Neutral Citation Number: [2021] EWHC 3542 (Ch)

Claim No: BL-2019-001768

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

Rolls Building

7 Rolls Buildings

Fetter Lane

London

EC4A 1NL

Date: Tuesday, 21st December 2021

Before:

MR. JUSTICE MILES

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Between:

(1) OCADO GROUP plc

(2) OCADO CENTRAL SERVICES LIMITED

Clai

- and -

MR RAYMOND McKEEVE

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MR DAVID CAVENDER, QC and **MR ALEXANDER BROWN** (instructed by **Mishcon de Reya LLP**) appeared for the **Claimants.**

MR ROBERT WEEKES and **MS GAYATRI SARATHY** (instructed by **Foot Anstey LLP**) appeared for the **Defendant.**

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Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,

2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.

Telephone No: 020 7067 2900. DX 410 LDE

Email: info@martenwalshcherer.com

Web: www.martenwalshcherer.com

MR JUSTICE MILES:

1.
This is a directions hearing in committal proceedings brought by Ocado against Mr. McKeeve. This judgment deals with the claimants' application for an order pursuant to CPR 81.7(1) compelling two potentially relevant witnesses, Mr. Henery and Mr. Hillary, to attend the trial of the committal application so that they can be cross-examined by both sides.

2.
The background is set out in some detail in a decision of the Court of Appeal in these proceedings in a judgment, the neutral citation of which is [2021] EWCA Civ 145. I shall assume that a reader of this judgment is familiar with it.

3.
In brief outline, Ocado was involved in a dispute with Mr. Jonathan Faiman and his business, Today. Ocado discovered evidence of what it considered to be a conspiracy to misappropriate and misuse its confidential information. In particular, it found out that Mr. Faiman had been in contact with Mr. Jonathan Hillary, who was a senior employee of Ocado until May 2019, when he resigned and was placed on gardening leave. Mr. Hillary was subsequently dismissed from Ocado and he joined Today as its chief operating officer.

4.
Mr. Hillary provided Mr. Faiman and Mr. McKeeve with confidential information concerning Ocado. Some of that information was referred to in meetings with representatives of Marks & Spencer, which Mr. Faiman was seeking to attract as a customer. Ocado contends that during one of those meetings, in September 2018, Mr. McKeeve told a consultant acting on behalf of Marks & Spencer that he expected Ocado to litigate and told him how he could reduce his exposure to that possible litigation.

5.
On 3 July 2019 Ocado obtained a search and evidence preservation order from Fancourt J. The search order was executed on 4 July 2019 on Mr. Faiman by the independent supervising solicitor. After being served with the court order, Mr. Faiman contacted Mr. McKeeve, who was his solicitor and was at the time a partner at Jones Day LLP. The supervising solicitor then spoke to Mr. McKeeve and explained that a search order had been made. According to the report of the supervising solicitor, he identified the parties to the dispute and said that there was a prohibition on informing others as to the existence of the proceedings.

6.
Shortly after being informed of the search order Mr. McKeeve contacted Mr. Martin Henery, the infrastructure architect at Today, using a specialist private messaging system called 3CX, and told him either to "burn it" or "burn all". It is common ground that that was an instruction to delete all messages recorded in dedicated accounts on the 3CX app. Soon afterwards Mr. McKeeve phoned Mr. Henery to confirm the deletion instruction orally.

7.
3CX is a specialist communications app which allows for phone calls and messages to be sent securely and privately to a person or group of persons. The evidence suggests that while on gardening leave from Ocado in May 2019 Mr. Hillary wanted to have a private and secure means of communicating with Today and that on 17 May 2019 Mr. Henery set up a Today account with 3CX with specific accounts for five users, including Mr. Faiman, Mr. Hillary, Mr. McKeeve and Mr. Henery.

8.

Mr. Henery followed Mr. McKeeve's instructions and, as a result, the 3CX messaging accounts for Today and the five users were deleted. In addition several e-mail accounts were deleted. The e-mail accounts were digitally recovered, but the messages on the 3CX messaging system were irretrievably lost. Mr. McKeeve did not refer to the existence of the 3CX system later on the day of the search, 4 July 2019. Nothing was said about the 3CX system until 9 July 2019 and Ocado only discovered what had happened on 15 July 2019.

