Neutral Citation Number: **[2021] EWHC 3187 (QB)**

Case No: **QB-2017-006111**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Amended pursuant to the order of Mr Justice Freedman dated 25 May 2023 lifting Reporting Restrictions

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: **24 November 2021**

Before :

Mr Justice Freedman

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Between :

(1) BES Commercial Electricity Ltd	**Claimant**
(2) Business Energy Solutions Ltd	
(3) BES Water Ltd	
(4) Commercial Power Ltd	
- and -	
Cheshire West & Chester Council	**Defendant**

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Philip Marshall QC and Matthew Morrison (instructed by **Weightmans LLP**) for the **Claimant**
Fiona Barton QC and Sarah Dobbie (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: **24th November 2021**

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JUDGMENT

~~**This judgment is subject to reporting restrictions under s.4 of the Contempt of Court Act 1981**~~

LIFTING OF REPORTING RESTRICTIONS
By reason of an order made by the Court on 25 May 2023, the Reporting Restrictions previously in operation as a result of an order made by the Court on 29 November 2023 have been lifted.

Following a lifting of reporting restrictions the judgment was released to National Archives on 25 May 2023.

Mr Justice Freedman **Wednesday, 24 November 2021**
(**10:10** am)

Judgment by **MR JUSTICE FREEDMAN**

1. This is a judgment given on Wednesday morning, 24 November 2021, in respect of an application on the part of the defendant for reporting restrictions in respect of the trial, in order to postpone the reporting until the outcome of related criminal proceedings.
2. The claimants oppose the application subject to a qualification: they submit that matters including documents arising out of the criminal proceedings ("the CP Materials") should be excluded from the trial. They submit that if they are not excluded, there should be limited press reporting restrictions in respect of the CP materials.
3. The nature of the action is that the claimants claim that in an investigation of allegedly criminal matters, the defendant's employee, Mr Bourne, was guilty of misfeasance in public office and other related wrongs at the expense of the claimants for which the defendant is vicariously responsible. They also claim that there were breaches of the claimants' Convention rights in relation to the instigation and obtaining of search warrants. They also claim that there were acts of trespass, conversion and breaches of Convention rights in the execution of the search warrants and the retention and handling of the seized material.
4. Following two days allowed for pre-trial reading on the opening day of the hearing, on 17 November 2021, the first day for the oral hearing, an application was made on behalf of the defendant for reporting restrictions pursuant to section 4 of the Contempt of Court Act 1981 ("the 1981 Act"). There was no written application or earlier intimation of the application to the court.
5. On Tuesday, 16 November 2021, when the court was in the middle of the reading time allotted, a note was sent to the parties in the following terms:

   "Could assistance be provided on Wednesday in respect of the following. Is there any pending criminal prosecution against any directors, officers or employees (present or former) of the

claimants, or any of them, or any of their associated companies? If so, (a) what are the details in respect of the same, (b) has there been any judicial consideration in connection with the effect of the instant civil trial on any prosecution, and (c) how does any prosecution affect the approach that the civil court ought to have in dealing with the issues in the current trial?"

6. In answer to (a) the court was referred to paragraph 1 of the skeleton argument of the defendant for trial, which said the following:

"The defendant conducted a complex, long-running phased investigation into alleged fraudulent business practices of the first, second and fourth claimants and associated brokers. The investigation has resulted in the following charges, which have been committed for trial:

"(a) Andrew Pilley is the director of the Business Energy Solutions ("BES") group of companies and Commercial Power Limited ("CP Limited"). He has been charged with two offences of fraudulent trading contrary to section 993 of the Companies Act 2006, one offence of money laundering contrary to section 328(1) of the Proceeds of Crime Act 2002, and one offence of fraud by false representation contrary to sections 1 and 2 of the Fraud Act 2006.

"(b) Michelle Davidson is the director of the BES group of companies and CP Limited. She is the sister of Andrew Pilley. She has been charged with two offences of fraudulent trading contrary to section 993 of the Companies Act 2006 and one offence of money laundering contrary to section 328(1) of the Proceeds of Crime Act 2002.

"(c) Lee Qualter (also known as Lee Qualter Goulding) is the director of Energy Search Limited ("ES Limited") and was previously director of Commercial Energy Limited ("CE Limited") and Commercial Reduction Services Limited ("CRS Limited"). He has been charged with one offence of fraudulent trading contrary to section 993 of the Companies Act 2006.

"(d) Joel Chapman is employed by BES as the Head of Regulation and Compliance. This role also includes an involvement with CP Limited. He has been charged with two offences of fraud by false representation contrary to sections 1 and 2 of the Fraud Act 2006..."

7. The essence of the application for reporting restrictions was a concern that evidence relevant to the civil proceedings, including evidence not being relied upon in the criminal proceedings, would be particularly damaging if such evidence were to be published. Examples included evidence from complainants and a whistle-blower and a 5 Live report radio programme, which was broadcast in 2012.

8. Upon being informed about this application only minutes before it was presented, the position of the claimants was that although they were able to present an initial response to the court, they rightly wished to take further instructions and to have the opportunity to provide a more considered response. In addition to this, the court was concerned to have written submissions from the parties. The court was concerned that the application for restrictions about publication, because of the interrelationship of the civil and criminal proceedings, only exacerbated the concerns underlying its note.

9. There was directed the provision of skeleton arguments by 10.00 pm on 17 November 2021 by the defendant, and by 11.30 am on 18 November 2021 by the claimants. The matter then resumed for argument in the afternoon of 18 November 2021, and on 19 November 2021. The court was addressed on 18 November, not only by Mr Marshall QC for the claimants, but also by Mr Laidlaw QC. Mr Laidlaw QC is instructed by Mr Pilley, Ms Davidson and Mr Chapman in the criminal proceedings. The court also had a letter from Farley LLP, to which I shall return, which acts for Mr Qualter in the criminal proceedings.

10. The court also heard not only from Ms Barton QC on behalf of the defendant, but from Mr Andrew Thomas QC. Mr Thomas QC represents the defendant, who are the prosecutors in the criminal proceedings. He appeared on the application for the search warrant.

11. The scope of the argument has included (1) the application under section 4(2) of the 1981 Act; (2) the relationship between the civil proceedings and the criminal proceedings; (3) the claimants' desire to exclude material sought to be introduced by the defendant from the criminal proceedings into the

trial and contained in bundles J1, D15-D17, and C3-C6; (4), the concerns raised by the court as to whether or not consideration should be given to a stay and, (5), a specific other discrete matter which is not a part of this judgment. Following consideration of a draft judgment over the weekend, the court asked for assistance on Monday, 22 November 2021 about a further matter, to which I shall refer below.

The nature of the action

12. The first and second claimants ("BES") are non-domestic energy suppliers. The fourth claimant ("CPL") trades as an intermediary, known as an aggregator, through which non-domestic energy suppliers (including BES) pass details of their products to a network of brokers. BES and CPL share a managing director, Mr Andrew Pilley. The third claimant ("BES Water") was established to operate as a non-domestic water supplier. Among the claimants' claims are that the actions complained of prevented BES Water from starting to trade.
13. The defendant is a local authority which has been conducting an investigation into allegations of fraudulent misselling by brokers, and the extent to which, if at all, any such fraudulent misselling is to be attributed to the first, second and fourth claimants and their officers, including Mr Pilley and his sister, Ms Davidson.

The claimants' claims

14. The claimants make claims including the following:

    (1) the defendant breached the claimants' rights under ECHR Article 1, Protocol 1, and/or Article 8, and/or is vicariously liable for the misfeasance in public office of one of the defendant's investigating officers, Mr David Bourne who it is alleged:

(a) assisted what the claimants claim was an unlawful, baseless and harmful campaign carried out against them by Messrs Neil Scrivener and Oliver Mooney for profit, which generated unfounded and exaggerated complaints and the loss of a significant number of customers.

(b) unlawfully disclosed information obtained as a result of and concerning the investigation to these individuals and delegated investigative functions to them.

(c) caused the defendant improperly to rely upon evidence gathered and/or influenced by these individuals in connection with its investigation and/or to obtain, alternatively to procure, the obtaining of search warrants against the claimants' premises on 22 July 2016 ("the search warrants").

(2) The defendant further breached the claimants' rights under ECHR Article 1 of Protocol 1, and/or 8 by virtue of having obtained and executed or procured the obtaining and execution of the search warrants unlawfully and/or without proper regard for the requirements of proportionality and necessity and in particular as a result of:

(a) Failure to make full and frank disclosure and/or fairly properly and accurately to present all information as required at common law and by statute in connection with the search warrants application in search of (1) the operation of the non-domestic energy market and industry practice; (2) the legal and factual relationships between the claimants and the brokers; (3) the manner in which the complaints were influenced by Messrs Scrivener, Mooney and Bourne, as well as a competitor/disgruntled former employee of the claimants; (4) the findings and scope of a historical investigation conducted by Ofgem, and (5) offers of cooperation and alternative means of obtaining the information and documentation.

(b) Failure to make use of less disruptive means of obtaining access to the information and documentation and/or to put in place appropriate safeguards and procedures in respect of privileged material.

(c) The excessive breadth of the search warrants and the manner and timing of the entry into the claimants' premises and the conduct of the search.

