



Neutral Citation Number: [2019] EWHC 906 (Admin)

Case No: CO/130/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before :

LORD JUSTICE HAMBLÉN
And
MR JUSTICE STUART- SMITH

Between :

**LEE QUALTER
COMMERCIAL REDUCTION SERVICES
LIMITED
COMMERCIAL ENERGY LIMITED
ENERGY SEARCH LIMITED**

Claimants

- and -

THE CROWN COURT AT PRESTON

Defendant

- and -

CHESHIRE WEST AND CHESHIRE COUNCIL

**Interested
Party**

-and-

**BES COMMERCIAL ELECTRICITY LIMITED
BUSINESS ENERGY SOLUTIONS LIMITED
BES WATER LIMITED
ANDREW PILLEY
MICHELLE DAVIDSON
COMMERCIAL POWER LIMITED**

**Interested
Parties**
**(‘The BES
Parties’)**

Christopher Daw QC (instructed by Farleys Solicitors LLP) for the Claimants
The Defendant is not taking part in any part of the proceedings
Andrew Thomas QC and Anna Pope (instructed by Adkirk Law) for the Interested Party
Philip Marshall QC and Matthew Morrison (instructed by Weightmans LLP) for the BES
Parties

Hearing date: 2 April 2019

Approved Judgment

Lord Justice Hamblen :

Introduction

1. This is a renewed application made by the Claimants for permission to bring proceedings for judicial review of the decision of the Recorder of Preston, HHJ Brown, to make Production Orders relating to the Claimants' banking records, pursuant to ss. 345 and 346 of the Proceeds of Crime Act 2002 ("POCA").
2. Permission was refused by Ouseley J by Order dated 8 February 2019.
3. The Claimants also seek an order for disclosure and for permission to amend the Claim Form to join various parties as interested parties.

The factual background

4. Trading Standards North West ("TSNW") is conducting an investigation into alleged offences of fraud relating to a number of businesses based in Fleetwood and Blackpool, Lancashire. The investigation is known as "Operation Best".
5. The Interested Party, Cheshire West and Chester Council ("CWAC"), acts as the lead authority for TSNW in connection with its investigations and prosecutions. TSNW operates by virtue of a Protocol Agreement between the participating local authorities in the region.
6. Mr Christopher Jeffs is an accredited Financial Investigator for the purposes of ss. 345(1) and 378 of the Proceeds of Crime Act 2002. He is employed by CWAC and seconded to TSNW.
7. Mr Jeffs is conducting a money laundering investigation arising out of the Operation Best fraud investigation. The applications for Production Orders which are the subject of challenge were made by Mr Jeffs on 23 April 2018.
8. The businesses which are under investigation are, in various capacities, involved in selling energy supply contracts to small business customers. Although the businesses are all based in Fleetwood and Blackpool, Lancashire, they have customers across the UK.
9. There are three groups of companies under investigation.
10. First, there are the energy supply companies. These are BES Commercial Electricity Limited and Business Energy Solutions Ltd (which trade together as BES Utilities and will collectively be referred to as "BES") which supply non-domestic energy. The directors of these companies are Mr Andrew Pilley and his sister Ms Michelle Davidson. BES are based in offices at Fleetwood Town Football Club, which is also controlled by Andrew Pilley. These are relatively large and profitable companies. Their annual turnover in their latest filed accounts was (respectively) £69.9 million and £21.1 million.
11. Secondly, there are the broker companies. These companies employ a telephone sales force who market and sell energy supply contracts. It is alleged that nearly all of their business is placed with BES. The principal broker companies under investigation are:

- (1) Commercial Reductions Services Limited (the Second Claimant). This company has ceased trading and was struck off the register of companies in February 2018.
 - (2) Commercial Energy Limited (the Third Claimant). This company has also ceased trading and was struck off the register of companies in August 2015.
 - (3) Energy Search Limited (the Fourth Claimant). This company is still trading, essentially continuing the same business as the previous broker companies.
12. In each case, the First Claimant, Mr Lee Qualter, is (or was) the sole director and shareholder of the broker companies. He is a former employee of BES. The Production Order was also made against Mr Darren Martindale, a director of Commercial Reductions Services Limited. He does not seek to challenge the decision made.
 13. The broker companies operated from premises at Darwin Court, Blackpool. It is said that those premises are controlled by Andrew Pilley and/or his companies. From HMRC records, the broker companies each had turnovers in the region of £1.2 to £2.1 million. They do not appear to hold any significant assets.
 14. Thirdly, there is the aggregator, Commercial Power Limited. The aggregator operates as an intermediary between brokers and energy supply companies. Amongst other roles, it provides back office support relating to the contracts. The directors of Commercial Power Limited are Andrew Pilley and Michelle Davidson. It operates from Darwin Court, Blackpool (the same premises as the broker companies).
 15. The individuals under investigation are Andrew Pilley, Michelle Davidson, Lee Qualter, Darren Martindale and various individual sales representatives employed by the broker companies.
 16. In outline, the allegations which are being investigated are that sales representatives employed by the Claimants (i.e. the broker companies operated by Lee Qualter) have systematically mis-sold energy contracts on behalf of BES by lying to potential customers in telephone sales calls. It is alleged that these include lies about price, price comparisons and contract terms. It is alleged that the fraud is targeted at small business customers, such as independent shops, pubs and hairdressers.
 17. It is alleged that the apparent separation between BES and the broker companies is a sham. The separate companies are used as a device to give the false impression that the brokers are independent when in reality they are operating as a direct salesforce for BES. This sham arrangement also distances BES and Andrew Pilley from the fraudulent activity of the sales representatives. It is alleged that in reality Andrew Pilley maintains overall control of the activities of the broker companies.
 18. The investigation was initiated by Lancashire County Council Trading Standards in 2014. When the potential scale of the investigation became apparent, it was passed on to the regional team, TSNW.
 19. Search warrants were executed at premises belonging to the companies and also at the homes of Lee Qualter and Darren Martindale on 28 and 29 July 2016.

20. The evidence which was relied upon in support of the warrants included a number of statements of complaint by aggrieved customers, evidence from a ‘whistleblower’ which was said in certain respects to be corroborated by the findings of a previous Ofgem investigation and an investigation by a BBC journalist.
21. The fraud investigation has moved on since the warrants were obtained. In particular, the investigation team have now had the opportunity to review sample recordings of the initial telephone calls made by the sales representatives. It is alleged that these provide clear evidence of fraud, thereby corroborating the original allegations made by complainants and by the whistleblower. There is evidence in internal documents which is said to provide strong support to the suggestion that the broker companies are in fact controlled by Andrew Pilley.
22. The evidence obtained as a result of the search warrants was relied upon for the purposes of the Production Order applications. The material was placed before the Court by way of additional statements from the financial investigator, Mr Jeffs, and the senior investigating officer Mr John Pierce.

POCA

23. The requirements for the making of a Production Order under POCA are as follows:

“345 Production orders

- (1) A judge may, on an application made to him by an appropriate officer, make a production order if he is satisfied that each of the requirements for the making of the order is fulfilled.

.....

346 Requirements for making of production order

- (1) These are the requirements for the making of a production order.
- (2) There must be reasonable grounds for suspecting that—

....

- (a) in the case of a confiscation investigation, the person the application for the order specifies as being subject to the investigation has benefited from his criminal conduct;

....

- (c) in the case of a money laundering investigation, the person the application for the order specifies as being subject to the investigation has committed a money laundering offence.

....

- (3) There must be reasonable grounds for believing that the person the application specifies as appearing to be in possession or control of the material so specified is in possession or control of it.
- (4) There must be reasonable grounds for believing that the material is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought.
- (5) There must be reasonable grounds for believing that it is in the public interest for the material to be produced or for access to it to be given, having regard to—
 - (a) the benefit likely to accrue to the investigation if the material is obtained;
 - (b) the circumstances under which the person the application specifies as appearing to be in possession or control of the material holds it.”

The judge’s decision

24. The application for the Production Orders was heard by the judge over two days, 17 and 18 December 2018.
25. The judge considered first whether CWAC had the power to pursue the investigation and to prosecute offences linked to that investigation, it being contended that it “does not have the power to conduct a freestanding investigation on a national scale into alleged mis-selling of energy contracts where money laundering offences may have taken place”. In a “Ruling on Preliminary Point” he determined that CWAC did have the necessary authority to investigate and prosecute offences, holding that:

“The Regional Trading Standards Investigation Team is a law enforcement agency and I am satisfied that under Sections 222 and 111 of the Local Government Act it does have the authority to investigate and prosecute offences. Mr Jeffs is an accredited financial investigator and under the POCA is an appropriate officer in relation to a money laundering investigation. The fact that Section 378(4) also includes a constable, a serious fraud officer, an officer of Revenue and Customs, and an immigration officer shows that the statute is intended to apply beyond police and central government officials. Furthermore, the Localism Act provides that a local authority has power to do anything that individuals generally may do, and this includes investigating money laundering offences.”
26. The judge then proceeded to make a “Ruling on Substantive Point”. Before doing so he heard oral evidence from Mr Jeffs and Mr Lawless, who had been on the investigations team since March 2018 and was called because Mr Pierce was not

available. He also considered detailed submissions from the parties, all of whom were represented by leading counsel. The judge decided that the applications based on POCA were properly founded. He rejected the Claimants' case that the applications were not made in good faith and that POCA was being used as a device to obtain the Production Orders. He was satisfied that there were reasonable grounds for suspecting that the Claimants had benefited from criminal conduct, for believing that the financial and banking material sought was likely to be of substantial value to the investigation and for believing that the public interest test was met.

27. The findings made by the judge reflect the relevant requirements of POCA, as set out above.

The grounds

28. There are two main grounds advanced in support of the judicial review claim:
- (1) CWAC's investigation is *ultra vires* and it lacks the legal power to make an application under s.345 of POCA for a production order; and
 - (2) Further or alternatively, the true and dominant purpose of the application is to secure evidence for CWAC's fraud investigation and thus the application should have been made under s.9 of the Police and Criminal Evidence Act 1984 ("PACE"), which CWAC cannot make in law.

The other applications

29. The Claimants applied for BES, BES Water Limited, Commercial Power Limited, Andrew Pilley and Michelle Davidson ("the BES Parties") to be joined as interested parties. This application was supported by two witness statements of Mr Damian Carter of Weightmans LLP, solicitors for the BES Parties and a skeleton argument provided on their behalf. It was opposed by CWAC for the reasons set out in a witness statement provided by Rachel Adamson of its solicitors, Adkirk Law.
30. The essential basis of the application was that the Production Orders relate to documents which are intended to be relied upon in the fraud investigation against the BES Parties. They are persons who are "directly affected by the claim" and therefore interested parties within the meaning of CPR r.54.1(2)(f). It was also submitted that they would be able to make a contribution to the proceedings, which is additional or different to that of the Claimants, by reason of their involvement as the subject of the fraud investigation and, moreover, that their involvement will not occasion undue cost or delay.
31. Having carefully considered the various grounds opposing joinder advanced on behalf of CWAC, we indicated at the outset of the hearing that we were satisfied that the BES Parties had shown that they were "directly affected by the claim" and that, as a matter of discretion, in the circumstances of the present case it was appropriate to allow them to be joined at the permission stage. We accordingly granted the amendment application.
32. In relation to the application for disclosure, we indicated at the outset of the hearing that our provisional view was that, for the purpose of the renewed application for

permission, we were not satisfied that there was any justification for making an order for disclosure or for suggesting that CWAC had not complied with its duty of candour, but that we would keep the matter under review during the course of the hearing. Having done so, we saw no reason to depart from our provisional view.

Ground 1 – Whether CWAC’s investigation is *ultra vires* and it lacks the legal power to make an application under s.345 of POCA for a production order.

The statutory framework

33. The main statutory provisions of relevance to CWAC’s powers of investigation are as set out below.

Section 222 of the Local Government Act 1972 (“LGA 1972”)

34. Section 222 LGA 1972 confers a general power on local authorities to prosecute or defend legal proceedings. It provides as follows:

“222 Power of local authorities to prosecute or defend legal proceedings.

(1) Where a local authority consider it expedient for the promotion or protection of the interests of the inhabitants of their area—

(a) they may prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, may institute them in their own name”

Section 111 of the LGA 1972

35. Section 111 LGA 1972 confers subsidiary powers which facilitate or are conducive or incidental to the discharge of a local authority’s functions. It provides as follows:

“111 Subsidiary powers of local authorities.

(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

....”

Section of the 1 Localism Act 2011 (“LA”)

36. Section 1 LA creates what is known as the “general power of competence”. It provides as follows:

“1 Local authority’s general power of competence

- (1) A local authority has power to do anything that individuals generally may do.
- (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—
 - (a) unlike anything the authority may do apart from subsection (1), or
 - (b) unlike anything that other public bodies may do.
- (3) In this section “individual” means an individual with full capacity.
- (4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including—
 - (a) power to do it anywhere in the United Kingdom or elsewhere,
 - (b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
 - (c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
- (5) The generality of the power conferred by subsection (1) (“the general power”) is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
- (6) Any such other power is not limited by the existence of the general power (but see section 5(2)).
- (7) Schedule 1 (consequential amendments) has effect.”