9.
Mr. McKeeve has accepted in his evidence that his instruction to Mr. Henery was a serious error of judgment for which he has apologised to the court on affidavit before these proceedings were brought, and he has also self-reported to the SRA. Mr. McKeeve has already had to pay some £260,000 for Ocado's costs of these proceedings. The proceedings have also attracted adverse publicity for Mr. McKeeve in the legal and national press.

10.
Mr. McKeeve's case is that the messages deleted on the 3CX app were innocuous. He says that the messages were therefore not relevant to the claim in the underlying proceedings between Ocado and Messrs. Faiman and Hillary, were not listed items within Schedule C of the search order, and did not constitute confidential information within the terms of the same schedule. He says that the 3CX app was used for administrative messages and that the deletion of the messages on it has had no, let alone any, significant adverse effect on the administration of justice. He also denies that he knew about the terms of the search order since he was not told about them, nor did he know about the claims made in the underlying proceedings. He also says that, in any event, he had no intention of breaching a court order. He says that he was misguidedly concerned to protect his wife, a European politician, whose name had been used as a pseudonym by Mr. Hillary on his 3CX account, from being dragged into the increasingly bitter dispute with Ocado.

11.
On 25 September 2019 Ocado brought this claim and sought the permission of the court to pursue a contempt application against Mr. McKeeve. The hearing of that application took place on 16 December 2019. On 3 March 2020 Marcus Smith J circulated a draft judgment refusing permission and on 5 March 2020, counsel for Ocado wrote to the judge and contended that the draft judgment failed to address its case. There were then further submissions and on 11 June 2020 Marcus Smith J handed down a judgment refusing permission to pursue the committal, but granting the parties permission, pursuant to CPR 31.22(1)(b), to rely on evidence in the underlying proceedings for the purposes of the committal proceedings.

12.
Ocado appealed. On 8 February 2021 the Court of Appeal handed down its judgment allowing the appeal. It concluded that the decision of Marcus Smith J was wrong and that there was a strong prima facie case that there had been a contempt of court.

13.
The Court of Appeal held that these proceedings should be adjourned to the trial of the underlying proceedings. It also ordered that in the event that the underlying proceedings settled, a directions hearing should be listed. The underlying proceedings were compromised in June 2021 and this is therefore a directions hearing in the contempt application.

14.
I turn to the relevant rules and legal principles. CPR 81.7(1) provides as follows:

"The court shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence as it considers appropriate."

15.
This new rule simplifies the old CPR 81.28, which provided materially as follows:

"(3) The court may require or permit any party or other person (other than the respondent) to give oral evidence at the hearing.

(4) The court may give directions requiring the attendance for cross-examination of a witness who has given written evidence."

16.
It was common ground between counsel that the new CPR 81 does not affect the court's powers in relation to committal and was not intended to limit or otherwise amend the court's powers to order a person to attend the trial to give oral evidence or be cross-examined.

17.
The express power in CPR 81.7(1) is not available to the court outside that rule in relation to ordinary civil proceedings.

18.
There is also a general power in CPR 32.1 for the court to control the evidence, but it is not clear on the authorities whether the court has the power to compel a witness to attend a trial in circumstances where the individual is not called as a witness by one of the parties: see Phipson on Evidence, 20th edition, paragraph 8-19. In that passage, the editors refer to a Court of Appeal decision in Kesse v Secretary of State for the Home Department [2001] EWCA Civ 177, where Schiemann LJ, giving the judgment of the court, said at [34]:

"We do not consider it necessary to decide definitively whether a judge in civil proceedings has, at any event, since the introduction of the Civil Procedure Rules power to call a witness in circumstances where neither party wishes to call him. We observe that the position may differ depending on whether the suggestion that the witness be called is first made after final speeches or much earlier in the litigation."