(3) The defendant is liable in the torts of trespass and/or conversion by virtue of having (a) seized, or alternatively procured the seizure, of items of property from the claimants including privileged material which were beyond the scope and purpose of the search warrants and the additional powers of seizure under sections 50-54 of the Criminal Justice and Police Act 2001 and/or (b) retained such property for an improperly long time and/or other than in accordance with sections 50-54 of the Criminal Justice and Police Act 2001 and therefore without lawful justification.

15. In the light of the above, the claimants seek, among other things, damages in respect of:

(1) the customer terminations, wasted management time and legal costs associated with the campaign of Messrs Scrivener and Mooney to the extent that the same was assisted or continued by virtue of Mr Bourne's activities;

(2) the loss of a chance that the investigation would have ceased and/or that the search warrants would not have been obtained absent the actions of Mr Bourne and/or the evidence it is claimed he caused the defendant to rely upon;

(3) the reputational harm and the loss of employees and customers following the execution of the search warrants;

(4) BES Water's failure to secure a licence to supply water in Scotland; and/or

(5) the additional costs and disruption of the claimants' business and extant legal proceedings caused by them being unable to use seized material including material subject to legal professional privilege.

The defendant's defences

16. The defendant defends all of the allegations. It has set out those allegations in 12 numbered points in paragraph 5 of its case summary. It is not necessary for the purpose of this judgment to set all of

that out, but it suffices to say that the allegations of misfeasance that without prejudice to the generality of the denials, the defendant denies that the actions of Mr Bourne constituted misfeasance, he was removed from the investigation on 30 June 2015, and the defendant says that he had no influence on the decision to apply for search warrants. The application was not made until about a year after Mr Bourne ceased to be engaged by the defendant. The defendant says that it reasonably suspected the claimants, their servants or agents of being engaged in fraudulent business practices. It says that the application for the search warrant was based on signed witness statements from members of the public, a statement from a whistleblower, a Radio Five Live investigation and the Ofgem report. It submits that the evidence used to obtain the search warrants was presented fairly and properly, and adverse arguments were drawn to the attention of the court.

17. It also submits that the application for the grant of warrants was made by officers of the Lancashire Constabulary who did not act as the defendant's servant or agent.

18. It submits that it acted reasonably and proportionately in and about the investigation and the steps subsequently taken. It submits that the items that were taken were pursuant to the search warrants and/or the powers under section 50-54 of the Criminal Justice and Police Act 2001, and that they were seized for no longer than was reasonably necessary.

19. All of these are contested matters which will form the subject of the trial. Summarising the matter, this is not a comprehensive account of anything that the parties are saying. It is simply to put into context the applications which are now being heard at the commencement before the trial itself proceeds.

The application under section 4(2) of the 1981 Act

20. Section 4 of the 1981 Act provides in relevant part as follows: section 4, contemporary reports of proceedings:

"(1) Subject to this section, a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith

"(2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose."

21. The defendant's written submissions in connection with the application contained matters relating to the law which was largely common ground:

"14. In R (Press Association) v Cambridge Crown Court [2012] EWCA Crim 2434, the Lord Chief Justice explained (at [13]):

"'These orders are intended to avoid “a substantial risk of prejudice” to the proceedings to which they are made, or to linked or related proceedings, such as a subsequent trial involving the same defendants or witnesses. […] An order under s.4(2) should, however, only be made when it is necessary to do so and 5 as a last resort. […] Essentially too, s.4(2) as its wording suggests, is aimed at the postponement of publication rather than a permanent ban.'

15. The White Book 2021 explains (at [3C-58]) (citing MGN Pensions Trustees Ltd v Bank of America National Trust and Savings Association [1995] 2 All E.R. 355):

In considering whether to make an order under s.4(2) the court should seek to answer three questions: (i) was there a substantial risk of prejudice to the administration of justice? (ii) did it appear necessary for the avoidance of that prejudice that there should be some order made postponing publication of a report? (iii) if so, should the court, in its discretion, make an order and, if so, in what terms?'

16. In relation to a 'substantial risk of prejudice', the White Book 2021 notes that,

22. [i]n determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability to abide by the judge's direction to decide the case only on the evidence before them."

17. In considering whether it is 'necessary' to make an order, the Court of Appeal in R v Sherwood ex parte The Telegraph Group Plc [2001] 1 W.L.R. 1983 (Longmore LJ giving the judgment for the Court) set out a three-part test (at [22]):

(a) Would reporting give rise to a 'not insubstantial' risk of prejudice to the administration of justice in the relevant proceedings?

(b) If so, would a s.4(2) order eliminate it? If so, can the risk be satisfactorily overcome by less restrictive means?

(c) If the judge concludes that there is indeed no other way of eliminating the risk of prejudice, should the degree of risk contemplated be regarded as tolerable in the sense of being 'the lesser of two evils'? (At that stage value judgments may have to be made as to the priority between 'competing public interests').

18. The onus is on the party seeking the restriction to show that a reporting restriction order is justified."

23. The defendant says that on 22 September 2021 the four individuals identified, Mr Pilley, Ms Davidson, Mr Chapman and Mr Qualter, were committed for trial to the Preston Crown Court. There are being considered charges against about another eight defendants, but it is not envisaged, if a decision is to charge them, that their case would come for trial with the defendants who have been charged. It is expected that the criminal trial will be some time in 2022. It was suggested that it might be a period of three months, starting in October 2022.

24. There is an intention on the part of the defendants in the criminal trial to pursue a stay application and an abuse of process argument which, if it takes place, may be heard in March 2022. Since the prosecution papers have not yet been served on them, and that is not expected until December 2021,

decisions as to whether such applications will be made and the nature of such applications have not yet been made.

25. The position of the defendant is as follows in relation to reporting restrictions: it says that the application is made out of an abundance of caution due to the fact that Mr Andrew Pilley is a witness in these proceedings and a defendant in the criminal proceedings. In his witness statement, Mr Pilley has given evidence on issues which form what the defendant says are key planks of the prosecution case, and upon which he is likely to be cross-examined in this case, namely

    (1) independence of the "strategic partner" broker companies;

    (2) recording of front end calls (and his knowledge of that fact);

    (3) cooperation and record with Ofgem.

26. The reporting of the proceedings will have no impact on the result of the civil proceedings, but, the concern is that the reporting may impact upon the criminal proceedings. In the formulation in the written submissions at the outset, it was said that the restriction was sought to avoid the obvious risk of prejudice to Mr Pilley (and by association to his co-defendants) if the evidence in the proceedings were reported and read by potential jurors, particularly where the document suggests that there is the potential for his evidence to be severely undermined. At the stage of the written submissions, it was said that the reporting of the evidence was highly unlikely to give rise to a substantial risk of prejudice to the prosecution case: see paragraphs 6 and 11 of the written submissions.

27. However, as I shall describe below, that position has changed following the submissions made by Mr Thomas QC. It was submitted in the written submissions at the outset that the risk of prejudice to the defendants in the criminal proceedings arising from reporting was particularly acute where evidence which was relevant to the civil proceedings -- in particular the evidence used in support of the warrants application -- is not being deployed in the criminal proceedings (for example, evidence from complainants and a whistleblower and the 5 Live report). It would therefore be particularly damaging to the defendants if such evidence were to be published.

28. The position of the claimants is that they do not seek reporting restrictions, subject to one matter: they say that if the CP materials are allowed to stand as part of the evidence or argument in the civil proceedings, then there should be a reporting restriction but only in respect of that aspect of the case confined to questions and answers and submissions in respect of the CP materials. Not only do the claimants not seek a reporting restriction, but nor do Mr Pilley, Ms Davidson and Mr Chapman. The court was informed about that through Mr Laidlaw QC, who represents them in the criminal proceedings. In respect of Mr Qualter, the other of the four defendants in the criminal proceedings, a letter dated 18 November 2021 was sent by Farleys Solicitors LLP on behalf of Mr Qualter to Weightmans solicitors who represent the claimants in this action. That letter read as follows: "As you are aware I act for Mr Qualter. I have been informed of the oral application made by the defendant in the civil proceedings in which your clients are claimants concerning the imposition of reporting restrictions in respect of the proceedings as well as the intention of the defendant to use materials from the criminal proceedings at the trial which commenced yesterday. I have also seen the submissions lodged on behalf of the defendant. Mr Qualter agrees with your clients that the criminal material should be excluded from this trial. However, if that does not occur, I can confirm on his behalf that he agrees that the necessary reporting restrictions are in respect of the materials from the criminal trial which you have identified to me, and of any submissions, questions and answers which themselves refer to it."
29. The intention therefore appears to be that the position of Mr Qualter is the same as that of Mr Pilley, Ms Davidson and Mr Chapman, in connection with the application for reporting restrictions and the desire to exclude from the trial the CP material.

The CP materials

30. The issue of the exclusion of the CP materials was first raised before the court in a list of interlocutory and housekeeping issues which was placed before the court on Wednesday, 17

November 2021. The issue concerned the intention of the defendant to rely on matters for the criminal trial, within the civil trial. This included disclosure documents largely obtained from the execution of search warrants. Reference was made by both of the parties to correspondence in this regard. The claimants had objected in a letter dated 4 November 2021. The matter needs to be put into its full context, and the following are useful dates to provide that context.

