Neutral Citation Number: [2024] EWHC 987 (KB)

Case No: KB-2023-003851

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 17th January 2024

**Before**:

**THE HONOURABLE**
**MR JUSTICE GRIFFITHS**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**LANDMARK SPACE LIMITED** **Claimant**

**- and -**

**JANE CHILAMBE** **Defendant**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Niran De Silva KC** (instructed by **Addleshaw Goddard LLP**) for the **Claimant**

**Mr Arnold Ayoo** (instructed by **Ervaid Law**) for the **Defendant**

Hearing: 17th January 2024

- - - - - - - - - - - - - - - - - - - - -

# APPROVED JUDGMENT

*This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.*

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 GRIFFITHS :

1. This is an application by the claimant for permission to apply to commit the defendant for contempt of court. By a claim form dated 10 October 2023, permission is sought to make a contempt application pursuant to CPR 81.3(5)(b), on the grounds that the defendant knowingly made a false statement in an affidavit sworn on 17 July 2023.

2. This was the defendant's first affidavit. A second affidavit, to which extensive reference was also made in submissions before me, was sworn after issue of the application, on 31 October 2023. The basis of the contempt application is very explicitly and specifically the affidavit sworn on 17 July 2023 and, in particular (as appears from paragraphs 3 onwards of the Details of Claim in the claim form), the statement by the defendant, at paragraph 6(a)(i) of the affidavit of 17 July 2023, that:

   > "I have only intentionally shared my login details to the company's IT systems with the company's IT department."

3. The claim form says that this statement is false, and that the defendant must have known that it is false, because, on 23 April and 30 April 2023, a colleague of the defendant (in fact her superior), called Lisa Farrell-Brown, attempted to log into the claimant's SharePoint site using the defendant's email address and password from her home address. A multi-factor authorisation or MFA passcode was, the claimant says, sent by text message to the defendant's personal mobile phone and correctly entered by Ms Farrell-Brown, thus completing the login process. The basis of the application is that the defendant must therefore have provided Ms Farrell-Brown with at least the MFA code on those occasions. This has also been accepted by Ms Farrell-Brown herself in the light of forensic IT evidence.

4. The claimant is a business which employs about 175 people. It stores data, including employee human resources records, on a cloud-based system called SharePoint which is a proprietary product of Microsoft. This data includes confidential material; for example, employee contact details, payroll and bank details, medical information and other matters. In the circumstances prevailing in April 2023, when Ms Farrell-Brown was not in the office, access to this data required her to input a username, the password associated with that username, and multi-factor authentication, or MFA, in the form of a one-time code texted to the mobile phone associated with the user. The claimant says that access to the HR area was limited at that time to three members of HR staff, who were Lisa Farrell-Brown herself (the HR director), the defendant (the HR business partner) and an HR assistant (Shakira Hamilton).

5. On 17 April 2023, Lisa Farrell-Brown was dismissed and placed on garden leave, pending expiry of her notice period. Her user account was disabled by the claimant shortly after 4pm on that day, which was a Monday. Her employment terminated on 26 April 2023. The defendant's case is that she did not know Ms Farrell-Brown was on garden leave until 19 April 2023 and even then did not know she had lost access to the IT system with effect from 17 April 2023. Her case is that she did not know about the termination until all staff were emailed about it, which was not until 28 April 2023.

6. Following her dismissal, garden leave and deprivation of access to the HR SharePoint system on 17 April 2023, Ms Farrell-Brown at least attempted on 23 April 2023 to log

into the SharePoint systems using the defendant's username and password. The claimant believes that the login was successful in downloading materials but accepts that it is unable to prove that. The case is put on the basis, therefore, that there was at least an attempt to download materials.

7. Entry of the defendant's username and password by Ms Farrell-Brown generated, according to expert evidence produced by the claimant (and not substantially disputed, as I understand it, either by Ms Farrell-Brown or by the defendant, at least at present), a multi-factor authentication passcode which was sent via text to the defendant's phone. That code was then very rapidly entered into the device on which Ms Farrell-Brown was logging into the claimant's SharePoint. She used that access to attempt the download of just over 38,000 files.

