Neutral Citation Number: [2022] EWHC 2478 (Ch)

Case No: BL-2019-001768

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

(1) OCADO GROUP PLC **(2) OCADO CENTRAL SERVICES LIMITED**	**Claimants**
- and -	
RAYMOND McKEEVE	**Defendant**

- -
- -

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

Hearing dates: 4 October 2022

- -

Judgment Approved by the court for handing down (Corrected)

Mr Justice Adam Johnson:

Introduction & Background

1. This is my judgment dealing with the questions of sanction and costs, following my earlier judgment of 3 August 2022 (the Liability Judgment) in which I determined that the Defendant, Mr Raymond John McKeeve, was liable on one of four Grounds of alleged contempt for having interfered with the due administration of justice. In what follows I will assume some familiarity with the Liability Judgment and will use the definitions adopted in that Judgment.

2. The present contempt Action arises out of an earlier Underlying Action between Ocado and three different Defendants, namely Today, Mr Faiman (the principal behind the Today business) and Mr Hillary, a former employee of Ocado who had moved across to join Mr Faiman's new operation. The allegations in the Underlying Action involved a claim for misuse of Ocado's confidential information, a claim for breach of contract against Mr Hillary, and a claim that the other two Defendants induced that breach of contract. The Underlying Action settled in 2021, on terms which involved "*a significant payment to Ocado*" and publication of an Agreed Statement of Facts, recording admissions by the Defendants that (i) they had all breached their obligations of confidence to Ocado, (ii) Mr Hillary had breached certain contractual and fiduciary duties to Ocado, and (iii) Mr Faiman had induced Mr Hillary's breaches of contract.

3. Notwithstanding that settlement, Ocado have continued to pursue the present Action against Mr McKeeve. According to the costs information they have provided, their expended costs, excluding the costs of the present hearing, now total approximately £1.1m. That overall figure includes costs of approximately £627,000 since December 2021, when there was a directions hearing before Miles J which resulted in the Grounds of Contempt being amended to add a new Ground 5. In the event, Ground 5 was the sole ground on which the case against Mr McKeeve was made out.

4. Mr McKeeve has also expended costs in mounting his defence: these total roughly £615,000, including roughly £302,000 since December 2021.

5. Among other events, since the Liability Judgment was handed down on 3 August 2022, McKeeve has filed a Third Witness Statement. That deals with a number of topics. To begin with, Mr McKeeve has indicated that he accepts the contents of the Liability Judgment and, in particular, the finding that he committed a contempt of court by causing the destruction of the 3CX App and therefore preventing the material contained on that App from being searched. Mr McKeeve has also given evidence about the effect of the present Action on him both professionally and personally. He has produced a large number of character references.

6. Both parties have made helpful submissions on the question of the appropriate sanction. As to costs, the Claimants seek an order for their costs to be paid on the indemnity basis and ask for a payment on account of 80% of those costs. Mr McKeeve's position is that he has succeeded in defending three of the four Grounds of Contempt alleged against him, and should be entitled to his costs of doing so. He also seeks findings that the costs of Mr Libson's Third Affidavit – Libson 3 (referred to in the Liability Judgment at [121]) – be disallowed, and that Ocado should pay his (Mr McKeeve's) costs of and incidental to Libson 3.

7. In practical terms, Mr McKeeve argues that this outcome should be reflected in an order that (i) he recover all his costs up to the date of the December 2021 directions hearing before Miles J, at which Ground 5 was introduced for the first time and (ii) thereafter, Ocado should pay him 20% of his costs, that figure being said to represent the parties' relative success on the issues with which the Court was eventually concerned at trial.

Sanction

8. I then turn to the question of the appropriate sanction.

The Overall Approach

9. In Attorney-General v Crosland [2021] 4 WLR 103, the Supreme Court set out at [45] the following *"recommended approach"* to sentencing for criminal contempt:

> "*1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.*
>
> *2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.*
>
> *3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.*
>
> *4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.*
>
> *5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.*
>
> *6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.*
>
> *7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension*."

10. It follows that the first question to address is the seriousness of the contempt. In light of that, the Court must then determine whether the seriousness justifies a custodial

sentence or whether a fine would be sufficient. The Court must then determine the appropriate term of the sanction. Finally, if a custodial sentence is to be imposed, it must consider whether the sentence should be suspended.

Seriousness

11. I come first to the initial question of seriousness. In determining seriousness, the factors identified by Popplewell J (as he then was) in Asia Islamic Trade Finance Fund Ltd v. Drum Risk Management Ltd [2015] EWHC 3748 (Comm) ('*Asia Islamic*') at [7(6)] have been regularly applied. They are as follows:

    i) Whether the claimant has been prejudiced by virtue of the contempt and whether any such prejudice is capable of remedy;

    ii) The extent to which the contemnor has acted under pressure;

    iii) Whether the breach of the order was deliberate or unintentional;

    iv) The degree of culpability;

    v) Whether the contemnor has been placed in breach of the order by reason of the conduct of others;

    vi) Whether the contemnor appreciates the seriousness of the deliberate breach;

    vii) Whether the contemnor has co-operated; and

    viii) Whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward.