November 2020, disclosure;

13 January 2021, supplemental disclosure;

25 August 2021, further supplemental disclosure;

29 September 2021, identification by the defendant of what was required in trial bundles, including CP materials at items 39-41 and 47-48;

4 October 2021, identification by the defendant of further CP materials at items 22 and 42-43; 28 October 2021, defendant identifies further documents comprising some additional item 38 documents (six additional documents in 38.1, two additional documents in 38.2 and two additional documents in 38.3) to be included in the core bundle and provide supplemental disclosure of six documents also sought to be in the core bundle;

28 October 2021 and 4 November 2021, correspondence from the claimants stating that the CP materials were inadmissible and/or irrelevant.

31. In the letter dated 4 November 2021 from Weightmans on behalf of the claimants to Clyde & Co on behalf of the defendant, the following was written:

"Beyond that our clients do not agree that the other documents should be included in the trial bundle. In respect of the documents requested from sections 38.1 and 38.3 of your client's disclosure list and the items identified by the lettered paragraphs (c) to (g) in your letter, these are documents from the ongoing criminal investigation which have no relevance to the pleaded issues in these proceedings. It is clear that your client improperly seeks to wish to litigate the criminal trial in these proceedings by reference to materials which were obtained from the execution of the search

warrants, rather than to address the pleaded issues concerning the misleading of the court at the application for the same, the issues concerning their execution and treatment and return of property. If your client disagrees it will need to explain why these documents are relevant to the pleaded issues in these proceedings."

32. Returning to the list of interlocutory and housekeeping issues to which I have already made mention, the paragraph 2 was headed "Scope of trial, civil/criminal proceedings". That read as follows:

"2.1 intention of D to litigate issues or rely on matters exclusively for criminal trial including pre-interview disclosure docs largely obtained from execution of search warrants.

"2.2 objections raised by seize and correspondence including 4/11/21 letter from Weightmans.

"2.3 involves:

2.3.1, documents seized in execution of search warrants at (bundle references);

2.3.2 (bundle references), (transcripts of interviews; prepared statements);

2.3.3 (bundle references) Consumer Futures documents (from CWAC updated disclosure list section 43);

2.3.4 (bundle references) recordings (from CWAC updated disclosure list);

2.3.5 (bundle references) Inspired Energy documents (from CWAC updated disclosure list); 2.3.6 (bundle reference) magistrates case summary and summary of defendant's position."

33. The claimants' position is that there is no overlap between the instant proceedings and the criminal proceedings. In the claimants' submissions in respect of the question of reporting restrictions, they say that the civil proceedings can broadly be categorised as

(1) misfeasance in public office on the part of Mr Bourne;

(2) breaches of the claimants' Convention rights in instigating the obtaining of the search warrants; and

(3) acts of trespass, conversion and breaches of Convention rights in the execution of the search warrants and the retention and handling of seized material.

34. As regards misfeasance they submit that it must be shown that Mr Bourne either acted with targeted malice (intent to injure), or with untargeted malice in the sense that his actions were unlawful, that he knew of this, or was subjectively reckless as to unlawfulness and knew or was subjectively reckless as to the likelihood of harm.

35. They submit that the evidence in respect of misfeasance is by reference to the belief and motivation of Mr Bourne, an examination of his state of mind at the time, and looking at the reasonableness of his belief is based on information available to him at the time between January and June of 2015. By definition, that excludes the CP materials obtained as a result of the execution of the search warrants in June 2016.

36. As regards the alleged breach of Convention rights in connection with the search warrant applications, the claimants submit that it suffices if there is unlawfulness, lack of necessity or disproportionality. It is no defence that malice or absence of a reasonable or probable cause, because they do not have to be proven as part of these claims. The claimants submit that those who instigate unlawful action on the part of another may be liable even if the person whose actions they instigate is not liable.

37. There is no agreement about this, but the claimants' skeleton on the question of reporting restrictions set out the law on which they rely, particularly stemming from a case called Davidson v CC of North Wales [1994] 2 All ER 597. That is set out at paragraphs 18.5 to 18.11 of their argument.

38. The defendant submitted orally that an examination of the pleadings shows an overlap between the civil and criminal proceedings. That was developed in written and oral submissions, and related in particular to the following, namely

(1) independence of the associated broker companies;

(2) lawfulness of alleged campaign conducted by Messrs Scrivener and Mooney;

(3) telephone calls which were recorded between customers and brokers and who had access to recordings and who know what was recorded;

(4) cooperation and track record with Ofgem and the ombudsman;

(5) compliance functions.

39. The claimants submitted that analysis of the pleading shows that a positive case has not been made about these matters by the defendant. Insofar as they have been pleaded, they have led to no admissions. It is, therefore, a departure for the defendant to seek to make out a positive case about these matters at trial, which is not permitted: see CPR 16.15.

40. The claimants' written submission at paragraph 21.1 was as follows:

"The defendant's only responsive pleading to this averment (that was a reference to the unlawful, baseless and harmful campaign carried out by Messrs Scrivener and Mooney) is a non-admission... where a party does not admit, and requires the other party to prove an averment it is not entitled to advance a positive case to the contrary at trial (see CPR Rules 16.51 and 16.52) and the notes to the White Book at 16.5.2 which make clear that the defendants who wish to put forward a different version of events must deny allegations and support such denials by pleading their own version: see also Miah v Bansal [2002] EWHC 1535 (Ch) at 48 and LBI HF v Millen [2016] EWHC 2132 (Ch) at 32. It is therefore not open to the defendant to seek to lead evidence from the criminal proceedings or to put a positive case that the campaign was in fact lawful and not baseless."

41. In oral argument the court was referred to those cases which apply those general principles to the facts of the particular cases: see transcript Day 2, 26-28.

42. There were then submissions by the parties in respect of each of the above matters where, broadly, the claimants submitted that there was no positive case and that the defendant was therefore not entitled to proceed with a positive case as a result of which the use of the CP materials was not permitted, due to the state of the pleadings. I shall now look at the submissions that were made in that regard.

Independent brokers

43. The claimants referred to paragraph 12 of the re-re-re-amended particulars of claim ("PC") where it was stated that:

    "BES Utilities gains contracts by using a network of independent brokers and via energy aggregators."

44. In the amended defence at paragraph 16 it was pleaded:

    "The defendant does not admit paragraph 12, in particular it is not admitted that the said brokers are independent as alleged. The claimants are put to proof of the other aggregators used by BES Utilities and a percentage of contracts placed with BES Utilities by those aggregators."

45. The pleading then pleads that there are a number of matters under investigation which may be indicative that the brokers are not independent. That includes the fact that the managing director of BES Utilities was Mr Pilley and that he was the managing director of the aggregator, CPL. There is also reference to Mr Pilley being a close friend of Mr Qualter, who is now a director of Commercial Reduction Services and Energy Search Limited, and the company secretary of Commercial Energy Limited, who are among the brokers whose independence has been questioned.

46. There is reference to information alleged by the staff, for example, describing Mr Pilley as being "in charge or being the boss". There is reference also to the Radio Five Live programme and to instances of alleged collusion between the different companies. This part of the pleading ends with the words:

    "Whether these allegations are supported by the evidence is a matter which remains under investigation."

47. The claimants say that this is not enough to make a positive case that the brokers were not independent but amounts to no more than some non-admissions and to matters under investigation.

48. It is part of the claimants' case that it was misleading for the case summary put before the Preston Crown Court to refer to Energy Search, Commercial Energy, and Commercial Reduction along with BES and CPL as being a single business trading under different names: see PC paragraph 39.1. In fact, the claimants say that each of these companies are separate companies conducting business as an independent brokerage. In that regard, the defendant denied paragraph 39 of the PC: see defence para.34. However, the para. 34 of the Defence also said:

    "The claimants are put to proof of the facts relied upon in paragraphs 39.1 to 39.6.5 in support of the alleged breaches."

49. The claimants submit that the true reading of the defence is as follows: that although there is a denial of the first four lines of paragraph 39, the matters in the particulars of breach between paragraphs 39.1 and 39.6.5 are matters as to which the defendant puts the claimants to proof, and therefore here too there is not a positive case.

The campaign conducted by Messrs Scrivener and Mooney

50. At paragraph 6A.1 of the PC, it is alleged that Mr Bourne acted maliciously and with the intention of injuring one or more of the claimants both in connection with the investigation by the defendant into the claimants and/or by assisting the unlawful, baseless and harmful campaign carried out by the claimants via Messrs Scrivener and Mooney. The response of the defendant at paragraph 10 of the defence was that this paragraph was denied. It was also denied that Mr Bourne acted maliciously and with the intention of injuring the claimants, or that he assisted the campaign carried out by Messrs Scrivener and Mooney. It was denied that he acted unlawfully. However, the claimants point out that paragraph 10 did not specifically deny that the campaign of Messrs Scrivener and Mooney was unlawful, baseless or harmful, nor did it contain a non-admission. In that regard the claimants point to paragraph 25 of the defence, which deals with paragraph 28 of the

PC which refers to misfeasance in public office. In the course of that paragraph 25 at (b)(i) it was pleaded:

"If, which is not admitted, the activities of Messrs Scrivener and Mooney constituted an unlawful, baseless and harmful campaign, it is denied that Mr Bourne intentionally assisted in such activities."