8. Ms Farrell-Brown's case is that she did so in order to gather evidence in support of an employment tribunal claim, which she subsequently brought, and which is still pending. The claimant's case is that the defendant must have cooperated in passing on the MFA code. The defendant says she cannot recall doing so on this occasion, but did provide an MFA code to Ms Farrell-Brown on occasions in the past, when requested, not apparently thinking that there was anything wrong with that. That is information which can be seen in the defendant's later affidavit, the one sworn on 31 October 2023.

9. On 25 April and 27 April 2023, the user account associated with the defendant was again used by Ms Farrell-Brown in an attempt to log into the claimant's SharePoint system. On those occasions, an MFA passcode was not required because the "keep me signed in" opinion had been selected. It is, no doubt, for that reason that these dates do not feature in the claim form and in the proposed contempt proceedings. On those occasions, Ms Farrell-Brown attempted the download of 1,708 files (on 25 April) and 44 files (on 27 April).

10. On 30 April 2023, Ms Farrell-Brown used the defendant's username and password again, in another attempt to log into the claimant's SharePoint system. On this occasion, according to the claimant's expert evidence (which does not appear to be disputed), an MFA code was again sent to the defendant's personal mobile phone. It was then correctly entered into the device which Ms Farrell-Brown was using.

11. The claimant's case is, again, that the defendant must have cooperated in passing on that code, on 30 April. The defendant says she cannot recall doing so on this occasion, but relies on the same general account of her willingness to provide an MFA code when it was requested of her by Ms Farrell-Brown (which I have already referred to) in her second affidavit. The defendant says that she would not know from the fact of an MFA code being sent to her that it related to the claimant, or what it was all about.

12. The defendant (and also the third person in the human resources department, Ms Hamilton), was dismissed by the claimant for gross misconduct. That dismissal was on 18 May 2023. I have not got a dismissal letter, although I do have a letter of 19 May referring to the dismissal. I am told that the reason for the dismissal was that the defendant allowed her account to be used by Ms Farrell-Brown and the data breach or attempt to download documents. At that stage, no specific mention was made of an MFA code.

13. The defendant has brought claims against the claimant in the employment tribunal which have not been determined. They do not include a claim for unfair dismissal because the defendant did not have sufficient service to entitle her to make such a claim. They do, however, include claims for sex discrimination, race discrimination and victimisation. Those claims have not yet been decided. Ms Farrell-Brown and Ms Hamilton have also brought claims in the employment tribunal.

14. After the claimant had discovered Ms Farrell-Brown's activities, it instructed solicitors, Addleshaw Goddard. On 19 May 2023, which is the day after the defendant's own dismissal for gross misconduct, they wrote to her saying (at paragraph 7):

> "Our client terminated your employment for gross misconduct, following an investigation and disciplinary process. Your employment came to an end on 18 May 2023."

On page 56, having referred to Ms Farrell-Brown's access on 23, 25 and 27 April 2023 (the letter counting 25 April as two access events, one in the morning and one in the afternoon), the claimant's solicitors said as follows (at paragraph 19):

> "On each of these four occasions, the user logged in from an IP address that was previously used by Ms Farrell for legitimate activity whilst performing her role when she was employed by Landmark. The user credentials, however, were shown to be yours.
>
> 20. …
>
> 21. At the time of writing, it has not yet been established whether you had logged into SharePoint and actioned the downloads or Ms Farrell had logged into SharePoint using your user name and password, in which case, we can only assume you had voluntarily provided to Ms Farrell your access codes in order to facilitate this activity."

At this stage, the emphasis in the letter was therefore on the defendant's username and password.

15. The defendant's solicitors replied on 2 June 2023; having been instructed on her behalf and also on behalf of Ms Farrell-Brown and Ms Hamilton. In relation to the passage I have cited, that letter said (at paragraph 7):

> "For the avoidance of doubt [the defendant] emphatically denies that she in any way facilitated any unlawful and/or prohibited access to [the claimant's] systems for [Ms Farrell-Brown] or anyone else."