12. It is common ground that factors (i) to (vii) are relevant to the question of seriousness. There is a dispute, however, as to factor (viii).

13. Factors (i) to (vii) are derived ultimately from a judgment of Lawrence Collins J (as he then was) in Crystal Mews Limited v. Metterick & Ors (unreported, 13 November 2006). In Asia Islamic Popplewell J, having adopted those 7 factors as matters which might serve to make the contempt more or less serious, went on to add a further factor, namely factor (viii), as bearing on the same issue.

14. In making his submissions, Mr Cavender KC queried the correctness of this addition in light of the analytical structure referenced by the Supreme Court in the Crosland decision (above), because that refers to matters of mitigation such as previous good character and any expression of remorse only at a later point in the structure, after the question of the seriousness of the contempt, and the form of punishment, have been determined (see point (4) in the quotation at [9] above).

15. With respect, on this point I prefer the submissions made by Mr Weekes KC for Mr McKeeve. I do not think that the Supreme Court, in setting out its summary of the overall analytical structure, was intending to exclude from consideration in relation to the question of seriousness the relevance of any apology or expression of remorse by the contemnor. I think Mr Weekes KC is correct to say it would be illogical to do so, having regard to the other factors which it is common ground are relevant to that

question. One such factor, for example, is the general question of the contemnor's culpability. It seems to me it would be relevant, in considering culpability, to have regard to whether a contemnor had expressed regret or given an apology for his or her actions, because an unrepentant contemnor who refuses to accept any responsibility is more culpable than one who has apologised. This illustrates the point that the factors are to some extent overlapping and inter-related. Moreover, the question of seriousness is a precursor to the next question, which is the question of whether some form of sanction or punishment is required for the contempt; and more specifically, whether a fine is a suitable punishment or whether a custodial sentence is necessary. In answering that question, it would seem to me relevant to ask whether there has been an apology or an expression of remorse, because the absence of an apology or expression of remorse from an entirely intransigent contemnor might well be a signal that a fine is not an appropriate form of punishment, and that a custodial sentence is necessary in order to drive home to the contemnor in a very direct way the extent of the Court's disapproval.

16. For those reasons I will go on to consider all 8 of the factors identified above in considering seriousness. I will consider further below the issue of the appropriate sanction, taking account of the conclusion on seriousness and other matters also.

17. Taking then the Asia Islamic factors in turn, I comment as follows.

18. *Prejudice*: I accept there was prejudice to the Claimants in at least one sense. That is in the sense that Mr McKeeve's actions in securing the deletion of the 3CX App resulted in the irretrievable destruction of certain data which the Court had already determined, by means of its Search Order, should be preserved for the purposes of being searched.

19. This point prompted some debate among the parties. Mr Weekes KC argued that there was no prejudice at all to Ocado, given the nature of the contempt alleged and found under Ground 5. His argument was that the nature of the finding in relation to Ground 5 was incompatible with the idea that Ocado had suffered any real prejudice at all. That is because liability under Ground 5, which Ocado had called their "*fall-back*", was dependent only on the intentional deletion of the 3CX App, as a data source which was intended to be preserved and searched as one of the purposes of the Search Order; it was not dependent in any way on the contents of the App or on any specific intention on the part of Mr McKeeve to delete documents of a particular type on the App. Thus, Mr Weekes argued that the key finding in the Liability Judgment in relation to Ground 5 was only that (and only needed to be that) the 3CX App was intentionally deleted. That circumscribed the matters which might legitimately be taken into account in determining the question of prejudice or harm arising from the Ground 5 contempt. It was impermissible, he said, to have regard to the comment made in the Liability Judgment at [275(ii)] that any search of the data on the 3CX App, had one been conducted, would have "*yielded results*" – i.e. would have led to the production of disclosable documents touching on the question of the role in fact being carried out by Mr Hillary (although not documents containing any Confidential Information).

20. In my judgment, there are a number of different points here, which one must untangle:

    i) It is correct that I held in the Liability Judgment that the *actus reus* of Ground 5 was made out merely by the deletion of 3CX App, as an "*Electronic Storage Device*" within the terms of the Search Order (see at [275]).

ii) I do not think that means, however, that in determining the question of harm at this stage, the Court should disregard what was actually lost as a result of deletion of the 3CX App. That is for at least two reasons. The first is that, during the course of trial, I *did* make findings – to the criminal standard – about what the 3CX App contained. Having made those findings as a result of the overall inquiry into Mr McKeeve's conduct required by the contempt application, it would seem to me entirely artificial now to ignore them.

iii) The second (related) reason is this. One of the main points relied on by Mr McKeeve himself in relation to Ground 5 was that the elements of that contempt could not be made out merely by deletion of the App – instead, he said it had to be shown that there was something on the App which was likely to be material to the outcome of the Underlying Action, which was intentionally deleted. Only that combination of factors would involve an interference with the due administration of justice which was sufficiently serious as to amount to a contempt. Thus, Mr McKeeve himself put in issue on his own case the value of the materials contained in the 3CX App.