51. The claimants therefore say that the defendant is not permitted to run a case to the effect that their campaign may not have been unlawful, not baseless or not harmful.

Telephone calls

52. As regards the partial recording of telephone calls, it is a part of the claimants' case that it was wrong for the case summary to the Crown Court to criticise the fact that only parts were recorded because this was standard market practice: see PC paragraph 36.3. The defendant stated that this was not admitted and the allegations arose from lies and deceptions on the part of the sales staff of the broker companies: see defence paragraph 33. There is expert evidence from the parties directed in part to whether it was or was not standard practice to record only parts.

Cooperation

53. As regards the claim of the claimants (PC paragraph 44.5(a)) that the attention of the court on the application for the search warrant was not given to the cooperation provided in respect of the investigations by the DTI in 2004, EnergyWatch and Trading Standards in 2005, and Blackpool Trading Standards in 2011, the response of the defendant was at paragraph 41 of the defence. That was to say that the court was informed that the defendant had cooperated. The claimants take objection to the statement at the hearing that the defendant intended to challenge the claims by reference to the deliberate editing of customer files which went to the Ombudsman with the knowledge of Mr Pilley. It was said that internal emails at J1/3-23 had nothing to do with the question as to whether there was cooperation.

54. Then there was a plea of the claimants that the defendant had no objective and/or rational foundation for suspecting that the claimants had been involved in any criminal activity and/or that their premises would contain any information relevant to the defendant's investigation (PC para 82.2). The defendant concentrates its answer to this part of the pleading by referring to the pleas being misconceived and an abuse of process and protected by immunity in any event (see defence at paras 79-82). The claimants say that this is one of a number of particulars relied upon as to disproportionality by the defendant, but not an integral part of the causes of action.

The defendant's response

55. The defendant submits that when the pleadings are looked at as a whole, it does contain assertions against the claimants of a positive nature. At paragraph 8 the defendant pleads as follows: "If, which is not admitted, the purpose of the comfort calls made by CPL was to verify that correct procedures had been followed by brokers, it is averred that complaints by customers and the conclusions of Ofgem following investigation into the said comfort calls give rise to reasonable cause to suspect that the process was systemically deficient and resulted in customers being materially misled and/or fraudulent practices being concealed. For the avoidance of doubt the defendant avers that it is not the comfort calls in isolation which give rise to a reasonable cause to suspect that fraudulent representations were being made. It is averred that it is the core process taken collectively which forms part of the fraudulent operation. Fraudulent representations were made during the front end call, which takes place both before the contract and comfort call. It was only following detailed examination of material and recordings seized during the warrants that the distinction between the calls became clear."
56. As regards the matters relating to the independent brokers, the defendant points to its case at paragraph 16, where it sets out the matters that are under investigation, and submits that when paragraph 16 is seen both as a whole and in connection with the whole of the pleadings, and in the

context of the evidence as a whole, that it is clear that they are running a positive case in relation to the lack of the independence of the brokers. They rely upon the matters that are set out in the subparagraphs (a) to (h), when it is stated that the allegations supporting the evidence remain under investigation, that was a way of signalling that there may be more matters that would arise in evidence. Particularly noteworthy is (h), which reads as follows:

57. "For the avoidance of doubt, the alleged collusion between the different companies and their staff takes the following form:

"(i) It is alleged that the deceptions are committed by staff within the so-called independent broker companies, who tell lies to potential customers in order to induce them to enter into agreements.

"(ii) It is alleged the CPL and/or its staff were compliant in the fraud. The fact that CPL may have handled legitimate business on behalf of other energy suppliers is wholly immaterial. The alleged offences concerned only the trade which is placed via the brokers who are under investigation on behalf of BES. The alleged fraud requires no more than that the aggregator is compliant.

"(iii) It is alleged that BES, its staff and/or its directors controlled the activities of the so-called independent brokers and ensured that the sales were placed with BES Utilities."

58. Another paragraph which the defendant gives by way of example as to the nature of the positive case which it is making is paragraph 33 where it is stated:

"The allegations under investigation arise from lies and deception on the part of sales staff within the broker companies."

59. At paragraph 41, the defendant pleaded the following in relation to breaches arising from the defendant's assertions that information and documentation could not be obtained in the absence of search warrants. It stated as follows:

"Paragraph 44 is denied. In particular, it is averred that the court was informed of the fact that BES Utilities had cooperated with the Ofgem investigation. The defendant did not respond to approaches from the claimants' solicitor because of the risk of prejudicing the investigation into allegations of

fraud. The matters under investigation were not regulatory breaches but allegations of systemic criminal dishonesty. It is averred that disclosure of that fact to the claimants or their representatives would have seriously prejudiced the investigation. In particular:

"(a) There were reasonable grounds to believe that, had the nature and extent of the investigation been disclosed, evidence would have been destroyed; (b) there were reasonable grounds to believe that if material had been sought by way of production orders, the material would have been withheld or destroyed; in the circumstances, dialogue was wholly inappropriate and warrants were necessary."

60. At paragraph 78 of the defence, responding to paragraph 80 of the PC, which raised questions as to whether the search warrants and seizures were necessary and proportionate, the defendant pleaded as follows:

"Paragraph 80 is misconceived in law. The issues of necessity and proportionality arise at the time of the exercise by the court of the discretion to issue a warrant and/or within the statutory criteria applicable to search powers, not at the time of execution. The obtaining and execution of the warrants was (sic) necessary and proportionate."

61. The defendant also submits that the matter is to be looked at in the context of the evidence as a whole that has been adduced, and in particular, the evidence about Mr Pilley. There were highlighted in the defendant's submissions passages in relation to Mr Pilley relating to

(1) independent brokers at paragraphs 17, 21, 37, 156, 160 and 171;

(2) about cooperation at paragraphs 51, 54, 150 and 183;

(3) about the campaign of Messrs Scrivener and Mooney at paragraphs 57, 60 and 63;

(4) complaints being resolved in favour of BES, paragraphs 56, 70, 78, 81, 111 and 174; (5) the standard practice of not recording parts of the calls at paragraphs 147 and 149.

62. At paragraph 17(e) of Mr Pilley's statement he introduced the evidence of Mr Newell, an in-house solicitor with the claimants. Mr Pilley said the following:

"Mr Newell will be addressing in his witness statement a substantial number of significant disparities between the complaints as it appears in the customers' witness statement taken by Trading Standards and the historical record of their experience with BES and (the) complaints made to the Ombudsman as shown by the contemporaneous documents in our files."

63. The defendant submits that it is entitled to respond to this evidence to show that the brokers are not independent and that there have been areas of active non-cooperation, that matters have been resolved, and that where matters have been resolved in favour of BES it has been due to concealment and the provision of false information. It says that if it is not able to respond in this way, evidence will be admitted which is not only false but which is known to be false by at least Mr Pilley and possibly Mr Newell, who ought to be given a warning about the privilege against self-incrimination.

Further points of the claimants

64. The claimants then make the following further points. They say that the effect of the foregoing is an unwarranted departure by the defendant from the position in 2018, namely that there was no interrelationship between the civil and the criminal proceedings. They point to the fact that there was canvassed in correspondence the possibility of a stay to be applied for by the defendant which did not proceed, namely letters of 5, 6 and 12 July 2018. There was no application for a stay. The matter was revisited before Mr Justice Turner at a hearing following the hand-down of the judgment allowing the claimants' appeal. There was again reference to the possibility of a stay application in correspondence of 8 and 15 April 2019.

65. The defendant in submissions before Mr Justice Turner said that "if this claim reaches a stage where the next steps to be taken are likely to prejudice the criminal investigation", a stay will be sought. When it was suggested that a stay ought to be applied for by a certain time, Mr Justice Turner said in reasons for an order made on 27 June 2019, that he would not require an application to be made by a set date, but the longer the time that passes before any such application is made, the less likely

that it would be granted. The matter was revisited on 17 October 2019 when it was Mr Marshall QC who in answer to the judge said that it was not thought that the criminal trial would derail the civil trial because:

"This (civil) claim is all to do with historical things. We are principally focusing on the period up to the point of the execution of the search warrant some years ago. We are not really focusing at all on what has happened thereafter, which is obviously the investigative process which is still currently ongoing, so at the moment we do not really see any problem."

66. Mr Marshall QC went on to say:

"The focus was really principally on individuals and in particular on the brokers who have allegedly given misrepresentations to potential clients, so at the moment we cannot see any issue. Obviously we will watch and see what comes, but for now we do not anticipate a problem."

67. Then Ms Barton QC flagged a matter as follows, namely:

"I do not know whether it is likely that any of those individuals will be called as witnesses by the claimants in these proceedings. I would have thought on the papers I have seen it is likely. If those people were the subject of a charge then of course the privilege against self-incrimination would apply to the evidence that they give, and so there might be an issue then. I know we are flagging it up because the investigation is ongoing."

68. The claimants submit that there has been a late decision on the part of the defendant to change course and introduce the CP materials in order to create an overlap with the criminal process. This behaviour is said to be abusive and is properly met with the exclusion, say the claimants, of the CP material.