That was, as I have said, a response to the letter talking about her username and password. Earlier in the letter (at paragraph 10), the solicitors for the defendant and her two colleagues said that, when Ms Farrell-Brown joined the claimant, a Microsoft SharePoint system was in place:

> "…as it is assumed to be at present… Although it did, from time to time, require a two-stage authentication, this was not a consistent requirement. Some users were required to provide a two-factor authentication while others were not."

16. In response to that, the claimant's solicitors wrote on 15 June 2023. At paragraph 9 of the letter they said this:

> "Your letter entirely fails to address the question of whether it was [the defendant] that logged into SharePoint and actioned the above downloads or whether (as appears highly likely from the IP address that was used to conduct the said downloads) it was Ms Farrell that logged into SharePoint using [the defendant's] username and password. Please confirm clearly and precisely Ms Farrell and Ms Chilambe's positions in this regard."

Again, therefore, the emphasis of the enquiry was entirely on the defendant's username and password. Later in the letter, the solicitors responded to the reference to two-stage authentication and said (in paragraph 14):

> "With regard to the allegation that two-factor authentication for SharePoint was not consistently required for access to SharePoint by every user, we are instructed that a number of risk-based factors are considered as to whether two-factor authentication is required or not. If the login attempt is made from outside of a Landmark location on a device that is not known to Landmark then it will prompt two-factor authentication every time a new session is initiated."

This does appear to me to be a response to a suggestion that security was lax rather than being linked to the specific demand for an explanation (much earlier in the letter at paragraph 9) which focused on the defendant's username and password.

17. Other correspondence followed, including on 30 June 2023 another letter from the claimant's solicitors to the defendant's solicitors. This said at paragraph 3:

> "As we have repeatedly made clear, our client's main concerns are the protection of its proprietary and confidential information, as well as ensuring it complies with its obligations regarding the protection and recovery of personal data belonging to its employees. These are legitimate concerns and our client is perfectly entitled to seek injunctive relief in the absence of the requested undertakings, which are reasonable (as explained below) and the very least our client would obtain if it were to make an application."

It then discussed the undertakings which it was demanding in order to avoid an application to the court. There was an undertaking not to use or disclose the claimant's HR records (discussed in paragraph 5(a) of the letter). There was an undertaking to preserve evidence (discussed in paragraph 5(b) of the letter). There

was an undertaking regarding the delivery up of any HR records in the possession of the defendant and the other two employees represented by their solicitors (discussed in paragraph (c) of the letter). There was a concession in relation to an undertaking about a mobile phone (in paragraph 5(d) of the letter). Paragraph 5(e) of the letter then said this:

> "Our client requires affidavits from your clients in order to provide it with comfort that its confidential information that was unlawfully downloaded (by Ms Farrell's own admission) has not been unlawfully misused or disseminated to third parties. In the circumstances, we are very confident that a court would not expect our client to take the explanation that has been proffered by Ms Farrell as to the use of her son's laptop and its subsequent destruction at face value, without the same explanation being made the subject of sworn evidence. Further, we also note that there have been a number of inconsistencies in your client's stated position in your letters (such as the reasons for Ms Farrell accessing the Landmark IT systems post 17 April 2023) and also a number of direct contradictions with the IT forensics report. Our client, therefore, requires your clients to set out their positions in a sworn affidavit. This is not negotiable; it is an essential aspect of the relief sought by our client."

18. There does not appear to be any reference in the body of this letter to login details of the defendant, username, password, or multi-factor authentication. However, the undertakings are attached to the letter. As well as the matters referred to in the body of the letter, they include (under the heading "provision of information") a requirement that an affidavit be sworn by the defendant by 4pm on 7 June 2023:

> "Confirming: (i) whether I have shared my login details to the company's IT systems with anyone and, if so, who I shared them with and why."

Nothing more is said about login details, or what that means. There is a definition section containing five definitions later on in the undertakings, but none of them defines login details.

19. Following this correspondence, the parties entered into a settlement agreement, dated 10 July 2023. The parties to the agreement were the claimant, Ms Farrell-Brown and the defendant. The dispute is defined as the claimant's claim that Ms Farrell-Brown and the defendant facilitated a significant data breach, stole the claimant's confidential information, potentially misused it, caused the claimant to be potentially liable for fines and/or other sanctions from the Information Commissioner's Office and implicated the claimant in criminal activity.