19.
The defendant also referred me to the case of Lissack v Manhattan Loft Corp Limited [2013] EWHC 128 (Ch), where Roth J, at [32], said that he had canvassed with counsel whether the court might call a particular witness itself, but it was common ground between the parties that the court has no power to do so without the consent of both sides. He referred to the earlier case of In re Enoch and Zaretsky [1910] 1 KB 327 and recorded that it was common ground that its effect had not been changed by the CPR. He did not record any reference to Kesse. I do not regard that case as saying anything useful as the point was common ground and neither party sought to argue that the court had the relevant power.

20.
In ordinary civil litigation a party may issue a witness summons. A witness so summonsed becomes a witness of the party issuing the summons and that party is not entitled to cross-examine the witness unless the court declares the witness to be hostile. If a party calls a witness the usual rule is that the

party is taken to accept their evidence and cannot cross-examine them unless they are treated as hostile, see The Filiatra Legacy [1991] 2 Lloyd's Reports 337, at 361, per Mustill LJ.

21.
Another route by which evidence may be admitted is by hearsay notice. Counsel for the defendant accepted that a hearsay notice could be given in respect of part of an affidavit or witness statement. Where a hearsay notice is served, the other party may apply to the court for liberty to cross-examine the witness. The party putting in the hearsay evidence may then be bound by any answers given by the witness in cross-examination: see Phipson at paragraph 29-07, though it appears that the court may make a direction that the party adducing the evidence is not bound in this way: see Towry v Bennett [2012] EWHC 224 (QB) at [24].

22.
I turn to the submissions of the parties. The claimants were represented by Mr. Cavender QC and Mr. Brown, the defendant by Mr. Weekes and Ms. Sarathy. I was greatly assisted by their high-calibre and powerful submissions

23.
The claimants submitted in outline as follows.

24.
First, the court has a broad power under CPR 81.7 to control the evidence at trial. This is wide enough to cover the orders sought here. A witness required to attend in this way for cross-examination by both parties is not properly to be regarded as subject to the rules that a party may not impugn the witness' truthfulness. The court does not need to decide whether it would have such a power in ordinary litigation. Committal proceedings have the unusual feature that they are concerned with an alleged interference with the administration of justice. The court therefore has its own interest in ensuring that the alleged interference with justice is properly determined and should do so on the basis of the best available evidence. CPR 81.7 has to be read together with CPR 81.6, which enables the court itself to bring committal proceedings. Where such proceedings are brought, there must be a power for the court itself to require witnesses to attend and that power is found in CPR 81.7.

25.
Secondly, as a matter of discretion the order should be made. Mr. Hillary and Mr. Henery have produced evidence in the form of affidavits which is potentially material to the allegations of contempt. This was not given by them as witnesses for either the claimants or the defendant. It was given in the underlying proceedings. Their evidence covers the purposes of the 3CX system, how the 3CX system was used, the knowledge and involvement of Mr. McKeeve and the circumstances of the deletion of the 3CX system. Both sides have already relied extensively on the evidence of Mr. Henery and Mr. Hillary and the Court of Appeal expressly referred to their evidence in deciding to give permission to Ocado to pursue the contempt proceedings. Marcus Smith J gave the parties express permission to rely in these proceedings on the evidence in the Underlying Proceedings, which includes those affidavits. Ocado will rely on much of that evidence. However, it does not accept it in its entirety and wishes to be in a position to challenge some of the evidence about the way the parties used the 3CX accounts. The Court of Appeal described the evidence on that point as "terse". In practice the claimants could not reasonably call Mr. Henery and Mr. Hillary as their own witnesses, including by way of witness summons. They work for Today. Ocado has been in hard-fought litigation

with Today, so they cannot be expected to assist Ocado, and Ocado will, if it summonses the witnesses itself, be caught by the rule that it cannot challenge any of their evidence.

26.
Ocado submitted, thirdly, that it is in the interests of justice that Mr. Henery and Mr. Hillary be required to attend the trial and give oral evidence as they are highly relevant witnesses who will be able to provide evidence which they, and they alone, can give.