37. In support of Ground 1, Mr Daw QC for the Claimants, and Mr Marshall QC for the BES Parties, point out that under the Protocol Agreement powers are delegated to CWAC “to enforce the provisions of the legislation set out in Schedule 1 within the area of the Partners” (Para. 2.1). Schedule 1 includes the Fraud Act 2006, but not POCA. CWAC accordingly needs to rely upon Para 4.1 which provides that:

“The Partners authorise [CWAC] to exercise their functions in relation to the investigation of offences and institution of legal proceedings in respect of any offence discoverable during an operation referred to in the Schedule 1 to Annex A and further authorise that the SB officers appear in a Magistrates’ Court in respect of those proceedings in the areas of the Partners.”

38. CWAC’s case is that an offence of money laundering will fall within the definition of “any offence discoverable during [the] operation”. Likewise, a confiscation investigation under POCA would be part of the authorised proceedings in respect of any such offence. The structure of the Protocol Agreement is that there is a defined category of offences in Para 2.1 and Schedule 1 which might be the trigger for a regional investigation; thereafter, Para 4.1 gives express authority to the regional team to investigate and prosecute any offence which comes to light in the course of that investigation.

39. In these circumstances, the Claimants and the BES Parties submit that any money laundering investigation is “parasitic” on an investigation into a Schedule 1 offence, in this case the fraud investigation, and that it follows that that underlying investigation must itself be lawful.
40. Whilst it is accepted that there is a power to prosecute fraud offences under s.222 LGA, and an ancillary power to investigate under s.111 LGA, such a power only arises where it can be shown that such a prosecution is considered “expedient for the promotion or protection of the interests of the inhabitants of their area”.
41. In the present case it is pointed out that there is no evidence that any consideration was given at the time the decision was made to launch the investigation as to whether such an investigation would be in the interests of local inhabitants. Despite requests, no disclosure relating to that decision has been provided. It is submitted that if there was documentation evidencing such consideration, it would no doubt have been produced. Nor was this a matter addressed in the statement/evidence of Mr Jeffs, Mr Pierce or Mr Lawless. Reliance is also placed on the various different statutory provisions relied upon by CWAC to justify its actions, all of which have been abandoned other than s.222/s.111 LGA and s.1 LA.
42. It is further submitted that in any event there is insufficient evidence of impact on local inhabitants to justify a decision to prosecute under s.222 LGA and accordingly a linked decision to investigate under s.111 LGA. Reliance is placed upon the decision of this Court in *R v AB* [2017] EWCA Crim 534, [2017] 1 WLR 4071.
43. In *AB* the Court held that a local authority (Thurrock) had no power under s.222 LGA to bring a prosecution alleging conspiracy to defraud and acts intending to pervert the course of justice relating to the legal aid system, all relevant acts being committed outside the authority’s area. The Court recognised that whilst local authorities had a broad discretion under s.222 LGA in relation to decisions to prosecute, such decisions were reviewable, although the court should be slow to interfere.
44. The Court stressed the need for the alleged criminality to have an actual or potential impact on the local inhabitants and for their interests to be engaged over and above their interests as ordinary citizens. The Court stated as follows at [53]-[56]:
 - “53. In our judgment the Council's decision to prosecute fell outside the ambit of its broad powers under section 222. There were no proper grounds for it to consider that it was expedient for the promotion or protection of the interests of the inhabitants of Thurrock to prosecute the defendants (and not to refer this very serious matter to the DPP for prosecution). The Council could not reasonably have thought that there were.
 54. As for the suggestion that it could be considered in the interests of the inhabitants of Thurrock that the legal aid system, from which all may benefit, should not be defrauded, the alleged criminality to be prosecuted must have an actual or potential impact on the inhabitants of Thurrock as inhabitants of Thurrock, not just as UK taxpayers more generally. For the requirements of section 222 to be met, the interests of the

inhabitants of Thurrock must be engaged over and above their interests merely as ordinary citizens of the nation. The clear policy of the LGA, as reflected in the wording of section 222, was that the power in question was being conferred for the benefit of the inhabitants of Thurrock as such.

....