20. The settlement provided (in clause 2.1) that, upon Ms Farrell-Brown and the defendant providing an affidavit in accordance with the settlement agreement, the claimant would end its pursuit of any claim or claims against them. The affidavits were required by clause 3, which said (in clause 3.1):

> "Within 5 business days, following the execution of this agreement, the ex-employee parties shall provide a sworn affidavit in accordance with the form prescribed in the letter dated 30 June 2023, from… Addleshaw Goddard…"

In clause 3.2 it was agreed that:

> "If any information contained in the above referenced affidavits is untrue, this agreement shall be void and unenforceable and all of Landmark's rights to pursue the ex-employee parties based on the allegations set out in the letter before claim (including without limitation in respect of costs and damages) shall remain."

Therefore, although the provision of information settled the claimant's claims against the defendants (not the defendants' claims against the claimant), that settlement would fall apart if anything said in the affidavit was untrue.

21. The requirements of the affidavit were those in the letter of 30 June to which I have already referred. Consequently, there was still no express reference to MFA.

22. Pursuant to the settlement agreement, both the defendant and Ms Farrell-Jones swore affidavits.

23. The defendant's affidavit, which is the one which is said to have included a knowingly false statement and therefore constituted a contempt of court, was dated 17 July 2023. Under the heading "provision of information" it said this in paragraph 6:

> "I now set out the information I understand that it is being requested for me to provide: a. **whether I have shared my login details to the company's IT systems with anyone and, if so, who I shared them with and why**;."

To this, the answer was given:

> "i. I have only intentionally shared my login details to the company's IT systems with the company's IT department."

24. Correspondence resumed after the hearing before Bright J, on 24 August 2023, of an application against Ms Farrell-Brown. The defendant was not party to that application: she was not present and she was not represented. I have, however, been shown a transcript of discussion in the course of the application. It seems that the claimant was dissatisfied with what had already been said by Ms Farrell-Brown and was asking for more. At page 16E of the transcript, Bright J said:

> "I therefore find myself looking at an affidavit entirely unlike the situation in *Aon v JLT*, where the affidavit was intended to cover log in details, a phrase about which I take a view broader than your client does; you will feel free to persuade me to the contrary if you wish to, but it is important that you know that

> that is my view, at least provisionally. Beyond that it concerns me that your client has the opportunity to think again about what she has said in the affidavit in case she needs to. We can take all of that in stages. There are perhaps three aspects. One is the log in details and what that means and what should be said…"

25. Shortly afterwards the transcript notes Mr Dilworth for Ms Farrell-Brown saying:

> "As far as the expression: 'log in details' is concerned, it is not that I propose to persuade your lordship that there is a different definition from that which your lordship contemplates. What is relevant for these proceedings is whether the interpretation that Ms Farrell-Brown had of log in details was narrow or broad, and it was narrow, and your lordship says you take a different view. But it is certainly arguable that it is a phrase that is ambiguous, capable of a number of interpretations."

To this Bright J responded:

> "I accept that and I accept that she is likely to have been acting on legal advice. I do not criticise her for taking a narrow view. That does not reflect on her credibility or her truthfulness. She took a narrow view. But I take a different view and I take the view that what she promised to do is broader than that, and that she should keep to her promise."

In this discussion he is, of course, referring to Ms Farrell-Brown and not to the defendant. Although the defendant had also sworn an affidavit in response to the questions concerned, she was, as I have said, neither a party to, nor present or represented at, this hearing.

26. The discussion about what was meant by login details before Bright J is said to have been relevant also to the meaning of that phrase as it was understood by the defendant, although she was not party to that discussion. The discussion itself did recognise that it was arguable that the phrase was ambiguous and capable of a number of interpretations; and Bright J said that he would not criticise Ms Farrell-Brown for taking a narrow view, and that her doing so did not reflect on her credibility or her truthfulness.