iv) I disagreed with that basic submission; but in dealing with Ground 5 went on to say that in any event, in the circumstances of this case, and addressing Mr McKeeve's own point, the elements of the contempt were made out on any view, because there *was* material on the App which was relevant in the sense of being disclosable. That is what I meant by the observation that any search of the 3CX App would have "*yielded results*". That was not adopting, for the purposes of Ground 5, a factual finding made exclusively in connection with the parties' cases on Grounds 1, 3 and 4. Instead, it was addressing Mr McKeeve's own point made in connection with Ground 5. That reinforces the artificiality of the argument he now advances, because what it amounts to is an invitation to the Court to ignore a factual finding prompted by the way he formulated his own case.

v) The question of what Mr McKeeve knew about what was on the 3CX App is, I think, a different point again. I will come back to the question of what he knew, and what his motivations were, further below, but I note that I accepted in the Liability Judgment (at [259]) that his knowledge was limited. All the same, that does not persuade me that in assessing the question of harm done, I should disregard what was *actually* on the App. A person who deliberately destroys a data source even without knowing precisely what is on it cannot complain, it seems to me, if in the event it contained more that they thought or appreciated at the time. If something of value is lost, that is relevant to the question of the harm or prejudice caused.

21. Other matters are also relevant to the question of prejudice, however. One is that at least *some* of the information which would have been disclosed from a search of the 3CX App was revealed anyway. This was retrieved from Mr Hillary's iPhone, and was tabulated into what was called at trial the iPhone Call Log, showing calls made by Mr Hillary on the 3CX App between 14 June 2019 and 3 July 2019.

22. A further important point, it seems to me, is that the Underlying Action has now settled, on terms which – as I have described – appear highly favourable to Ocado. It obtained concessions from the Defendants on all critical points of liability and, it appears, a

substantial payment. It has not been suggested that Ocado could have obtained different and better terms absent Mr McKeeve's actions. Looked at from the broader perspective of the Underlying Action – and bearing in mind of course that the Search Order was made in order to protect Ocado's position in relation to the Underlying Action – it is difficult to see that Ocado have been prejudiced in any material sense at all.

23. *Pressure*: Mr McKeeve did not act under pressure from any third party, but I accept the proposition that, at least in giving his initial "*burn it*" instruction to Mr Henery, he acted under pressure of time in response to an unexpected situation which occasioned a sense of panic and concern (Liability Judgment at [233]). Indeed, in the Liability Judgment, I described Mr McKeeve's conduct as a "*spontaneous act of colossal stupidity*". Mr McKeeve has accepted that characterisation. It is another way of saying that he acted without thinking through what he was doing. It was a knee-jerk, not a considered, response.

24. Of course, Mr McKeeve *should* have thought about what he was doing. But in terms of seriousness, acting impulsively is obviously less serious than a considered or pre-mediated attempt to subvert the course of the Underlying Action by destroying documents likely to be relevant to that Action, which was the primary case Ocado advanced at trial. In assessing this factor overall, I also take into account my finding that although the initial "*burn it*" instruction was given under pressure of time and without careful thought, Mr McKeeve had the opportunity of reflecting on his actions as the process of executing the Search Order unfolded. This took up a great deal of the day on 4 July 2019. Mr McKeeve did not mention the steps he had taken, and that must have been because of a continuing intention to prevent it coming into the hands of Ocado for the purpose of it being searched (Liability Judgment [254]).

25. *Intention*: Here I must modify slightly Popplewell J's language from the Asia Islamic case, because I am not concerned with breach of the Search Order by a party to it, but instead with action taken by a third party which frustrated one of the purposes of the Search Order. Nonetheless, I can say that the action constituting the breach was deliberate. Indeed, intention is a part of the necessary *mens rea*. I concluded in the Liability Judgment that Mr McKeeve acted with the "*precise intention*" of preventing the 3CX App being searched (see Liability Judgment at [273]). Thus, although spontaneous, Mr McKeeve's actions were nonetheless deliberate, as he himself effectively accepted during his cross-examination (Liability Judgment at [250]).

26. *Degree of Culpability*: On this point, the Claimants argued that as a matter of principle, the deliberate destruction of documents falling with the scope of a search order is self-evidently a serious matter which should attract a high degree of culpability, and in particular in a case where the destruction is at the hands of a solicitor, an individual whose role as an officer of the court involves upholding the rule of law.

27. I agree with those general propositions. They are important factors in this case. The fact is that Mr McKeeve did exactly the opposite of what his role and his professional duties required. Indeed, he was contacted by the Supervising Solicitor precisely because he was a solicitor. The system of the Court making search orders is in large part dependent on the parties' legal advisers acting responsibly in the course of their execution. Mr McKeeve intentionally failed to do so, and his actions in that sense are highly culpable and merit the sanction of the Court.

