search Order.

ii) Mr McKeeve's evidence was that he did not in fact understand what the Supervising Solicitor, Mr de Jongh, was saying to him. I have already said above that I do not accept that evidence, if by it Mr McKeeve meant to say he was not aware of the import of what was happening. As an intelligent and capable man, even one faced with an unexpected and stressful situation, he must have done. I accept that, to a degree, he had to join the dots together for himself,

because the scope of the Order was not described to him, but he knew enough to know that it would interfere with the Search Order for him to delete an App that was accessible via mobile telephones or other devices. To the extent any inference is necessary as to Mr McKeeve's state of mind on this point, I am of course entitled to proceed on the basis of an inference (see per Lord Donaldson MR in A-G v. Times Newspapers at [131(iii)] above). Moreover, I am satisfied here that the inference is clear and overwhelming, and is the only inference that can reasonably be drawn from the available primary facts.

iii) Part of Mr Weekes QC's case was that no liability could attach to Mr McKeeve because he did not have the terms of the Search Order explained to him, and at the time he gave his instruction he had not been sent a copy and had not read it. I see that point, but I am not persuaded by it. It seems to me that the relevant purpose of the Order was entirely obvious from what Mr McKeeve *was* told. As in A-G v. Times Newspapers (above at [154]), the problem Mr Weekes QC identified was more imaginary than real, because the Court's purpose was manifest from "*the mere making of the Order*." The concept of a Search Order needs no explanation or elaboration in order to be understandable. One might, on other facts, have said, "*An Order to search what?*" But here Mr McKeeve knew what, because he was told mobile phones and other devices were being taken, and they were obviously being taken in order to be searched under the Search Order.

iv) I note that a similar approach was adopted by Mann J in his Judgment in Heidelberg Graphic Equipment & Anor v. Hogan & Ors [2004] EWHC 390 (Ch). There, the Claimants alleged misuse of their copyright material and obtained a search order which was executed at the Respondents' home. The First Respondent, Mr Hogan, was held liable in contempt for taking steps to conceal materials covered by the Order. That was because, even though he had not been served with a copy of the Order at the time – he had only spoken to his wife on the telephone, who told him there was an Order to search the premises and that it was "*the Heidelberg thing*" – Mr Hogan nonetheless "*had sufficient knowledge that what he was doing was effectively a breach of the order, or at least calculated to defeat the whole purpose of the order*" (per Mann J at [63]). I accept that the situation in that case was different to the present, because Mr Hogan was a Respondent to the Order, and in the present Action Mr McKeeve is not. Nonetheless, Mann J proceeded on the basis that knowledge of the relevant purpose of the Order could be gleaned without the contemnor being shown a copy of it or having its detailed terms explained. I respectfully agree with that general principle.

v) It was also argued that Mr McKeeve did not intend to interfere with the administration of justice, because his intention was never to interfere with the ultimate resolution of the dispute between Ocado and the Defendants in the Underlying Action. He did not think there was anything relevant on the 3CX App which would make any difference to that ultimate outcome. To my mind, however, this relies on too narrow a conception of what is meant by the due administration of justice. It not only encompasses the eventual outcome of a dispute or trial being compromised. It also encompasses the principle that the purpose of interlocutory orders made by the Court pending trial should not be

undermined. All of the cases cited above starting at [134], some of them of the highest authority, support that proposition. Sadly, for the reasons I have explained, that is just what happened here.

vi) I will mention again the limitation expressed in A-G v. Newspaper Publishing, to the effect that trivial and technical interference with the purpose of an Order will be insufficient to attract liability. But here, again for the reasons already expressed, I do not consider the interference to have been trivial or technical. I think it was serious and adverse, because a source which should have been available to be searched having regard to the purpose of the Search Order was not available. Moreover, it is a source which would, if searched, have yielded results. For present purposes it does not matter that the same materials might also have been identifiable from other sources (as was in fact the case as regards the data from Mr Hillary's iPhone, tabulated into the iPhone Call log, and as might also have been the case as regards the contents of Mr Faiman's various telephones and iPad (see [113] above), if they had eventually been searched). Such matters, as it seems to me, are relevant to the question of the overall seriousness of the contempt, which will include an assessment of the actual prejudice caused to the Claimants. But they are not, I think, relevant to the question of liability.

vii) Slushminers Accounts: The *mens rea* is not made out in relation to the Slushminers Accounts, because Mr McKeeve did not know about them and so could not have intended them to be deleted by Mr Henery.

Overall Conclusions

277. For all the above reasons, my overall conclusions are as follows:

i) Mr McKeeve is not liable on any of Grounds 1, 3 and 4.

ii) Mr McKeeve is liable on Ground 5.

278. I will need to hear further from counsel on both sides as to the consequences flowing from this Judgment, including as to costs and the appropriate sanction.

ANNEX 1: PROPOSITIONS IN RESPECT OF LIBSON 3

1. Mr. Libson has never had day-to-day conduct either of the Underlying Proceedings or the contempt proceedings.

2. Mr. Libson has never spoken to any of the following individuals: Messrs. De Jongh, McKeeve, Faiman, Henery, Hillary, Rowe, Waddilove and Ms. Melanie Smith.

3. Mr. Libson has no direct or first-hand knowledge of the facts and matters relevant to the contempt of court alleged in these proceedings.

4. The only sources of Mr. Libson's knowledge of the facts and matters set out in his first and third affidavits are:

   (a) briefings that he has received from and meetings he has participated in from time to time with (i) the members of Mishcon de Reya who are identified in Libson 3 §4; and (ii) members of Ocado; and
   (b) his review of the documents and evidence.

5. The primary purpose of Mr. Libson's third affidavit is to re-state Ocado's case against Mr. McKeeve, refer to and exhibit the documents on which Ocado relies in the contempt proceedings, provide a narrative summary of those documents and comment on them.

6. The first drafts of Mr. Libson's first and third affidavits were prepared by more junior members of Mishcon de Reya, and were then subject to review, amendment, and agreement by Mr. Libson.

ANNEX 2: 3CX PROPOSITIONS

The parties agree the following propositions concerning the 3CX system:

a. version 15 of the 3CX iOS application (the "*3CX App*") was unable to upload or transmit attachments;

b. the 3CX App contained a record of the calls made, received and missed through the 3CX App for each user. This call record was stored on the 3CX server and not locally.

c. the "termination" of a 3CX account causes the deletion of those call records;

d. 3CX extension numbers are assigned by the 3CX administrator for each 3CX group ("*3CX Admin*"). They cannot be changed after creation;

e. 3CX user names can be changed by the 3CX Admin;

f. Users of the 3CX App:

   i. cannot change their own user name, unless there is no previous user name assigned to them by the 3CX Admin;

   ii. cannot change other 3CX users' names;

g. If a user's name is changed on the 3CX account, it will take effect:

   i. on that user's own device, automatically when they start up or restart the 3CX App, or manually within the 3CX App from the Settings menu;

   ii. on other users' devices, immediately. As a result, the 3CX App will display the new username when making or receiving calls or messages from that user, and the new username will also appear in the 3CX App contact list;

h. The 3CX App could be used to send and receive URLs by way of text messages between 3CX users, which will open in the device web browser when tapped by a 3CX user.