56. Section 222 empowers a local authority only to prosecute in the specific interests of its own inhabitants, even if broad policy considerations can be taken into account. There is nothing on the facts here that comes close to the facts of *Oldham* [2014] PTSR 1072 or *Donnachie* [2009] LLR 523, where in each case the connections with the interests of the relevant local authority's inhabitants could readily be identified.”

45. In the present case, it is pointed out that this was a nationwide sales campaign and that the alleged victims are spread all over the country. It is said, for example, that it is apparent from the 38 witness statements relied upon for the purposes of the Search Warrants application in mid-2016, as disclosed to the BES Parties, that only one customer was based in Lancashire and none was based in Cheshire. As in *AB*, it is submitted that any prosecution ought to be brought by a national agency rather than a local agency, and there is insufficient impact on local inhabitants to justify a s.222 LGA prosecution.
46. CWAC’s response is that it is wrong to focus on the location of the complainants. All of the alleged offenders are local. The individuals and companies under investigation are all based in Lancashire. That, in itself, provides sufficient impact of the alleged criminality on local inhabitants to engage s.222 LGA. In any event, there are a number of complainants in the North West region.
47. CWAC submits that it is self-evident that it is in the interests of the inhabitants of an area to prosecute for offences of fraud committed by a trader located in its area, even if the aggrieved customers are situated elsewhere. Reliance is placed in particular upon the decisions in the Divisional Court in *R (on the application of Donnachie) v Cardiff Magistrates Court* (2009) EWHC 489 (Admin) and of Phillips J in *Oldham MBC v Worldwide Marketing Solutions* (2014) EWHC 1910 (QB). It is also pointed out that in *AB* the Court cited the *Oldham* case with approval and made it clear that relevant considerations are not limited by geography but may include broader policy considerations. The Court stated as follows at [49]-[51]:

“49. The power under section 222 arises by reference to a consideration of expediency; the expediency must be for the promotion or protection of interests. The interests are those of the inhabitants of the local authority's area. If those elements are satisfied, then the local authority may prosecute.

50. Relevant considerations are not limited strictly by geography. In so far as it was suggested in *Woolworths* (at para 33) that a breach outside a local authority's area could “ex

hypothesi” not be expedient for the purpose of section 222, it was wrongly decided: see for example the decision in *Donnachie*. Perhaps the most useful recent summary is to be found in the decision of Phillips J in *Oldham* [2014] PTSR 1072, para 28:

“As has been emphasised in the authorities ...section 222(1) is widely worded, imposing no express restriction on what a local authority may properly consider to be expedient to promote or protect the interests of its inhabitants ... there is no basis for limiting the matters the local authority may consider to activities taking place within the relevant area or directly affecting its inhabitants ... In *Donnachie's* case ... the Divisional Court emphasised the width of the section and of the power it confers. In my judgment, a local authority can properly take into account broader considerations of how to promote or protect the interests of its inhabitants, not limited to situations where unlawful activity is continuing or contemplated within its area.”

51. It is, in our view, permissible to take broad policy considerations into account. Thus, again in *Oldham* (at para 24), it was concluded that there were both broad policy reasons and specific aspects of the case which, individually, and certainly if considered cumulatively, justified the conclusion that the bringing of proceedings was expedient in the interests of the inhabitants of Oldham. At para 25, Phillips J stated:

“First, the inhabitants of an area have a clear and obvious interest in the local authority taking reasonable steps to procure that undertakings it has extracted from traders (such as that given by the defendants in this case) are enforced through proceedings where breached. If such steps are not taken, and undertakings are seen to be breached with impunity, the force and utility of such undertakings will be undermined, lessening their effect and usefulness and consequently leading to greater expense in taking proceedings instead of or in addition to accepting undertakings. It follows that a local authority can properly take the view that it is in the interests of the inhabitants of its area to bring (and to be seen to be bringing) proceedings against a trader who has given but then breached an undertaking, even if the trader has subsequently left the authority's area.”

48. In both *Donnachie* and *Oldham* the offences were committed outside the local authority's area, but it was held that there was sufficient impact on local inhabitants for a s.222 LGA prosecution to be brought. The Claimants and the BES Parties submit that these cases are factually distinguishable.