28. Again, however, I accept that the overall picture is more nuanced, and that certain other factors are also relevant to the final assessment. Although Mr McKeeve's *intention* was to prevent the 3CX App being searched, and that was sufficient to constitute the *mens rea* of the contempt alleged in Ground 5, that is different to the matter of his *motivation*. The Liability Judgment establishes that Mr McKeeve did not act as part of some pre-arranged plan to destroy relevant documents, which had been Ocado's case against him (see at [235]). I also accepted (Liability Judgment at [254]) that Mr McKeeve did not consider anything on the 3CX App to be that important. He did what he did motivated by a concern over his wife's position, and by a wider sense of frustration arising from what he regarded as his clients' irresponsible behaviour and his own foolishness in having allowed the lines between his professional and private lives to become blurred (Liability Judgment at [235]). To put it another way, he acted impulsively and stupidly and out of a sense of personal embarrassment, and not with the intention of subverting or affecting the course of the Underlying Action.

29. *Conduct of Others*: This point has no relevance in this case. Mr McKeeve acted independently and was not led to frustrate the purpose of the Search Order by reason of the conduct of others.

30. *Appreciation of the Seriousness of the Breach*: Translated into the circumstances of this case, the question is whether Mr McKeeve appreciates the seriousness of his actions in frustrating the purpose of the Search Order. I think there is little doubt that he does. His professional life and his private life have both been very severely affected by the allegations made against him and the course of the present Action. He is no longer working as a solicitor and has had to relinquish his former partnership position. The seriousness of his misconduct is now a matter of public record and has been widely reported. Although he contested liability at the trial before me, the apology and expression of regret he gave to the Court in his cross-examination (Liability Judgment at [18(vii)]) to my mind conveyed a clear sense that Mr McKeeve fully understood the seriousness of his actions and felt a sense of shame and embarrassment about what he had done, even if he could not – at that stage – bring himself to concede that he was guilty of a contempt. He has now accepted the findings made in the Liability Judgment. Nothing more is required, I think, to reinforce the seriousness of his default in Mr McKeeve's mind.

31. *Whether the contemnor has co-operated*: In my judgment Mr McKeeve did sufficiently co-operate in the conduct of the proceedings.

32. The Claimants criticise him for having failed expressly to admit his contempt at an earlier stage, based on any statement of admitted facts that he considered appropriate; they complain he failed to do so and instead "*fought tooth and nail at every stage to defeat the claims made against him*."

33. I do not consider that a fair point of criticism. I think the point can be illustrated by how Mr Cavender KC opened the case orally for the Claimants. At the start of Day 1, he said:

> "*Although there are contested facts about what precisely Mr McKeeve knew at the time he gave his burn instruction and the precise contents of the 3CX system, the basic contempt is clearly made out on the uncontested evidence before the court, including*

> *Mr McKeeve's own witness evidence. The contested evidence you are going to hear, my Lord, is likely to go to the severity of the contempt and therefore to sanction rather than to the question as to whether the actus reus has been satisfied or whether Mr McKeeve had the requisite mens rea*."

34. Looking back now with the benefit of hindsight, that seems to me to have been a reasonable summary; but it is inconsistent with the idea that there was a fundamental lack of co-operation by Mr McKeeve. He had sufficiently co-operated to the extent that the elements of what Mr Cavender KC called the "*basic contempt*" were already made out. The "*basic contempt*", as I read it, was effectively Ground 5 – i.e., the sole Ground of Contempt on which I eventually found Mr McKeeve liable.

35. It is true that Mr McKeeve resisted liability on Ground 5, but his arguments, as I interpreted them, were largely points of law about the purpose of the Search Order and the particular elements of the type of contempt he was charged with having committed. I have mentioned these already above (see [19(iii)]). Allied to them was the argument made by Mr Weekes KC, rejected in the Liability Judgment at [127], that it was impermissible for Ocado to rely on the evidence that the 3CX App contained a call log and had a voicemail facility.

36. I think Mr McKeeve was perfectly well entitled, through his counsel, to take those points, given what was at stake for him. I do not consider the fact that he did so, in the context of high-stakes litigation which has been hard fought on both sides, is evidence of a lack of co-operation in the relevant sense. The important point is that he did not seek to deny any of the basic facts which established his liability. Indeed, my findings on the critical question of his state of mind at the time – i.e., on *mens rea* – are largely based on Mr McKeeve's own evidence, and in particular on (i) his Affidavit sworn as long ago as 17 July 2019 in which he accepted that his interest was in preventing people from outside Today getting hold of the 3CX App, and (ii) his evidence given under cross-examination at trial in which he accepted straightforwardly that his intention had been to prevent the 3CX App coming into the hands of Ocado and the Court for the purpose of being searched (Liability Judgment at [250]).

37. *Acceptance of responsibility/apology/expression of remorse*: This was another area of controversy. Mr Cavender KC said there had never been any real apology by Mr McKeeve. He had really only expressed regret for the situation he found himself in, and that was a different thing.