69. There is said to be no overlap on the pleadings, despite the attempt by the defendant to the contrary. There is a qualification that in the event of the declaration sought about the unlawfulness of the search warrant the defendants in the criminal proceedings should be able to rely upon the same in an application to exclude material in the criminal proceedings. The claimants say that the true intent of

the reporting restrictions is to prevent matters which may demonstrate wrongdoing and unlawfulness in the conduct of the investigation from seeing the light of day before the criminal trial: see paragraphs 8 and 11 of the skeleton argument of the claimants. They say in the event, contrary to the primary case, that the CP materials are not excluded, then there should be reporting restrictions in respect of the CP materials and of any submissions and answers which refer to them: see claimants' skeleton paragraph 11. This position was advanced in the same terms by the defendants in the criminal proceedings and by the claimants through Mr Marshall QC, the defendants represented by Mr Laidlaw QC, and by Farley LLP on behalf of Mr Qualter.

70. The claimants also say that in the event that the court is concerned in order to keep the CP materials out of the trial, they will agree to remove the averments concerning an absence of reasonable and probable cause and independence of brokers so as to ensure that there are no overlapping issues in the cases. They would do the same as regards evidence. It would then be the case that the only issues would go to the credit of Mr Pilley. The claimants say that the issues as to credit have not been identified. They quote in this regard the judgment of Mr Justice Neuberger, as he then was, in Anglo-Eastern Trust and Another v Kermanshahchi [2002] EWHC 1702 (Ch) where he held that:

"The admissibility of evidence as to credit:

"... is very much a question for the court in the light of the central issues and facts of the individual case, the nature of the evidence which is sought to be adduced and the reasons advanced for and against its admissibility."

71. It was submitted that the court should at this stage not allow matters to remain in as to credit, and there have not been compelling reasons why the court should do so.

Discussion

72. It is regrettable that the application for reporting restrictions has been made very late in the day. If it had been made earlier, then the matter could have been addressed at the PTR or in one of the

applications given prior to the trial. It is also regrettable that there was no prior application on the part of the defendants to exclude the CP materials from the trial. In my judgment, this was not made necessary by reason of the application for reporting restrictions. The result has been that the first days allocated to the trial have been spent by dealing with these important matters in relation to both the application for reporting restrictions and the scope of the material before the trial.

73. The criticisms by the parties against each other in this regard have to be seen in the context that in my judgment both the claimants and the defendant can be criticised respectively. I shall consider first the question of the CP materials and then the question of the reporting restrictions.

Exclusion of the CP materials

74. The exclusion of the CP materials is based on an analysis of the pleadings and the evidence in a way that seeks to keep the two entirely apart. I accept that the concentration of the case is on the way in which the investigation was conducted, the search warrant obtained and then executed. That does not mean that this was entirely the case. I am satisfied that there is a major overlap in respect of the matters in the pleadings and in the evidence. As regards the pleadings, I have reached the following conclusions: first, the pleadings need to be seen as a whole and not by taking particular pleas out of context. There is sufficient in the pleadings to make it clear that, among other things:

(1) The investigation arises out of an allegedly fraudulent operation involving lies and deception of sales staff within the broker companies in which alleged fraudulent representations made in front end calls became clearer, according to the defendant, with the material and recordings seized during the warrants.

(2) On the defendant's positive case, the broker companies purported to be independent but the investigation which was continuing had indicated matters showing that there were a large number of items which pointed to the brokers not being independent.

(3) The matters being investigated were, it is alleged by the defendant, of systemic criminal dishonesty and that there were reasonable grounds to believe that had the nature and extent of the investigation been disclosed or productions had been sought, the evidence and the material would have been destroyed and withheld.

75. Second, the attempts to limit the impact of the pleadings has been largely non-admissions on the specific matters identified by the claimants is not correct for the following reasons, namely:

(1) the pleading of the claimants is very wide-ranging and on the claimants' current analysis goes beyond what was necessary for the way in which they now cast the case. However, they set the hare running and it is informed about the scope of the case in the pleadings.

(2) The pleading has to be seen in the context of the pleas to which I have just referred in the first of these points. In that context, an attempt to say that the defendant is confined by certain non-admissions is not a reasonable analysis.

(3) The independent brokers in the context of the pleading was a matter where issue was begun with a positive case referring to the information obtained during the investigation. A part of this allegation was the reference in the case summary to Energy Search, Commercial Energy and Commercial Reduction along with BES and CPL as a single business trading under different names. The defendant denied this at paragraph 34. I do not accept the contention that a true reading of paragraph 34 is to deny the first four lines but to make a series of non-admissions in respect of the allegations of breach. The particulars of breach, the reference in respect of paragraphs 39.1 to 39.6.5 of requiring the factual matters to be proven does not detract from the fact that there was a denial in respect of the entirety of the paragraph.

(4) The independence of the broker was connected with the alleged lying of the brokers, the non-taping of the front end calls, and the matters indicating that the brokers were not independent. These were all matters which were pleaded.

(5) The allegation that Mr Bourne assisted an unlawful, baseless and harmful campaign carried out by Messrs Scrivener and Mooney was denied. The fact that at a later stage of the pleading the defendant added that it did not admit that there was an unlawful, baseless and harmful campaign does not mean that there was no general denial. The latter pleading can be understood as the defendant being careful not to take on the need to have to justify the conduct of Messrs Scrivener and Mooney in order for the claimants to prevail in their case.

76. Third, the pleading must be understood in a broader context than that contended for by the claimants in this application. An example is as regards the alleged standard practice not to record the front end calls. This gave rise to a direction about expert evidence to deal, among other things, with this. If it was really the case that this was regarded as a matter which had simply not been admitted, where there was no positive plea, then the expert evidence in this regard would have been unnecessary. It can only be inferred that the parties understood the position at that time, and accordingly had in a much broader sense than that which was the tenor of the current submission, and that they proceeded on that basis.

77. Fourth, the evidence of Mr Pilley is expansive. I accept the analysis of the defendant that Mr Pilley has gone beyond a case of simply meeting a series of non-admissions. He has met the case that there has been a fraudulent design and his evidence is designed to show that there was no reasonable or probable cause that the defendant has had in its investigations. To this end, the points referred to above concerning Mr Pilley's evidence, which were highlighted in yellow on the draft provided to the court, do contain a major overlap between the civil case and the criminal case. So too does the evidence of Mr Newell involve potentially the same overlap. This was not an error in the way in which the witness statements had been prepared; it is apparent that the witness statements of the claimants had been very carefully prepared, not least because they were signed off at a time when it was apparent that the criminal investigation was at a very advanced stage. They must have been

prepared in the way in which they were in the knowledge that there was a major overlap or a potential major overlap between the subject of the evidence and the criminal proceedings.

78. There have been documents included in the disclosure emanating from the search warrant comprising disclosure made in December 2020 and supplemental disclosure in January 2021. Not only did this not elicit concern at the time, but as I shall demonstrate when I refer below to a matter which has arisen in relation to the use of materials obtained from the search warrants in the civil proceedings, the claimants positively wished to elicit this information in the disclosure.

79. When the documents were produced on disclosure there must have been an appreciation that these documents might then be used for the court. When it was intimated on 29 September 2021 and in early October 2021 that there was such an intention, this did not elicit any active opposition at this stage. For example, it was not raised at the PTR that took place in October 2021.

80. There is a suspicion on the part of the claimants that the application for reporting restrictions was an attempt to get the CP materials into the trial. There is a suspicion on the part of the defendant that the attempt to exclude the CP materials was an attempt by the claimants to use the late application of the defendant for reporting restrictions as an opportunity to curtail a part of the case. I have not found these theories useful. I prefer to examine the substance of the matters before the court.

81. In my judgment, the court ought to look at the matters in issue between the parties and the evidence before examining the application for reporting restrictions. As Mr Thomas QC put it, the issue of reporting ought not to be conflated with the issue of relevance and admissibility in the civil proceedings. The desire to have open justice ought not to be a lever to restrict the scope of the action or the evidence. That creates the danger of preventing a party from prosecuting or defending its case, or a part of it.

82. In my judgment, the attempts to limit the ambit of the case to exclude the CP materials must fail. There is an overlap of the issues on the pleadings. There is an overlap on the evidence. The claimants have chosen to express their case broadly and no doubt for good reason. I have made my

findings in respect of the pleadings as above. I do not accept the attempts to characterise the pleadings in the narrow manner submitted by the claimants. I have referred also to parts of the witness statements. The claimants having chosen to advance their case in a broad way, the defendant is entitled to deploy all relevant arguments and materials to meet that case. Otherwise the case will be tried on a false basis where the claimants have been expansive and the defendant would be unfairly restricted.

83. The fact that the claimants could have cast the case in a narrower way is irrelevant: they have chosen to cast their evidence, especially that of Mr Pilley, broadly, such that the defendant is entitled to test the evidence. In respect of the alternative of the claimants of abandoning parts of their case, that would not be sensible or just. The case cannot fairly be sliced up in this way: this would change its complexion. The witness statements have been prepared on this basis and the case prepared for trial. It may all work to the benefit of the claimants because it may appear that the way in which it is put about the independence of the brokers and the absence of reasonable and probable cause will enable the claimants to prevail. Alternatively it may work to the benefit of the defendant who may in defending such a case have a broader basis to defend.

