

EIP



Ocado permitted to make committal application against solicitor for contempt of court

Ocado Group PLC & Anr v Raymond John McKeeve [2021] EWCA Civ 145

Court of Appeal overturns first instance judge and allows application to commit solicitor for contempt of court

This is an appeal against an Order refusing permission for committal for contempt of court. It is made as part of wider proceedings in which Ocado is alleging misappropriation of confidential information by Project Today Holdings Limited, a competitor established by one of Ocado's original founders.

Upon being notified that an Order for Search of Premises and Preservation of Evidence had been granted (but before he had been provided with a copy), Mr McKeeve, a solicitor with 25 years' experience, called his client's IT manager and told him to "Burn it" (or "Burn all"). This resulted in the deletion of several accounts, including an app known as the 3CX account, irretrievably removing any messages sent. Ocado alleged that this was done to interfere with the due administration of justice.

The first instance judge refused permission, holding that Ocado's arguments did not fulfil the standard of "at least a prima facie case" and that it was therefore not in the public

interest to allow the committal application. Ocado could not show that the deleted documents were of such a nature as to fall within the Order, and the “inference that such documents did exist was both fragile and disputed”. The judge also took the view that intent could not be shown because Mr McKeeve was not aware of the terms of Order, and in particular its schedules, at the time he gave the instruction.

The judge further accepted Mr McKeeve’s explanation of his reason for making the call – that his wife’s name had been used as one of the pseudonyms on the 3CX account and he merely wanted to avoid dragging her reputation into the investigation. Mr McKeeve said in his evidence that he had no appreciation at all as to the effect of the Order, and that it never occurred to him that it might be inappropriate to delete the account.

Appeal Decision

The Court of Appeal stated that an appellate court should be cautious when interfering with a decision of a judge as to whether to grant permission in a contempt case. But went on to say that, in this case, the first instance judge “reached a conclusion which was plainly wrong”. They referred to several errors.

Firstly, the judge’s approach was too narrow and “placed both an unreasonable requirement on what Ocado needed to show [...] and too restrictive an interpretation on the Search Order and the Particulars of Contempt”. The judge placed too much emphasis on the fact that Mr McKeeve had not been told the precise terms of the Order at the time he gave the instruction to “burn”, and so could not have known that messages on the 3CX app were relevant. As Ocado argued, Mr McKeeve knew of the proceedings against his clients, and would have known not to destroy documents that could potentially become relevant to those proceedings. Moreover, if he did not feel that the documents were relevant, he would not have been worried that his wife’s name would be involved and her reputation damaged.

The Court further considered that the first instance judge had erred when deciding that the 3CX app itself was not a “document”. The Court took the view that the app, or in any event the messages contained on the app, were certainly documents, and would therefore be covered by the Order.

Additionally, the Court was particularly critical of the judge’s approach to the affidavit evidence as to the nature of the messages on the 3CX app. The first instance judge stated that “nothing can be said about the nature of this material”. However, affidavit evidence adduced by Mr McKeeve, while stating that all messages were innocuous, also acknowledged that it was not purely a social chat – among other things, he mentioned

messages that involved an Ocado employee that could have been relevant in showing the “degree and nature of the contact” with Project Today.

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For these reasons and others, the Court of Appeal allowed the appeal, and granted permission for Ocado to apply for committal for contempt of court. The committal application is to be heard by a different judge who should also hear the trial. Mr McKeeve has self-referred himself to the SRA.

Written by Emily Atherton