27. I think this is of limited relevance. This is a discussion in proceedings to which the defendant was not a party. It is a discussion which took place after she made the statement in her affidavit of 17 July. It is a discussion in the course of submissions. It is not part of a considered judgment. However, so far as it goes, it seems to me on the whole unhelpful to the claimant's position because it does indicate that Bright J accepted that the phrase "login details" was ambiguous and capable of a number of interpretations and that taking a narrow view of it did not cause him to criticise at least Ms Farrell-Brown or to reflect on her credibility or her truthfulness.

28. Be that as it may, on 25 August 2023 the claimant's solicitors, on the back of that hearing, wrote to the defendant's solicitors. At paragraph 3 they referred to paragraph

6(a)(i) of the affidavit of 17 July and said it could not be correct, because a multi-factor authentication was required which would be texted to the mobile phone, and the data logs show that such an MFA passcode was generated and sent by text to the defendant's mobile phone, and was entered twelve seconds later by a user (understood to be Ms Farrell-Brown) attempting to log in from an IP address associated with Ms Farrell-Brown's home address. It invited the defendant to provide a further affidavit:

> "…that (a) addresses the above inconsistencies;
>
> (b) confirms whether she has shared her log in details to Landmark's IT systems (including any MFA sent to her) with anyone else, in particular Ms Farrell-Brown;
>
> (c) explains why such details were shared; and
>
> (d) sets out the full details of her involvement in the data breach."

It required a response by no later than 4pm the very next day.

29. This was the first time that it had been suggested that an answer to a question about login details should include reference to the MFA code. It was not a specific request but a general request for an explanation of the general circumstances of what happened in April 2023 as opposed to the more targeted question which was answered in the affidavit of 17 July in the manner to which the claimant takes objection.

30. The defendant's solicitors ceased to act for her on 6 September 2023, which was a date by which they had indicated in a letter of 30 August 2023 that the defendant "will endeavour to produce a further affidavit addressing the issues set out in paragraph 7 of your letter".

31. The claimant's solicitors therefore, on 6 September, pressed the defendant personally to answer their additional questions, including their suggestion of inconsistency with the other evidence that they had.

32. It is perfectly clear from the correspondence that the claimant never believed that the MFA code texted to the defendant's phone had been provided to Ms Farrell-Brown by any means other than by the defendant herself. They did not take any step in reliance upon what they say her affidavit should be taken to mean; and, if it did mean what they say they understood it to mean, they did not believe it.

33. There does not seem to be any dispute between the parties as to the legal principles which I should apply when determining whether to grant permission for these contempt proceedings to be brought against the defendant. In summary, I have to consider whether there is a strong prima facie case of contempt and whether it is in the public interest for contempt proceedings to be brought.

34. In *KJM Superbikes Ltd v Hinton* [2009] 1 WLR 2406 the Court of Appeal said at paragraphs 16 and 17:

> "Whenever the court is asked by a private litigant for permission to bring proceedings for contempt based on false statements allegedly made in a witness statement it should remind itself that the proceedings are public in nature and that ultimately the only question is whether it is in the public interest for such proceedings to be brought. However, when answering that question there are many factors that the court will need to consider. Among the foremost are the strength of the evidence tending to show not only that the statement in question was false but that it was known at the time to be false, the circumstances in which it was made, its significance having regard to the nature of the proceedings in which it was made, such evidence as there may be of the maker's state of mind, including his understanding of the likely effect of the statement and the use to which it was actually put in the proceedings. Factors such as these are likely to indicate whether the alleged contempt, if proved, is of sufficient gravity for there to be a public interest in taking proceedings in relation to it. In addition, the court will also wish to have regard to whether the proceedings would be likely to justify the resources that would have to be devoted to them.
>
> In my view the wider public interest would not be served if courts were to exercise the discretion too freely in favour of allowing proceedings of this kind to be pursued by private persons. There is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance, whether justified or not… In my view there is also a danger of reducing the usefulness of proceedings for contempt if they are pursued where the case is weak or the contempt, if proved, trivial. I would therefore echo the observation of Pumfrey J in *Kabushiki Kaisha Sony Computer Entertainment Inc v Ball* [2004] EWHC 1192 (Ch) at [16] that the court should exercise great caution before giving permission to bring proceedings. In my view it should not do so unless there is a strong case both that the statement in question was untrue and that the maker knew that it was untrue at the time he made it. All other relevant factors, including those to which I have referred, will then have to be taken into account in making the final decision."