84. It is also arguable that the matters which touch on state of knowledge of the defendants at the time of the application for the search warrants and the behaviour by the claimants may be interlinked, even if aspects of the latter was not known at the time. By way of example, and without making any findings at this stage, it may be relevant to the assertions as to the materiality of non-disclosure, or misleading information provided at the time of the search.

85. Due to the way in which the preliminary matters were argued, the court heard the openings for the trial before giving this judgment. The court was addressed in the course of the opening about whether new material can be placed before the court in connection with an application to set aside a search warrant without at this stage making any ruling about it. It was an open question as to whether material obtained on the search warrant could be used in connection with arguments about

the alleged unlawfulness of the search warrant. It is unnecessary and undesirable at this stage to make a ruling as to what information, if any, not put before the court at the time of the search warrant, would be admissible. However, the ability to seek to introduce such information for this purpose should not be excluded at this stage. For this reason too, the attempt to slice off aspects of the pleadings and evidence might be wrong because these matters may be highly relevant on any view of the case to the matters which are the subject of the civil trial.

86. There is a further point, which is matters as to credit. Mr Pilley has not fought this case on the basis that the matters to be tested are simply the state of mind of those who made the investigation on behalf of the defendant. By making a positive case himself through his expansive case and his evidence, he remains to be tested on it. That, in part, is in respect of whether his assertions are correct. In part, also, there might be matters within the evidence which, whilst not going directly to the issues in the case, undermine his credit on matters which he is seeking the court to accept. It is not for the court at this stage to decide these matters. It suffices to say that a consequence of the way in which the claimants have prosecuted the case in pleadings and evidence is that it would be wrong at this stage to rule that any particular matters could not be utilised as to credit (that is subject to the particular matter in respect to which I shall refer separately).

87. The defendant must also recognise that the court has a discretion as to what to allow and not to allow by way of credit. It is possible that this will be revisited in the course of the case, but at this stage it is inappropriate to limit the scope of the defence around the credit point. For all these reasons there will not be an exclusion of the CP materials.

Reporting restrictions - defendant's case

88. The defendant's case was that it was appropriate to impose a reporting restriction and that this was a case not of a prohibition but one of postponement only. Mr Thomas QC referred to legislation where there are automatic reporting restrictions in the Crown Court: see Crime and Disorder Act

1988, section 52(a), and schedule 3, paragraph 3; Criminal Procedure and Investigations Act 1996, sections 40 and 41. This is subject to applications to lift or modify the reporting restrictions. He submitted that this informed in circumstances where there were civil and criminal proceedings which were so closely related.

89. Mr Thomas QC said that there were broadly two aspects of evidence, namely the material gathered prior to the warrants and relied upon in support of the warrants, and the post-warrant material. There is a particular sensitivity about keeping away such material from a jury because it is inevitable that the facts behind the civil and criminal cases will be of significant interest in the Lancashire area. This is because Mr Pilley is a prominent businessman with connections with a football league club.

90. The defendants in the criminal trial wish it to proceed locally in Preston Crown Court so that they can live at home and get on with their commercial lives during what is expected to be a long trial. The danger of proceeding without reporting restrictions is exacerbated, according to the submission of Mr Thomas QC because of that local interest. Mr Thomas QC stated that a decision to charge about another eight defendants was about to be made. As I have indicated above, it is not expected that they would be tried with the defendants represented by Mr Laidlaw QC or Farleys LLP, however, any consent to no reporting restrictions was not from them. The court was given no more information as to who they were and any interrelationship with the civil trial. There is, therefore, not an identity of interest between the claimants in the civil case and all of the defendants in the criminal cases; only some of them.

91. The defendant considered the possibility of preserving the position by applying for a stay of the civil proceedings until after the conclusion of the criminal proceedings. It decided at each stage, including after the four defendants had been charged, that it would not apply for a stay and that justice could still take place with the civil case before the criminal case. However, with the criminal case due to be heard next year, there is a concern about contamination. When so much had been prepared for a complex prosecution, the danger of a case going off the rails not because of some

tactic of the defendant in the criminal case, but because of the significant risk of contamination was something which should be avoided.

92. There was, as I indicated earlier in this judgment, a difference in emphasis between the way in which the matter was opened on behalf of the defendant and the submissions following Mr Thomas QC's address. The passages to the effect about no risk to the prosecution, to which I have referred above, stand to be adjusted in the light of the submissions made by Mr Thomas QC and then adopted by Ms Barton QC.

93. At one point in the submissions for the defendant, it was stated that there was surprise that the defendants in the criminal proceedings were prepared to do without reporting restrictions. However, as Mr Laidlaw QC and Mr Thomas QC submitted, there could be no sensible agenda of individual defendants seeking to have no reporting restrictions and not seeking a stay so as to fuel an absence of an abuse of process application. No criminal court would allow a defendant to benefit from such a tactic, and the parties would know this or have been so advised.

94. The court then explored with the defendant whether there could be a middle course, namely of having reporting restrictions in respect of the CP materials but no wider, in other words, that which had been submitted by Mr Marshall QC on behalf of the claimants. Following the submissions of Mr Thomas QC, both leading counsel for the defendant said that there were dangers about this. There were three problems identified, and I take this both from the submissions of Mr Thomas QC on Day 3, page 66, line 21 to page 68, line 3, and Ms Barton QC on Day 3, page 123, line 23 to page 124, line 25, namely

(1) keeping away from a jury material which will not be the subject of evidence in the criminal proceedings;

(2) identifying any areas which are separate from the criminal proceedings, especially where there were contentious areas of what was and what was not relevant; and

(3) creating an imbalance by having reporting restrictions in respect of the criminal case against specific defendants in the criminal proceedings but no restrictions in respect of other allegations against the defendant in the civil action. In the light of this, although the defendants had considered whether there was a middle ground, there was none which could be advanced satisfactorily.

95. In any event, it was submitted that there ought to be additional protections in place. Some witnesses would have to be given a warning about the privilege against self-incrimination. The parties would be asked to draft a suggested warning for consideration of the court.

Claimants' case

96. It was submitted that there was no prejudice to the prosecution as to which the claimants relied on the above mentioned paras. 6 and 11 of the defendant's written submissions. The application for reporting restrictions was without warning prior to the day that it was made, namely the first day of the trial. It was contrived in order to seek to introduce the CP materials into the civil case. If there was a real danger then it would have been raised years ago, and at least at the stage of the PTR, by which time the four defendants, Mr Pilley, Ms Davidson, Mr Chapman and Mr Qualter had been charged.

97. Those defendants did not seek a reporting restriction except for the CP materials if they were not excluded. It was for them to seek reporting restrictions if they considered it appropriate, however they did not do so and even if the CP materials were admitted, it would only be in respect of the same and they did not require any other reporting restrictions. They were entitled to weigh up the prejudice of reporting restrictions, and they identified none outside the CP materials. They regarded the CP materials as a discrete matter, and it could easily be excluded from reporting. The relevant materials could be identified, namely questions, answers and the submissions in respect of the CP materials.

98. The claimants submitted that open justice was the strong starting point. The test of necessity to avoid a substantial risk of prejudice to the administration of justice was not satisfied. Applying the case in R v Sherwood ex parte The Telegraph Group Plc above, reporting would not give rise to a not insubstantial risk of prejudice. If that was wrong, the risk could be satisfactorily overcome by the less restrictive means of confining a restriction to the CP materials. Even if it could not, the court had to consider the lesser of two evils, that is to make a value judgment between any risk that there might be in the civil trial taking place on the criminal trial on the one hand, and the damage to open justice by conducting a three-week trial with a degree of public interest while restricting the press from reporting any of it, perhaps for a year or more. The court should bear in mind that the essence of news is that it should not grow stale and so a postponement over a long period of time was still a very substantial restriction.

99. I shall refer to the submissions made for the press, which the claimants have politely adopted.

The press

100. In the event that proper notice had been given of the application, it might have been possible for the press to have attended with legal representation. There was not the opportunity in this case, however, the court had the benefit of written submissions from Mr Brian Farmer of the Press Association, now PA Media, and Mr Mike Keegan of the Daily Mail. They were not expressed as lawyers, but the submissions were still effective. In short, they submitted the following:

(1) reporting the trial would not pose a serious risk to the administration of justice;

(2) the court sits in public for very good reasons, in particular not to infringe Article 10 rights; (3) this is especially so in a case which is a challenge on a public authority involving very serious allegations including misfeasance;

(4) news is a perishable commodity and so a postponement for a long time will have as its effect that any subsequent article will not have the impact of contemporaneous reporting;

(5) there already has been some reporting about this litigation in the public domain and any juror could find reports online;

(6) any criminal trial is months away: jurors may have forgotten what they have read, judges will warn them to focus on the evidence;

(7) if there are specific items of evidence which raise concerns, specific orders can be given to deal with them, whether by sitting in private for any aspect or making a finding available only to the parties or excluding it from a public judgment. The claimants would add to this that where appropriate, there could be a limited rather than a blanket reporting restriction.