27.
The claimants also emphasised, fourthly, that this was an unusual case. First, the reason why the claimants are not in a position to advance any positive evidence about the contents of the 3CX accounts is that the defendant caused its contents to be permanently erased, as he has admitted. The only way the court will be able to reconstruct what has happened is through the evidence of witnesses. Secondly, Mr. Hillary and Mr. Henery have already produced affidavits, but these were not served on behalf of either of the parties to this application. They cannot, therefore, be regarded properly as the witnesses of either party. Thirdly, the Court of Appeal has already ruled there is a strong prima facie case of an interference with the interests of justice. Fourthly, the defendant is a solicitor and officer of the court.

28.
The claimants submitted there would be nothing unfair in the procedure they have suggested, because both sides would be allowed by the court's order to cross-examine these witnesses. The claimants also accepted that the defendant should be allowed to cross-examine them second, so that he will be able to challenge any evidence the witnesses may give during cross-examination by the claimants. The claimants say there is nothing premature about the order now being sought. If the defendant were later to serve a witness statement for Mr. Hillary or Mr. Henery and call them, that would then constitute their evidence in the case and the claimants would then be in a position to cross-examine them, but the claimants themselves do not propose to call them or serve a hearsay notice in respect of them.

29.
Finally, an order would preserve the rights of Mr. Hillary and Mr. Henery to apply to set aside any witness summons so they are not being prejudiced by the order being made now.

30.
The defendant submitted in outline as follows. First, the application is premature. The committal application is at an early stage. Either party may in due course serve a witness statement for the witnesses and then the usual procedural course will be followed. Alternatively, the claimants may put in a hearsay notice, at which point the defendant may apply for an order for cross-examination.

31.
Secondly, the application is wrong in principle and procedurally unfair, as it involves the claimants in substance and effect calling their own witnesses and then cross-examining them. CPR 81.7 is a general power intended to give the court the ability to give directions about evidence, but it does not allow a party to circumvent the usual rules about parties not challenging their own witness, or serving proper hearsay notices with all of the attendant consequences. Committal proceedings are adversarial in nature and the principles under the CPR generally apply to them. Such differences as there are between Part 81 and the other rules involve greater protections for defendants, such as the rule that a defendant is not compellable.

32.
Thirdly, the application should be determined under the general rules of civil litigation. This is supported by the approach taken by Aikens LJ in Masri v Consolidated Contractors International [2011] EWCA Civ 21 at [41] in relation to disclosure, where it was said that proceedings for committal or other penalties for contempt of civil proceedings and applications for discovery in relation to them must therefore be governed by the CPR, in particular, by Part 31. The defendant says that, in the same way, the rules for calling witnesses and reliance on hearsay in proceedings for committal must be governed by the relevant rules of the CPR.

33.
Fourthly, the claimants are not prevented from using the usual processes of calling witnesses as their own under a witness summons or serving a hearsay notice. They simply do not wish to do so because there are parts of the evidence that they do not like. But that is not usual in civil litigation. It would be unfair to deprive the defendant of the benefit of the usual principle that a party may not cross-examine its own witness.

34.
Fifthly, the order being sought is unprecedented and if an order is made in the present case, it may be expected that similar orders would be sought in many other cases.

35.
I have reached the following conclusions. First, I consider that the court has the power to make the order sought. It is unnecessary to decide whether the court would have a power to call its own witnesses against the opposition of one of the parties in ordinary litigation. That question is not settled and it is not necessary to decide it. I agree with the claimants, however, that there is a power under CPR 81.7. The rule is in broad terms. It allows the court to make such orders as it thinks appropriate to control the evidence. I agree with the claimants that it has to be read together with CPR 81.6, which gives the court itself a power to commence a committal application. That was introduced by the new Part 81. In such a case, the court must have the power to summons and examine witnesses and I agree with the claimants that it is to be found in CPR 81.7. If the court has power in a case brought under CPR 81.6, I think that it must also have a like power in other cases. Moreover, in any committal application, the court itself has its own independent interest in determining whether there has indeed been an interference with the administration of justice, as is alleged. This consideration also favours a broad reading of CPR 81.7.