49. *Donnachie* concerned proceedings under the Trade Descriptions Act 1968 rather than a general fraud prosecution. The prosecution related to cars which had been clocked, and used as taxis. Even though the offences were committed outside the local authority area, the prosecution could be said to protect local inhabitants: (i) from buying clocked cars; (ii) from risks associated with the use of clocked cars as taxis, and (iii) by ensuring that licensing decisions taken in relation to the taxi company would be taken in the full light of their true activities. It is submitted that no like considerations arise in this case.
50. *Oldham* concerned proceedings under the Misleading Marketing Regulations 2008 rather than a general fraud prosecution. While the sales being investigated were on a national basis, Phillips J was only content that the requirements of s.222, LGA were satisfied in connection with the local authority's application for injunctive relief because a specific undertaking had been given to such local authority by the company in question before it had left the local authority's area, and there was a risk that it might resume activity and make sales to businesses based in the local authority's area given its previous practice. Again, it is submitted that no like considerations arise in this case.
51. In my judgment, for the reasons given by the Claimants and the BES Parties, as outlined above, the Claimants' case on this issue is arguable, both in relation to whether the interests of local inhabitants were considered and whether such interests could be said to be sufficiently impacted to justify a s.222 LGA prosecution or a related s.111 LGA investigation. Moreover, if CWAC is correct in submitting that it will invariably be in the interests of the inhabitants of an area to prosecute for offences of fraud committed by a trader located in its area, regardless of where the aggrieved customers are situated, it may be helpful for that to be authoritatively established.
52. Although the judge concluded that CWAC had power to conduct the investigation, there is little reasoning to support that conclusion. It may well be that the focus of the argument before the judge was more on the lawfulness of the money laundering investigation (in relation to which all relevant acts would have taken place locally) than on the lawfulness of the fraud investigation. In particular, it is to be noted that there is no consideration or finding of impact on local inhabitants of the alleged fraud.
53. In relation to CWAC's reliance on s. 1 LA, the Claimants and the BES parties submit, in particular, that:
- (1) This provision only extends a local authority's powers by reference to what an individual has power to do in a legally enforceable manner or as one of their functions. It cannot mean a local authority has power to do anything an individual has the capacity or freedom to do – e.g to marry or divorce. Reliance is placed on *De Smith's Judicial Review* (8th ed.) at 5-112:
- “...the idea that an entity which is (a) a public authority and (b) a corporation has the powers of “an individual” is legally puzzling. The plain meaning of powers of individuals generally extends activities permitted under s.1 only to non-government functions, such as powers to purchase and manage land and enter into contracts. Individuals do not generally have powers

to regulate, inspect, legislate, create criminal offences or demand taxes”

Although individuals do have powers legally to enforce contracts and other transactions they do not have any legally enforceable power or function to investigate crime. Only the police and other designated statutory authorities have powers to do that.

- (2) The activities which CWAC has been carrying on in relation to the fraud investigation could not be carried on by a private individual. For example, the actions taken in connection with the Search Warrants included listing CWAC officers as persons authorised to accompany the police so as to assist the search, and all of the material seized by the police being handed over without any kind of preliminary review or restriction on its further use. By way of further example, interview evidence has been obtained by making threats of arrest and other compulsion that a private individual could not make, and interviews have been conducted at police premises using police equipment.
54. In addition, even if s.1 LA confers a general power to prosecute it must be exercised for lawful purposes. That raises the question of how such a general power relates to the specific power conferred under s.222 LGA, and whether it could lawfully be exercised regardless of lack of impact on local inhabitants.
55. I am satisfied that the Claimant’s case on this issue is also arguable.
56. In my judgment, permission for judicial review on Ground 1 should accordingly be granted. It will remain open to the Claimants to pursue their application for disclosure in so far as it relates to this specific issue.

Ground 2 – Whether the true and dominant purpose of the application is to secure evidence for the interested party’s fraud investigation and thus the application should have been made under s.9 of PACE.

57. The Claimants submit that the applications for Production Orders should have been made under s.9 of PACE rather than s.345 of POCA. They argue that, because Mr Jeffs had expressly stated in his application that any evidence obtained as a result of the Production Orders will be considered not only in relation to the money laundering/confiscation investigation but also the wider fraud investigation, the application should have been made under PACE. Reliance, in particular, is placed upon Mr Jeffs’ statement that the material sought “is likely to be of substantial benefit to both the money laundering and fraud aspects of the investigation”.
58. It is submitted that this makes it clear that Mr Jeffs and CWAC always intended to deploy the material for the fraud investigation, that there is no question of its use in that investigation being incidental and that its intended use in that way was either equal or greater in significance to its intended use in any parasitic money laundering investigation.
59. It is common ground between the parties that the requirements under s.9 of PACE are materially different in that:

- (1) the application must be made by a Police Officer; and
 - (2) the threshold test under PACE requires reasonable grounds to believe that an offence has been committed, as opposed to reasonable grounds to suspect under POCA.
60. The Claimants' case is that the judge should have dismissed the application on the grounds that the "true and dominant purpose" of the application was not a POCA investigation but the wider fraud investigation. The Claimants rely upon the decision of the House of Lords in *R v Southwark Crown Court ex parte Bowles* [1998] AC 641.
61. In that case it was held that the power to obtain production orders under Section 98H of the Criminal Justice Act 1988 Act was limited to applications in furtherance of a confiscation investigation. There was no power to use it in furtherance of an investigation into a criminal offence, including an offence of money laundering. The test applied by the House of Lords was whether the "true and dominant" purpose of the application had been to obtain evidence in furtherance of confiscation investigation rather than to investigate criminal offences. It was also held that, as long as the application was genuinely in furtherance of a confiscation investigation, it did not matter that its effect might be that the police may also obtain evidence revealing the commission of criminal offences – see the judgment of Lord Hutton at p651.
62. It is to be noted that the argument in *Bowles* was that the relevant power could not even be used to investigate a money laundering offence, because of the narrow wording of CJA 1988. That is no longer the case under the equivalent provisions of POCA. The restriction has now been reversed by Section 345(2) of POCA. The power to obtain a production order under POCA expressly applies both to money laundering and confiscation investigations.
63. The statement of Mr Jeffs which is relied upon by the Claimants needs to be considered in its proper context, as follows:

“The above individuals and companies are all subject to a criminal investigation into Money Laundering offences contrary to Sections 327, 328 and 329 of the Proceeds of Crime Act 2002 which have been started and have not yet concluded. There are reasonable grounds to suspect that the subjects of the application have committed a money laundering offence.

I confirm that the above nominals and companies are also subject to a fraud investigation. It has therefore been considered as to whether the application should in fact be made with support from Lancashire Constabulary under the Police and Criminal Evidence Act 1984 (PACE). Whilst there are clear grounds to believe that an application for the material under PACE would meet the required threshold: the primary purpose of this request is to track the movement of criminal property i.e. the proceeds of an alleged fraud. Therefore an

application under the provisions of the POCA is thought to be the most appropriate legislation to use in these circumstances.

The financial material sought in this application is likely to be of substantial benefit to both the money laundering and fraud aspects of the investigation.”

64. It was accordingly the evidence of Mr Jeffs that the “true” and indeed “dominant” purpose of the application under POCA was to support a money laundering investigation. That evidence was accepted by the judge.
65. Having carefully considered the Claimants’ arguments (advanced both at the preliminary stage and over the course of the full hearing), the judge was satisfied on the evidence that CWAC was seeking to advance a genuine money laundering investigation. The fact that the material might also be considered in relation to the fraud investigation did not mean that the power was improperly exercised.
66. The judge found that:

“...the complaint raised by Mr Daw that the applications are not in good faith or that POCA is being used as a device to obtain the orders, is rejected. This conclusion is supported by the fact that before the applications had been made, the enquiry was being referred to as a ‘money laundering investigation’. The earliest reference was in September 2016. In any event there is to my knowledge no legal bar to legally obtained evidence being used in another enquiry and the fact that financial records or personal bank accounts might also assist a fraud investigation is obvious. However, that does not mean a money laundering investigation is not taking place or that the process is tainted. For Mr Jeffs to have asserted that the material sought by the application is likely to be of substantial benefit to both the money laundering and fraud aspects of the investigation is simply common sense because of the overlap involved in the two enquiries.”
67. There is no basis for this Court to go behind the findings made by the judge on the evidence before him. This was a decision made by an experienced criminal judge following a two day hearing, involving cross-examination of Mr Jeffs and Mr Lawless, more than 1,000 pages of exhibited evidence, and written and oral legal submissions by leading counsel for both sides.
68. In the light of the findings made by the judge, there is no arguable error of law in the decision he reached that the application was properly and lawfully made under POCA.
69. I would accordingly dismiss the renewed application for permission on Ground 2.

Conclusion

70. For the reasons outlined above, I would grant permission on Ground 1 but refuse permission on Ground 2.

Mr Justice Stuart-Smith

71. I agree and have nothing to add.