38. I think this point is connected to the one addressed in the previous section. Mr Weekes KC drew attention to Mr McKeeve's initial Affidavit, sworn in the Underlying Action on 17 July 2019. As I have already explained, that Affidavit effectively set out the evidence on which I eventually concluded that Count 5 was made out, because in it Mr McKeeve accepted that he had intentionally caused deletion of the 3CX App for the purposes of it being searched. He also gave evidence as to his motive, and as to the fact that he did not consider there was anything important on the App so that in deleting it he did not intend to destroy evidence relevant to the Underlying Action. That is the same basic version of events now accepted in the Liability Judgment, after trial. In his Affidavit, and of course during the proceedings, Mr McKeeve resisted the idea that his conduct amounted to a contempt. In my Liability Judgment I disagreed; but that outcome was largely the result of my characterising his conduct, in light of the proper

legal test and the purpose of the Search Order, in a different way. The fact remains that Mr McKeeve set out the basic elements of his conduct in his original Affidavit, and at paragraph 13 apologised for that conduct.

39. Mr McKeeve has apologised elsewhere, including during his cross-examination, in a passage set out in the Liability Judgment at [18(vii)]. It is true that, again at that stage, Mr McKeeve did not go as far as to admit any contempt as such and to apologise for it. As I expressed it in the Liability Judgment, however, he did appear to me to go as far as to acknowledge he had acted wrongly and in a manner which was properly a cause of embarrassment and shame, for which he accepted full responsibility, even if he could not quite bring himself to characterise what he had done as amounting to a contempt of court.

40. Taken in the round, I consider that these are properly matters I should have regard to in determining seriousness and the question of sanction, for the reasons explained above at [15].

Conclusion on Seriousness and form of Sanction

41. The main argument advanced by Mr Weekes KC was that no further sanction was required, beyond the public declaration in the Liability Judgment that Mr McKeeve was guilty of a contempt of Court. Mr Weekes KC pointed to the devastating effect the present litigation has had on Mr McKeeve both professionally and personally. He pointed to the fact that Mr McKeeve had a previously untarnished professional record and referred to the many character references the Court has received, which testify to the fact that his conduct in the present matter was entirely out of character. He pointed to the fact that the Liability Judgment has been widely publicised, and will leave an indelible mark on Mr McKeeve's reputation. He has lost his former position as a successful partner at a major law firm. He has dealt with the stress and uncertainty of the present Action now for roughly three years. That combination of factors is already a sufficient sanction for what was effectively a stupid mistake, which Mr McKeeve accepted a long time ago he was responsible for.

42. I have determined that I cannot accept that submission. At the forefront of my mind, even taking account of the points made by Mr Weekes KC, is the fact that Mr McKeeve is a solicitor. In that role he has a particular function and a particular responsibility in the due administration of justice. As I have already noted, although the circumstances of this case are highly unusual, and although I accept he acted impulsively, the fact is that he did exactly the opposite of what was properly to be expected of him. He deliberately interfered with the purpose of the Search Order by procuring the destruction of a data source which that Order required to be searched. That is self-evidently a serious matter and merits the sanction of the Court.

43. In those circumstances, the next question is whether the contempt is so serious that only a custodial sentence will suffice, or whether a fine is a sufficient penalty.

44. I have found this a difficult question, given the matrix of factors I have already analysed above. In such a case, one feels a strong initial impulse towards the imposition of a custodial sentence; but on more considered analysis, I find the decision a more balanced one in the very particular circumstances of this case.

45. The particular factors which weigh on me are (i) the fact that the "*burn it*" instruction was a "*spontaneous act of colossal stupidity*", i.e. an impulsive act which was out of character for someone with a previously unblemished professional record; (ii) the fact that Mr McKeeve did not think he was in fact doing anything which would interfere with the outcome of the Underlying Action and did not intend to do so; (iii) the fact that the steps he took do not in fact appear to have interfered with the outcome of the Underlying Action, which has settled on terms favourable to Ocado; (iv) the fact that, although he contested liability to the end, Mr McKeeve admitted as long ago as July 2019 the basic elements of the conduct underlying the finding of contempt eventually made against him; (v) the fact that Mr McKeeve plainly accepts the seriousness of his actions, has apologised for them and has sincerely expressed his shame and embarrassment about what he did.

46. As against that, Mr Cavender KC observed that one important factor in favour of a custodial sentence would be the potential deterrent effect of such a sanction. The Court makes Orders on the basis that they will be obeyed, and the system of civil justice is obviously undermined if parties (or third parties) think they can override the effect of such Orders with impunity. That being so, a custodial sentence in this case would send a strong message.

47. I entirely see the force of those points, but still one must ask whether a custodial sentence is necessary. In doing so, it seems to me one must make an allowance for the likely deterrent effect of the situation Mr McKeeve has already found himself in. I have already described this above. Among other matters, his previous position as a respected and successful practitioner has been severely compromised and his reputation is indelibly tarnished. He is now the subject of a Judgment making an express finding of contempt against him. It is naïve to think that such a combination of factors will not also have a deterrent effect on other legal professionals.