36.
Secondly, I am unable to accept the submission of the defendant that, in reality, the claimants are simply seeking to call Mr. Hillary and Mr. Henery as their own witnesses and then cross-examine them. The order the claimants seek does not treat the witnesses as those of either party. Instead the evidence given in the affidavits is to be taken as their evidence-in-chief and the order allows both parties to cross-examine them. There is also force in the claimants' submission that, as a matter of substance, Mr. Hillary and Mr. Henery cannot be regarded as having given evidence for them or as being in their camp. As I have already explained, there has been hard-fought litigation between Ocado and Today and they both work for Today. Their affidavits were sworn in the underlying proceedings and were not served by either party to the committal application.

37.
Thirdly, while I accept that the proceedings are essentially adversarial and that the court is not to be regarded as adopting an investigatory function, I do not think it follows from that that the order

sought should not be made. As I have already noted, the court has its own interest in the administration of justice and therefore has a reason to seek to understand the events as completely as possible.

38.
I have also considered carefully whether, by making such an order, the court could be seen as in some way descending into the arena and assisting one side over the other. I have concluded that in making the order, I would not be making any assumptions about the evidence that Mr. Hillary and Mr. Henery may give. They may well support the case of the defendant that the messages on the system were essentially administrative and innocuous. On the other hand, they may provide further and more detailed evidence than they have to date about the nature of the messages which may assist the court in determining whether there has been an interference with the administration of justice. I do not consider that the court would be, by making such an order, aligning itself with one or other of the parties and it is of importance that both parties would have the ability to cross-examine the witnesses.

39.
Fourthly, in my judgment the facts of this case have unusual features. The very reason why the claimants are not able to lead direct evidence about the use of the 3CX accounts is that the contents of the accounts were permanently expunged on the defendant's instructions. This has been admitted by the defendant. There is no other source of evidence than the witnesses. What was contained in the accounts is plainly material to the committal proceedings. As I have already said, the defendant contends that the messages were innocuous and that affects both the question of actus reus and mens rea. Moreover, the witnesses have already given evidence in affidavits but not to the parties to the committal proceedings. The parties therefore know what those witnesses have said. The use to which the 3CX accounts were put is clearly, as I have said, a highly material issue. The evidence given on the issue to date has been described by the Court of Appeal as "terse" and it does seem to me there is force in the claimant's point that without an order of the kind sought, there is no realistic way that the witnesses' evidence on that issue will be tested or investigated further.

40.
I do not think that if the court were to make an order in the present case, there would be a flood of similar applications.

41.
I also think it of some is significance that the application is against a solicitor, who is an officer of the court; and also that the Court of Appeal has already held that there is a strong prima facie case.

42.
Fifthly, I do not consider that the order sought is unfair as a matter of substance. It gives both parties the right to cross-examine, with the defendant going second. Moreover, neither party will be bound by answers given in cross-examination and will be able to make submissions about the evidence as a whole and what weight and effect the court should give to it. The only suggested unfairness was that the defendant would be deprived of his right to prevent the court cross-examining its own witnesses, but that submission seems to me to depend on seeing the witnesses as the claimants’ own witnesses. For the reasons I have given, I do not think that is the right description of them. They would be summoned by the court and not by either party. But in any case, there appears to be nothing intrinsically unfair about the proposed process, by which both parties are to be given the right to cross-examine, with the defendant to go second.

43.

Sixthly, I do not think the application is premature. It concerns a point of principle and I think there is sense in determining it now. The claimants have said that they will not themselves issue a witness summons or serve a hearsay notice. If the defendant serves witness statements for Mr. Hillary and Mr. Henery and calls them as witnesses, their witness statements will stand as evidence-in-chief and the affidavits will not. Any order the court may make should stipulate appropriately to cover that possibility.

44.
Seventhly, nothing in the order sought would affect the rights of Mr. Hillary and Mr. Henery to apply to set aside any summons the court issues pursuant to the order now being sought.

45.
I have carefully weighed the various factors urged on me by the parties and have concluded in all the circumstances that I should make an order as sought by the claimants.

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