35. The question of the strength of the *prima facie* case which must be shown was also considered by the Court of Appeal in *Norman v Adler* [2023] EWCA Civ 785 at paragraph 39, where Thirlwall LJ said:

> "In the cases to which I have referred the practical starting point when considering permission to bring proceedings for contempt in the public interest is whether there is a strong case (capable of being proved to the criminal standard) that the

> alleged contemnor made a statement to the court knowing it to be untrue and knowing that it would be relied upon by the court. Sometimes there is reference to a strong prima facie case (self evidently something more than a prima facie case). In *KJM Superbikes* the phrases were used interchangeably. They mean the same thing: a case in which the evidence is sufficiently strong, without more, to satisfy the criminal standard of proof."

36. In *Ocado v McKeeve* [2021] EWCA Civ 145, Davis LJ (with whom David Richard LJ and Nugee LJ agreed), said:

> "It seems to me that the overall general approach should, where claimants are not Law Officers or other relevant public bodies, be to require that a prima facie case of sufficient strength is being presented such that, provided the public interest so requires, permission can properly be given. That approach would thus enable the filtering out of cases which can, even on a prima facie basis, be assessed as weak or tenuous, even if just about sufficient to limp through a strike out application. Moreover, whilst the court must avoid delving too deeply into the merits at this stage, the phrase 'strong prima facie case' seems to me to present the judge concerned with an evaluative range and a degree of flexibility, depending on the evidence and circumstances of the particular case, whilst at the same time requiring the case to be sufficiently strong so as to merit its going forward."

37. In *Frain v Reeves* [2023] EWHC 73 (Ch) Joanna Smith J said at paragraph 25:

> "While I accept the claimants' submissions that (in this case) the question of the defendants' state of mind when they made the statements is one which could ultimately only be determined following cross examination at a substantive hearing of the contempt applications, I reject any suggestion that, at this stage, I cannot and should not consider with care, the available evidence as to their individual states of mind. This will involve 'viewing the evidence of claimant and defendant as a whole' (see *Ocado* at [85]) and considering whether that evidence raises a prima facie case of sufficient strength to justify permission being given."

In paragraph 32 she said:

> "In my judgment, *Ocado* does not affect or undermine the proposition that where more than one inference may reasonably be drawn at trial in relation to evidence advanced in support of a committal application, the claimant will be unable to establish a strong prima facie case to the criminal standard. Mr Darton was unable to show me any authority to the contrary."

38. The case against the defendant does not appear to me to be strong. There are a number of factual issues, including whether she remembered passing on the MFA codes when she swore her affidavit. She says in a later affidavit that she did not remember it. It is said on behalf of the claimant that that later statement was incredible and should not be believed.

39. Secondly, there is the factual issue of whether what she said in the affidavit was wrong; and this turns, in particular (given that there is no substantial dispute about the mechanism by which the MFA codes reached Ms Farrell-Brown in April 2023, regardless of the defendant's claim that she does not specifically recall it), on what is meant by the question about login codes which the defendant was answering.

40. The defendant quoted the question she was answering before she answered it. She quoted it as:

> "Whether I have shared my log in details to the company's IT systems with anyone and, if so, who I shared them with and why."

There is therefore a question about whether login details included not only username and password (which is what was being discussed in the correspondence leading up to undertaking being demanded and complied with) but also multi-factor authentication, such that multi-factor authentication should have featured in the answer as well. Given that multi-factor authentication had been discussed in the correspondence, but not specifically as being part of the login details, the claimant's case on that appears to me to be weak. That is so even before going to the impression conveyed by Bright J in the course of argument in the case against a different party.

41. For my own part, I do think (in the context of the correspondence) that login details did clearly include the username and password entered to log in but did not clearly include a subsequently received MFA code. The MFA code is an authentication code. It authenticates the login. It is not a login detail in itself. Login details, on the face of it, and in the context of this particular correspondence, might well be limited to a username and password, which is how the defendant understood it (so she says).