48. In addressing the question of sanction, I have reminded myself that the imposition of a prison term is the Court's ultimate weapon and must be used sparingly, and only invoked when truly needed (see the comments of Murray J in Aspinalls Club Ltd v. Lim [2019] EWHC (QB) 2379 at [23(i)].) The Court should also keep in mind the desirability of keeping offenders, and in particular first time offenders, out of prison: see e.g. SRA v. Khan [2021] EWHC (Ch) 45 at [52(3)].

49. Bearing those points in mind in particular, I have formed the view that a custodial sentence is not warranted. The matter is a serious one, for all the reasons I have given, but is not, I think, having regard to the full range of factors analysed above, at the most serious end of the spectrum so as to warrant a sentence of imprisonment. A sanction is certainly warranted, but in my judgment a properly balanced analysis leads to the conclusion that imposition of a fine is an appropriate penalty.

50. Since the amount of any fine has to be assessed in light of any costs liability imposed on the contemnor, I will revert to that point below, having considered the question of costs.

Costs

The Issues

51. The issue in relation to costs arises principally from the fact that although Ocado succeeded on Ground 5 of its Grounds of Contempt, it failed to make out its case on Grounds 1, 3 and 4. Thus, although it has in one sense been successful, having secured a positive finding on its overall allegation that Mr McKeeve interfered with the due administration of justice, it did not succeed in certain formulations of its overall case.

52. Ocado say the position is simple. They have obtained the basic form of relief sought from the outset. As the successful party they should be entitled to its costs. There should be no discount, in the form of any issues based costs order or otherwise, arising from their lack of success on Grounds 1, 3 and 4. Alternatively, if there is any discount it should be a modest one. That is because the different Grounds were really all different ways of putting the same basic case, and Ocado should be allowed a wide degree of latitude in the formulation of that case given the lack of information available to them precisely because of Mr McKeeve's actions. That meant they were forced to put the case in a number of different ways; they were entitled to investigate the full background, and the Court was entitled to have a full account as well. In such a case, the Court in making a costs order should avoid an unduly finely detailed division of issues when deciding what costs order to make, and instead should take a pragmatic view looking at matters in the round: see the comments of Sales J (as he then was) in F&C Alternative Investments (Holdings) Ltd v. Barthelemy (Costs) [2011] EWHC 2807 at [16], [19] and [21].

53. Mr McKeeve advocates a more granular, issues based approach. As mentioned already, this has a number of strands.

    i) One is that Ground 5 was added in only by amendment in December 2021. Thus, says Mr McKeeve, a convenient practical approach would be for him to have all his costs to the date of the amendment, because prior to that the only Grounds advanced were Grounds which were not sustained at trial, and where a case succeeds because of a late amendment an appropriate response is often to require the eventually successful party nonetheless to pay the losing party's costs until that date: see Beoco Ltd v. Alfa Laval Co Ltd [1995] QB 137, at 154 and 156 per Stuart-Smith LJ (CA).

    ii) A further strand is that, from December 2021 onwards, the Court should make an issues based costs order, which (a) should reflect Mr McKeeve's success in defending Grounds 1, 3 and 4 by giving him the costs of doing so, and (b) while also reflecting Ocado's success on Ground 5, should set-off those costs against those due to Mr McKeeve, resulting in a net payment to Mr McKeeve of 20% of his claimed costs.

    iii) A further, discrete point is the status and usefulness of Libson 3, which Mr McKeeve describes as a tendentious and entirely inappropriate document, which was not really evidence at all but instead a disguised, additional Skeleton Argument which Ocado had no permission for. He says that Ocado should have no costs associated with preparing it and Mr McKeeve should have his costs of and incidental to dealing with it.

Discussion and Conclusions

54. To begin with, I accept that it is relevant in costs terms that Ocado did not succeed on certain critical parts of the case as it was put at the outset of the trial. The key questions though are whether any order should be limited by reference to (i) the amendment to add Ground 5 made in December 2021, and/or (ii) the parties' relative success in relation to the four Grounds which were in play at trial following the amendment.

55. I have come to the view that neither approach would be satisfactory in the circumstances of this case. The problem in my opinion is that both involve too rigid and formulaic a division in costs terms between the different Grounds of Contempt, in a manner which in this case would give rise to artificial and perverse results.

56. Nugee LJ was faced with a similar question in a recent case, Kea Investments Ltd v Watson [2022] 4 WLR 14. He said at [7]:

> *"The application before the Court was an application to commit Mr Watson for contempt of court. That was supported by a number of discrete counts, but I take the view that it was a single application with a single objective, and that on that application Kea was the successful party as it did succeed in establishing not only a breach of the order, but a sufficiently wilful breach to require punishment by way of committal. It does not matter that the application was supported by 5 or 10 or however many counts or sub-counts: it was still a single application, not 5 or 10 separate applications. In general if an applicant seeks an order from the Court, and obtains the order that they seek, they are I think to be regarded as the successful party for the purposes of CPR r 44.2(2), even if they have not succeeded in all the grounds relied on."*

57. This emphasises the relevance of determining who, in the event, was the successful party. Here, I regard Ocado as the ultimately successful party, because they sought a finding of contempt against Mr McKeeve and ultimately obtained just such a finding.