Discussion

101. The court takes into account these salutary points and expresses its thanks to Mr Farmer and Mr Keegan for their assistance. In my judgment, there has been identified a substantial risk of prejudice in this case to the administration of justice. I do not accept that it is possible satisfactorily to separate out what Mr Marshall QC calls the historic aspects of the case, namely the investigation and execution of the search warrant, from the alleged fraud in the criminal case. The degree of overlap is apparent from the detailed argument in connection with the CP materials. The court rejects the submission at this stage that the matters of overlap between the civil trial and criminal trial are limited to the CP materials. It is much wider than that, as was apparent from considering the pleadings in the witness statements. This judgment is being given after the openings in the case. The feel for the overlap has become more apparent as the court has been introduced in the oral openings by the parties to the evidence in the case. There is a substantial risk that the appreciation of the impact of the overlap will grow as the case progresses. The risk of prejudice is particular to the instant case, and especially because of the risk of members of a jury learning about matters which are not to be a part of the evidence before it. It is also acute because of the degree of overlap

in respect of the evidence in the civil and the criminal cases. Although there can be a narrow definition of issues, in fact, there are broad areas of overlap.

102. It was submitted that there is no substantial risk of prejudice because there has been reporting about earlier proceedings, including two judicial review applications, and also a number of days of an opening and evidence in respect of the case against Mr Mooney and Mr Scrivener. There has been some reporting in the press about that, and I have been shown various articles. It was submitted that the horse has bolted.

103. In my judgment, this is a question of degree. The reporting about those matters is now some time ago. In any event, the impression so far is that those matters were not as newsworthy as the instant trial. Judicial review proceedings are without witnesses and therefore often less newsworthy than where there is live evidence. In this action Mr Pilley himself is expected to give evidence, and in any event, a lot of the evidence concerns Mr Pilley. The concern about publicity is because of the local interest in Mr Pilley, and through him in the people close to him. The unlocking of the stable door is therefore not an answer to the risk of prejudice because there is far more that may come out of this action than has come from the judicial review applications and in the trial against Messrs Mooney and Scrivener.

104. It is submitted that there is no substantial risk because the trial is almost a year away. That goes as to the degree of the risk. In my judgment, that is not so far away as to prevent no substantial risk: it is a question of degree. Without reporting restrictions the matters in this case may still be recalled and cause prejudice. Further, matters may well be reported not just when the witnesses give evidence, but at the various stages thereafter, including around the time of a reserve judgment. For these reasons, the first element of the Sherwood case is satisfied, namely that there is a substantial risk of prejudice.

105. The second element in the Sherwood case is whether a section 4(2) order would eliminate the risk and whether it could be eliminated in other ways. The submission is that the court will ask

jurors if they have read reports and they may be asked not to be impanelled on that basis. The court would give the usual internet warning and ask the jury to try the case on the evidence. All of this is important but, in my judgment, it does not remove the substantial risk to which I have referred. The degree of newsworthiness of this case in the Fylde area which is so close to the Preston Crown Court is such that in my judgment it cannot be satisfactorily overcome by other means.

106. The next question is about the discretion of the court. What is the lesser of the two evils, given the competing two public interests? I take the point about the currency of news, but in my judgment, a postponement is the lesser of the two evils in this case. The court is reluctant to impose such a reporting restriction, bearing in mind the important points made about Article 10 and the various reasons why it is of critical importance in a democratic society that there should be open justice. In my judgment, for all the reasons indicated, the danger to the criminal trial both as regards the four defendants charged and those to be charged outweighs the point of no reporting restrictions.

107. I note that the four defendants are prepared for this matter to go ahead without reporting restrictions, save in respect of the CP materials, but in my judgment the court has to take into account also preserving the ability for the prosecution to take place and for a fair trial thereafter to be possible. Should there, therefore, be a middle way? In my judgment, there is no safe middle way at this stage. I have particular regard to the overlap between the civil and the criminal trial. This is not just a difficulty in definition, but it makes unrealistic a division of the material. That division cannot be obtained either by reference to the CP materials alone or by any other method. Although I make the order for reporting restrictions at this stage, it is a matter which should be kept under review. Circumstances may change as the trial develops, it can be reviewed at the end of the civil proceedings rather than the conclusion of the criminal proceedings. It may be that it can be reviewed in the course of the trial. There should be general liberty to apply to any person affected by this order, which will include the press in the usual way.

108. So for these reasons, although with regret that the application has been made late, the application is in my judgment one which the court must accede to. Being satisfied that there is a substantial risk of prejudice to the administration of justice, it is necessary for the avoidance of that prejudice to make an order postponing publication of a report and to make an order in the terms which I have indicated.

Use of documents obtained on a search warrant

109. As I indicated above, in the course of preparing this judgment, the court wished to receive submissions as to whether the defendant was able to make use of the documents obtained as a result of the search order and, if not, whether the court could consent to its use. It also sought assistance as to how the court's discretion might be exercised on such an application. The court is grateful for the written submissions received from the parties on the evening of Monday, 22 November 2021, supplemented by oral submissions at the end of the openings on 23 November 2021. It appears that the bulk of the documents emanate from the claimants. The attention was drawn to documents which may emanate from the football club.

110. Mr Pilley is a director of some of the claimant companies and a director of the company which owns the football club. It is possible that there is some other person or company whose documents are among what have been called the CP materials. From the information which has been gleaned and without doing an exhaustive search, it seems very likely that the CP materials belong, as to the main part, to the claimants or to companies which are or may be connected with the claimants. It is useful to observe what has happened thus far. I referred earlier in this judgment to correspondence between the parties which took place in 2019. There have been no points taken about the use of the material from the perspective of the possible ownership by third parties. This might be because there are no third parties at arm's length affected. On the contrary, thus far it is the claimants who have taken the lead to procure the defendant to include this material in the disclosure.

111. In a letter dated 13 August 2019, Weightmans for the claimants wrote to Clyde & Co for the defendant, and wrote the following:

"It could not be clearer following the recent Omers decision that the balance of public interest now rests firmly on the side of disclosure of all relevant materials obtained as a result of a criminal investigation. It was also expressly held that the sorts of considerations prayed in aid by your client (including assertions as to the expectation of privacy on the part of witnesses and the fact that materials obtained as part of an investigative process) do not automatically justify restrictions on disclosure or the narrowing of the relevance test under CPR Part 13 (see paragraphs 79 and 83).

"Indeed, Hildyard J noted at 79(3)-(4) that in the context of disclosure between parties to a dispute it would be wrong to apply the rigid test of necessity derived from third party disclosure cases, and that the starting point for disclosability remains relevance. Further, in a party-to-party case, it is only if the party opposing disclosure can point to a 'weighty considerations against disclosure' and the absence of any litigious advantage to be gained by disclosure for the other party which could not be obtained in some other less intrusive way that the court will refuse production (at 79(9)-(10)). Even then, the court should only reach a final decision in this regard after inspecting the underlying material (at 79(11)) and should ordinarily only refuse to order disclosure of relevant documentation where 'the same information is available from another source without disproportionate difficulty' (at 79(12)). It is also instructive to note Hildyard J's recognition (at 83(5)) that investigative material must be looked at as a whole and may not be capable of being fully and fairly understood in part."

112. In response on 27 August 2019, Clyde at first resisted the request. They said:

"In relation to your correspondence dated 13 August, we do not accept your assertions concerning the Omers case and its strict applicability to this action given that your client is currently under investigation by our client. The factual matrix is different to Omers. Until we understand the specifics of your complaint in relation to an absence of disclosure/inspection we reserve our position in respect of its applicability and/or where the balance lies in relation to disclosure. For instance,

there may well be 'weighty considerations against disclosure' [paragraph 11] and/or the court may be persuaded that appropriate protections should be applied to protect privacy and confidentiality..."

113. By a letter dated 30 August 2019, in response, Weightmans wrote saying, among other things: "Our clients have been at pains to stress how the disclosure sought pertains to the issues in dispute. Further, your suggestion that this allegation is demonstrated by our clients allegedly seeking documents already in their possession is a non sequitur, to the extent that our clients already possess that documentation, they will gain no insight or knowledge into the criminal investigation by being redisclosed."

114. This led then to the documents being disclosed in the manner which I have indicated in the chronology referred to above.

The law

115. The parties have assisted the court in relation to the relevant law as to the extent to which documents obtained pursuant to a search warrant can be used in relation to a case outside the criminal case. The search warrants were obtained pursuant to the Police and Criminal Evidence Act 1984 ("PACE") as was held by Dillon LJ in Marcel v Commissioner of Police [1992] (Ch) 225 at 253F to 254E. The purposes for which material seized during a criminal investigation, compulsorily or otherwise under PACE is governed by section 22. This provides that material may be retained so long as is necessary in all the circumstances for use as evidence at a trial for an offence; for forensic examination or for investigation in connection with an offence; and to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence (sections 22(1) to (2)).