42. If that is a possible way of reading the question, then it is not suggested that the answer she gave was necessarily wrong, since the whole focus of the contempt application is on the MFA and not the username and password which Ms Farrell-Brown said she had obtained by other means. Ms Farrell-Brown says, as indeed the defendant does, that it would be obvious what the defendant's username was, because it was in the standard form used by the claimant. Ms Farrell-Brown's case is that she discovered the password when she saw it on a screen and not that the defendant told her what it was. The claimant has not suggested in its evidence or in submissions that it is proposing to challenge that aspect in the contempt proceedings. Therefore, the whole case for contempt turns, if it is to proceed to the other stages of the questions which I must examine, on whether "my log in details to the company's IT systems" extends beyond the username and password to the MFA code. I understand different people reading that phrase in different ways, but that is in the defendant's favour. It does not seem to me that there is a case, even on a *prime facie* basis, on the existing evidence, that is likely to satisfy the criminal standard of proof against the defendant.

43. I am fortified in that conclusion by the lack of reference to the MFA in the question itself, or in the definition of login details, that term not being defined at all, although other terms were. The claimant framed the question knowing that the issue of MFA codes had already been ventilated in correspondence. It did not in that question refer explicitly to MFA codes. It might have done so. To build a contempt case which must be proved to the criminal standard of proof and for which the claimant actively seeks the penalty of imprisonment on the basis of what it says the defendant must have understood or ought to have understood, although it was not clearly stated, appears to me to be difficult.

44. In support of the submission a great deal of reliance has been placed on other things said by the defendant, particularly in her second affidavit of 31 October 2023. This is said to be by way of context. It is said that because the defendant should not be believed on other aspects of the case, she should not be taken to have been acting in good faith on the question of what was meant by login details and therefore on the question of what the recipient of the affidavit would understand that to mean and answering that question.

45. It is right to say that even if what the defendant said in the affidavit was wrong, it will be necessary for a contempt application to succeed to demonstrate that she was deliberately misleading rather than making an honest mistake. In view of the context in which the undertaking was requested and, in particular, the lack of explicit reference to MFA in the context of the question about login details, I do not think that the claimant has a sufficient prima facie case to support permission being granted.

46. I will, however, deal with the public interest questions. It is submitted that this question, and the answer to it, were very important to the defendant and that they were what it required in order to settle the case. However, it seems to me quite clear from the correspondence and the settlement agreement and, indeed, from the general circumstances of the case, that the key focus of the claimant, and its key interest, was in ensuring that confidential information was not being disseminated further, and that any materials which had been downloaded were retrieved.

47. The detail of how Ms Farrell-Brown was able to use the username and password and, indeed, MFA code, in order to gain an access which she had been deprived of following her suspension, does not seem to me terribly important, particularly in the circumstances where the claimant in the correspondence was demonstrating that its position was the same as it is now, and that the claimant was not for one moment persuaded, or misled, by anything that was said in paragraph 6(a)(i) of the affidavit of 17 July 2023, or that it for one moment was shaken in a belief that the defendant had indeed been the source of the MFA code which was speedily entered by Ms Farrell-Brown on the occasions in April 2023 to which I have referred. The claimant already had all the material upon which it now relies to suggest that the defendant did pass on the MFA code to Ms Farrell-Brown. Confirmation from the defendant was otiose and, even if the defendant did not provide confirmation, the claimant was already satisfied that the defendant had indeed passed it on. The absence of confirmation from the defendant made no difference to its thinking, or its future actions in relation to retrieving or safeguarding confidential information and data.

48. The honesty, or otherwise, of the conduct of Ms Farrell-Brown, particularly - but perhaps also the defendant - in relation to the MFA code and other matters, is likely to

be examined in the course of the employment tribunal proceedings, since the claimant relies upon misconduct as the reason for dismissing Ms Farrell-Brown and the defendant (whereas Ms Farrell-Brown and the defendant contend that the reasons were unlawful discrimination or victimisation). That is, therefore, an issue to be tried in the employment tribunal proceedings. It is undesirable that there should be satellite litigation in the High Court, which will incur additional costs, engage additional resources in the justice system, and distract from the more essential disputes being canvassed in the employment tribunal, on an equitable and efficient basis, which is more consistent with the overriding objective as it affects these two parties, and the other parties in dispute with the claimant.