58. The related point is that identified by Sales J in the F&C Alternative Investments decision, which I have mentioned above. The point here is that the different Grounds of Contempt all arose out of the same factual story, namely the highly unusual events of 4 July 2019 when the "*burn it*" instruction was given. Those particular events had to be looked at in their context, and so a broader form of factual inquiry was more or less inevitable. Ocado, and the Court, were entitled to a full investigation and explanation of what had happened.

59. In the F&C Alternative Investments decision, Sales J made the following comment at [21]:

> *"Parties should be afforded a reasonable degree of latitude in formulating claims, including pleading alternative bases for the same basic claim. That is a normal and reasonable way to conduct litigation (where the parties are operating under conditions of uncertainty about how the court might ultimately*

> *react to the arguments and evidence to be heard in support of the claim) and may be a good way of ensuring that the court has before it the full circumstances of the case so that it is in a position to get to the true heart of the dispute and arrive at what it regards as the just outcome. Therefore, where that is done and the party proceeding in that way has won on his claim and has acted reasonably, it will often be appropriate for a simple costs order to be made in his favour."*

60. Those comments are entirely apposite here. They lead me to reject the notion of a costs order limited by reference to the December 2021 amendment, or on the basis of a strict issue by issue division reflecting the ultimate outcome in terms of the four Grounds of Contempt relied on. There was a direct factual overlap between them, in the sense that they all arose out of the same factual story, and reflected different possible outcomes of essentially the same investigation which, given the highly unusual background which cried out for proper examination, was always going to have to be conducted however the case was reflected in precise pleading terms.

61. In my view, the Ground 5 amendment introduced in December 2021 must be looked at in that light; it was simply another possible formulation of the overall contempt allegation, introduced to reflect one possible outcome of the factual investigation which would be inevitable at trial in any event. In that sense, I think it inaccurate to describe the case advanced before then as a losing case, which is how Mr Weekes KC sought to characterise it. I also think it would be altogether too crude to allow Ocado only the costs which Mr McKeeve says are solely referable to Ground 5, since that would exclude costs of the necessary broader inquiry into the potentially relevant background.

62. That is not the end of the analysis, however. As already noted, I do consider that some allowance should be made for the fact that Ocado at trial invited a number of serious findings to be made against Mr McKeeve, which in the event were not substantiated on the evidence. Put at its highest, their case was that the 3CX App was a clandestine communications system installed precisely with the intention of being deleted in the event that Ocado came knocking; and that when he gave his deletion instruction, Mr McKeeve was acting in a pre-mediated way, on the basis of that prior agreement or understanding.

63. That was, as Mr Weekes KC pointed out, tantamount to an allegation of fraud, and Mr McKeeve successfully resisted that allegation. I accept that considerable time and energy was spent during the trial in considering it and in considering the elements of the story said to support it. Although, as I have held, I think it would be too crude to make an issues based costs order, I do think it fair that Ocado's failure to make out this part of its case should be reflected in a reduction in the amount of its recoverable costs. Such an approach is, I think, consistent with the requirement under CPR 44.2(7) that, before the Court considers making an issues based costs order under CPR Rule 44.2(6)(f), it should first consider whether it is practicable instead to order a proportion of the receiving party's costs.

64. I think that is practicable here. The assessment cannot be a scientific exercise. It seems to me I must do my best based on my knowledge of the issues in the case, of the evidence, and of the overall manner in which the trial unfolded. Having regard to such matters, I have determined that there should be a 40% reduction in the amount of

Ocado's recoverable costs – i.e., Ocado should recover 60% of its claimed costs prior to the present consequentials hearing, to be assessed if not agreed.

65. I accept Mr Cavender KC's submission that the costs of the consequentials hearing are different, because the present hearing was always going to be required in any event. I do not therefore propose to make any similar reduction in recoverable costs as regards the present hearing.

66. Certain other points remain.

67. *Libson 3*: The first is the question of Libson 3. As to this, although I accept Mr Weekes KC's submission that this was a somewhat unusual document, the fact remains that it was served pursuant to the Order made by Miles J made in December 2021 (see the Liability Judgment at [118]), and was intended to serve the ostensibly useful purpose of setting out clearly, far in advance of the trial, the case Ocado were making and which Mr McKeeve was therefore expected to meet. For my own part, I consider it did serve a useful purpose in drawing together into one coherently expressed document many strands of evidence from different sources touching on the same subject matter. It was a somewhat unconventional document, I agree, and I do not encourage the creation of similar documents in the future, at least not without a clear direction from the Court. Nonetheless, so far as the present case is concerned, I consider that any deficiencies in the document are adequately reflected in the reduction in the amount of Ocado's costs I have already proposed.

68. *Indemnity basis?* The next question is whether Ocado's costs should be payable on the indemnity basis. In my view they should. The case is obviously one which is out of the norm.