116. In the light of this, Dillon LJ approved the view of Sir Nicholas Browne-Wilkinson VC (at 255G to 256D) that:

"Search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy -- fundamental human rights. Where there is a public interest which requires some impairment of those rights, Parliament legislates to permit such impairment. But, in the absence of clear words, in my judgment Parliament cannot be assumed to have legislated so as to interfere with the basic rights of the individual to a greater extent than is necessary to secure the protection of that public interest. In the case of this Act, it is plainly necessary to trench upon the individual's right to his property and privacy for the purpose of permitting the police to investigate and prosecute crime; hence the powers conferred by Part II of the Act. But in my judgment Parliament should not be taken to have authorised use of seized documents for any purpose the police think fit. For example could the police provide copies of seized 2 documents to the Press save in cases where publicity is necessary for the pursuit of their criminal investigations? . . .

"In my judgment, subject to any express statutory provision in other Acts, the police are authorised to seize, retain and use documents only for public purposes related to the investigation and prosecution of crime and the return of stolen property to the true owner."

117. In Marcel it was held that this duty did not preclude the police from giving disclosure of material seized from the plaintiffs to civil proceedings when served with a subpoena by the defendant to those proceedings. This was, however, only because the claimants themselves could have been required to make such disclosure.

118. In the judgment of Sir Richard Slade in the Marcel case there were particular matters that were raised that are quoted in the defendant's note of 22 November 2021 at paragraphs 8-10:

"8. Sir Richard Slade stated (at p.67G-H):

"'In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The use for any other purpose of documents seized in

exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use the for purposes contemplated by the relevant legislation'.

"9. Sir Richard Slade accepted (at p.68E-F), however, that permissible use within the above framework includes 'incidental' use:

Further, the relevant sections [of PACE 1984] would, I think, authorise acts which were reasonably incidental to the pursuit of those primary purposes, thus including in appropriate circumstances the disclosure to third parties of seized documents. In my judgment, however, the Vice-Chancellor's broad description of those primary purposes as "police purposes" (see ante, p. 234G) was a correct one'.

10. Referring to the ruling of the Vice-Chancellor, Sir Richard Slade continued (at p 69B):

[…] the right to insist on the duty of confidence is not an absolute one. Where the enforcement of the duty of confidence comes into conflict with other public interests, the court has to balance the relevant factors to see whether that duty is outweighed by the public interest … In the present case, the duty of confidence is in direct conflict with the public interest in ensuring that all relevant information can be used in evidence in the conflict with the main actions. The question is whether the plaintiff's right to confidence can outweigh that public interest.'

15. Sir Richard Slade continued (at pp 70G-71A):

"'I of course accept that there is a public interest in ensuring a proper observance by the police of the obligation of confidentiality in respect of documents seized under relevant powers. […] I cannot, however, see why that public interest should in all cases and in all circumstances outweigh the public interest in ensuring a full and fair trial on full evidence in cases where the police have seized documents under Part II of the Act of 1984 and wish to use them for the purpose of assisting the

supposed victim of an alleged crime to obtain a fair trial of a claim for damages in a civil case on full evidence. Everything must depend on the circumstances of the particular case'."

119. That approach was endorsed by the Court of Appeal in Preston BC v McGrath [2000] EWCA Civ 151. Having summarised the effect of Marcel, Waller LJ held at page 8 of the report: "(1) that it is to the owner of documents that the police will owe a duty of confidence and who may have a cause of action to prevent that breach of confidence; (2) that duty of confidence is not absolute and there will be circumstances in which in the public interest information can and should be disclosed by the police overriding the duty of confidence owed to the owner; (3) unless they can obtain the consent of the true owners it is best practice for the police to await the receipt of a subpoena before disclosing documents to aid civil proceedings, and best practice to inform the owner before disclosing the same so that the question whether the confidence should be overridden can be considered by the court; and (4) apart from the duty owed to the true owner of the documents the duty of the police is simply a public duty, and any question of acting outside that public duty would be a matter for judicial review."

120. In Crook v The Chief Constable of Essex Police [2015] EWHC 988 at paragraphs 37-41, in appraising whether confidential information and other information acquired in the course of an investigation may be deployed, a public authority may only use it to the minimum extent necessary to achieve a legitimate aim (at paragraph 54). The court was addressed about the case of Omers Administration Corporation v Tesco Plc [2019] EWHC 109 to which reference had been made in the letter of Weightmans of 13 August 2019. In that case there was a whole raft of parties who had documents that had been taken by the SFO, and aware there was a protocol arrived at to enable third parties to make representations about their position.

121. Of application to this case is that in addressing "the issue of public interest confidentiality in the context of the fact that the documents in question were obtained or created under compulsion", Hildyard J noted at paragraph 83:

"(3) The fact that the documents were only brought into existence because of the criminal proceedings, and are only in the possession of the Defendant through […] '"windfall"' disclosure via the DPA process', does not relevantly impact on the question whether their disclosure is, in the events that have happened, 'necessary' for the fair disposition of the proceedings.

"(4) The documents in question undoubtedly are likely to contain material 'necessary for the fair disposal of the action', at the very least in terms of the approved test: the Claimants are likely to gain a litigious advantage by their production, and furthermore, since the Defendant already has the documents in its possession and control the Claimants would suffer an unfair disadvantage if they were denied material documents which the Defendant already has. […]

"(5) […] the SFO Documents forms part of an entire investigative process that must be looked at as a whole and may not be capable of being fully and fairly understood in part. […]

"(6) In such circumstances, the public interest in confidentiality, though usually of particular weight in the context of documents obtained by compulsion, must yield to the public interest in ensuring (to quote Scott Baker LJ in Frankson at [13]) that:

"'as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result'."

The claimants' submission

122. The claimants submit that there has not been identified who is the owner of each of these documents. In the ordinary course, that ought to be done in order to determine how the duties of confidentiality can be dealt with. However, in view of the fact that this matter has only seen the light of day on Monday, 22 November 2021, there is no time to have this process without disrupting an already disrupted trial. It was submitted that the defendant ought to have raised this a long time ago and it is now too late. It was submitted that it was not for the claimants, because the claimants did not believe that the CP materials should be deployed in any event.

The defendant's submission

123. The defendant submits that there is no absolute bar on the use of the documents. There are competing public interests. They submit that the starting point is that there is a general duty of disclosure to the owner of the documents and they quote from the Omers decision that:

"Documents seized by a public authority from a private citizen in the exercise of statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used: see paragraph 88."

124. However, this is not an absolute bar to use of the document in other proceedings. It is necessary to balance the competing public interests. The competing public interest in this case is that set out by Scott Baker LJ in Frankson v Secretary of State for the Home Department [2003] EWCA 655 at paragraph 13 that:

"As far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result."

Discussion

125. In my judgment, on the facts of this case, the use of the materials is in order for the prosecutor to defend itself against very serious allegations which might, at worst, impact on the prosecution. This might be by an abuse of process application or by an application under section 78 of PACE made before the Crown Court judge. In my judgment, the defendant is able to say in these circumstances that it is necessary to use these documents in this civil action for public purposes relating to the very matter for which they obtained the search warrant, namely the investigation and prosecution of crime.

126. From its perspective, and this is highly contentious at this stage, it is necessary to defend the allegations in order to keep the prosecution on track and on the basis of Ms Barton's submissions, it will be running a case to show that the allegations made in the civil proceedings are unmeritorious.

127. The claimants take a polar opposite approach, and they believe that the defendants are seeking to make excuses at best for their own misfeasance and unlawful conduct. In this context, they have submitted that they should not be allowed to make use of documents insofar as they come from third parties.

128. At this stage, the court cannot even reach a provisional view as to whose case will prevail. That is the purpose of having a trial, this civil trial where the court approaches everything with an open mind. However, for the purposes of disclosure the court is, in my judgment, entitled to proceed on the premise that the defendant needs to use these documents in order to defend itself. On its case, it is necessary to permit this course of action in order to have the best prospect of reaching a fair result.

129. As regards the third parties, that is anybody other than the claimants who might be the owners of the documents, on the information before the court if there are parties other than the claimants it is unlikely that there is a third party at arm's length from Mr Pilley which is affected. It may be that there is, but if there is, the way in which that can be accommodated is by liberty to apply to third parties who might be affected to vary this order. It is in my judgment not necessary on the facts of this case to adopt the Omers procedure.

130. I bear in mind in coming to this view that the right to insist on the duty of confidence is not an absolute one, and I bear in mind that the documents are being used by the defendant not only to defend itself against the proceedings but in order to keep its prosecution on track.

131. If it is necessary for the court to give consent in order to do justice between the parties, this is given. The defence of proceedings arises out of the execution of the search warrant. It is a purpose which is either ancillary to the prosecution itself or is so closely related to the same that there is no

question here of collateral use. It is a conclusion which also accords with a number of features in this judgment. It is a conclusion which also accords with the way in which the claimants were looking at the matter in the course of the correspondence of August 2019.

132. As I have found in this judgment, there is a close connection between the civil and criminal proceedings covered by pleadings and evidence. There is the fact that the parties for over a year have been proceeding on the basis that these materials should be disclosed. All of this is consistent with the likelihood that these are documents of the claimants or of companies connected with the claimants. It follows for these reasons that there is no bar to the use of these documents because of some implied undertaking, but if there is any bar, the court gives consent to the use of these documents.

Conclusion

133. For the reasons expressed above, I refuse to exclude the CP materials from the case. I impose the reporting restriction and I do not make any order restricting the CP materials on the grounds of confidentiality.