49. The settlement agreement itself provided that, if the claimant believed and could prove that the statement in the affidavit was untrue, it could pursue its remedies in the High Court. It has chosen not to do so. This undermines the submission that this particular statement was of critical importance in securing the settlement. The settlement has been maintained, so far as the claimant's claims against the defendant are concerned. The claimant never has brought High Court proceedings against the defendant in relation to the substantive claims, and does not propose to do so.

50. Satellite litigation in the High Court in the form of a contempt hearing brought with permission also appears disproportionate and unnecessary. The defendant has been dismissed because of her alleged involvement with Ms Farrell-Brown's activities. She has been challenged on her first affidavit, and she has faced the present application for permission to have her in contempt. She has explained herself and, although the claimant does not believe her, there is not much else that can be said.

51. It is not the function of a committal application to engage in the sort of wide-ranging scrutiny of correspondence and subsequent affidavits which I have been led through this morning. Committal proceedings based on false statements require a rigorous focus on whether the particular statement made on oath was correct or not and, if not correct, whether any error was innocently made and, if not innocently made, whether the fault is so grave as to justify action by way of contempt proceedings and further consequences.

52. It is not the case that every time a person is shown to face a *prime facie* case that they made a false statement in an affidavit, or witness statement, or other document verified by a statement of truth (such as a list of documents), there should be a contempt hearing. The dicta which I have cited show that these applications are not granted in every case but are considered in every case with care, public interest being an additional requirement over and above the fact (if it could be shown to the criminal standard on a *prime facie* basis) that a false statement has been made.

53. The claimant appears to argue that the contempt application is somehow a means of obtaining redress, or information in order to support its business needs and objectives, and its obligations to regulators, including the protection of its confidential information, and that of its employees, and the proper securing of its confidential information in the future. However, it already has all the information it needs in that respect; and it is not the function of a contempt application to pursue those objectives - and certainly not on the facts of this case. A contempt application is a matter of public interest in defending the integrity of the justice system. It is not a means of

pursuing private interests. Private interests are pursued and secured by ordinary litigation, should a party choose to litigate them.

54. The defendant has put in evidence, in paragraph 14 of her witness statement, that the claimant's chief executive officer, Mr Edward Cowell, has (as it is put) "boasted" that he will financially ruin Ms Farrell-Brown, and take everything she owns, and that he intends to put the defendant herself, and Ms Farrell-Brown and Ms Hamilton, in prison, and that he has unlimited financial backing. No witness statement has been put in by Mr Cowell, nor were those allegations denied in correspondence. They have, however, been denied on instructions before me from the Bar.

55. Even if I grant permission and the defendant is held in contempt it is not, in my judgment, likely that she will be committed to prison, even taking the claimant's case at its highest, since no one was misled and she further explained her position in her second affidavit on 31 October 2023, which was very soon after the claimant issued the application on 10 October 2023, and well before it was brought before me for hearing on 17 January 2024.

56. But, as I have already explained, even if I were to grant permission, it is not likely that the defendant would be found in contempt at all.

57. In conclusion, this appears to me to be an application to commit which is not particularly strong, were it to be allowed to go forward. It fails to meet the necessary evidential standard. It also seems to me disproportionate even to the allegation which is made, given that the misstatement (if such it was) had no consequence. The statement, and the subsequent contempt allegations, were made in the context of what appeared to be strong feelings on both sides, and when other litigation was on foot in the employment dispute in which the claimant is the respondent to allegations made by employees. It seems to me undesirable that the underlying disputes between the parties should spill into a contempt application before this court. The evidence does not justify it; the circumstances do not require it; the interests of justice do not suggest it; the overriding objective would not be advanced by it; and, in those circumstances, I refuse permission.

- - - - - - - - - -

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