69. *Relevance of means?* There is then a question of principle, which is whether, in assessing the amount of recoverable costs in a contempt case, the Court should have regard to the contemnor's means. This point was not developed in any detail, but the parties drew my attention to certain statements by the Supreme Court in the Crosland case, at [2021] UKSC 15, [2021] 4 WLR 105, para. [10]; and at [2021] UKSC 58, [2022] 1 WLR 367, para. [93]. In the first of these decisions the relevant panel of the Supreme Court, in dealing with costs in a contempt case, said:

> *"10. In determining whether the claimed amount is reasonable and proportionate, the court may take into account the respondent's means (Yaxley-Lennon). The court may also consider the relationship between the value of any costs order and the level of any fine which has been or is due to be imposed. (See generally Deputy Chief Legal Ombudsman v. Young [2011] EWHC 2923 (Admin); [2012] 1 WLR 3227, para. 55 per Lindblom LJ, citing LTE Scientific at para. 104.)"*

70. In a case called National Highways v. Heyatawin [2021] EWHC 3093 (QB), [2022] 1 WLR 1521, however, the Divisional Court said at [9], in referring to Crosland:

> *"These cases show that the costs order may be relevant to sanction in a case where the court is considering a financial sanction. Crosland was such a case. In our judgment, however,*

> *they do not show, as a general proposition, that the means of the contemnor are relevant to the proportionality or reasonableness of the costs claimed."*

71. In yet a further decision, The Secretary of State for Transport v. Cuciurean [2022] EWCA Civ. 661, the Court of Appeal took a slightly different approach, but still one which led it ultimately to conclude (at [68]) that:

> *" ... the discretion to award costs is governed by the general principles in the CPR ... and ... contempt cases, even in protest cases, are not in some special category even though tempered to some extent by the approach in Crosland ... ."*

72. These recent authorities give rise to an interesting issue, but in my judgment it is not one which arises directly in this case. That is because they were cases concerned with rights such as those under Arts 10 and 11 of the ECHR (right of freedom of expression or of freedom of assembly or association). The relevance of such rights engaged the question whether the sanction imposed was proportionate (see the analysis in Cuciurean at [48]). It was in that context that the question of the means of the contemnor appears to have been relevant. In the present case, no such Convention rights are relied on. It is a case of a contempt arising from interference with the terms of an injunction. The rights engaged are the legal rights of the applicant for the injunction, Ocado. Not to allow Ocado their costs reasonably and proportionately incurred in vindicating their rights would involve an impermissible derogation of those rights, which the Court, in making the Search Order in the first place, had already determined were reasonable and necessary (see Cuciurean at [53]).

73. In any event, I bear in mind that the evidence I have received as to Mr McKeeve's means is somewhat limited. The high watermark of it is an Annex to his Third Witness Statement, but this provides little detailed information and what is provided is somewhat out of date (for example, no up-to-date valuation is given of his primary asset, which is his interest in the matrimonial home). Insufficient information is provided to persuade me that Mr McKeeve's means are simply inadequate, in particular if, as he has intimated, he obtains a direction for payment by instalments.

74. *Interim Payment?* The principles are well known. CPR 44.2(8) provides:

> *"Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."*

75. Christopher Clarke J (as he then was) gave the following guidance in Excalibur Ventures LLC v Texas Keystone Inc and others [2015] EWHC 566 at [23]-[24]:

> "*What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs*

> *claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.*
>
> *In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.*"

76. Bearing in mind those factors, I will order that Mr McKeeve make a payment on account as follows:

    i) A figure corresponding to 80% of the costs of the overall proceedings I have directed Ocado should recover (i.e., 80% of the 60% I have allowed). That comes to £524,695.23 (£1,093,115.06 x 60% = £655,869.04; 80% of that figure = £524,695.23).

    ii) A figure corresponding to 80% of Ocado's costs of the present consequentials hearing. As of yesterday, they were £107,072.50. If they remain at that level, then a payment of £85,658 will be required.

Amount of fine

77. I then have to consider the amount of the fine I have determined should be levied. In doing so, I have regard to the matters of personal mitigation emphasised by Mr Weekes KC, including in particular the evidence of Mr McKeeve's good character contained in his many character references. I also take into account the costs order now made. I also take into account the information I have as to Mr McKeeve's means. I have also had regard to the information provided in Mr Weekes KC's Skeleton Argument, summarising the details of fines given in other cases.

78. In light of those considerations, and bearing in mind also the comments I have made already as to the relative seriousness of Mr McKeeve's contempt, notwithstanding my conclusion that it is not such as to warrant a custodial sentence, I nonetheless think that a substantial fine is appropriate. I have determined it should be a fine of £25,000.

Conclusion

79. That resolves the matters addressed by the parties in the present consequentials hearing. I will need assistance from counsel in finalising a form of Order which gives effect to my findings. I hope that such matters can be dealt with quickly and without further disagreement.

80. I have noted from Mr Weekes KC's Skeleton Mr McKeeve's stated intention to apply for an order that the payments he is now required to make should be made by instalments. I will need to consider with counsel any further directions which may be needed for the disposal of that application.