Neutral Citation Number: [2023] EWCA Crim 6

Case Nos: 202200816 B3, 202202247 B3, 202202248 B3, 202202249 BC, 202202250 B3, 202202252 B3, 202201866 B4, 202201868 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRADFORD
His Honour Judge Burn
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
His Honour Judge Southern

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 January 2023

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE JAY
and
MRS JUSTICE CUTTS

- -

Between:

THE KING (CITY OF YORK COUNCIL)	**Applicant**
- and –	
(1) AUH **(2) BIM** **(3) BNZ** **(4) ABU** **(5) BPC** **(6) AQE**	**Respondents**
THE KING (BIRMINGHAM CITY COUNCIL)	**Respondent**
-and-	
(7) BIY **(8) ARA**	**Applicants**
-and-	
THE LAW SOCIETY OF ENGLAND AND WALES	**Intervener**

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Jonathan Kirk KC, Cameron Crowe and Sabrina Goodchild (instructed by **Weightmans)** appeared on behalf of **The City of York Council**
Nina Grahame KC and Charlotte Atherton (instructed by **Keith Dyson Solicitors**) for the **Second Respondent**
Richard Kovalevsky KC and Charlotte Ritchie (instructed by **Cohen & Gresser LLP**) and **Jonathan Ashley-Norman KC and Mandip Kumar, Solicitor Advocate** (instructed by **Precedence Law**) for the **Third Respondent**
The First, Fourth, Fifth and Sixth Respondents were neither present nor represented

Richard Barraclough KC and Joseph Millington appeared on behalf of **Birmingham City Council**
Sallie Bennett-Jenkins KC and Daniel Chadwick (instructed by **Edward Fail, Bradshaw & Waterson**) for the BIY
Lewis MacDonald (instructed by **Edward Fail, Bradshaw & Waterson)** for ARA

The Intervener filed written submissions

Hearing date: **3 November 2022**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Burnett of Maldon CJ:

1. The background to these two appeals against rulings made in preparatory hearings has been set out in the court's judgment handed down on 9 August 2022 (Lord Burnett of Maldon CJ, Jeremy Baker and Cutts JJ) ([2022] EWCA Crim 1113). Both cases arise from alleged criminality which is said to comprise consumer offences under paragraph 46(2) of Schedule 5 to the Consumer Rights Act 2015 ("the CRA 2015"). The Court ruled that paragraph 46(1) of schedule 5 to that Act confers power upon a local authority to prosecute consumer offences irrespective of a connection with its area. That was the first of the issues said to arise in these appeals.

2. The parties have identified six further issues, some of which are conditional on the outcome of others:

   (1) Do the indicted offences of money laundering and conspiracy to defraud qualify as consumer offences under paragraph 46(2)(d) of schedule 5 to the CRA 2015 by virtue of "originating from an investigation into" a consumer breach?

   (2) Was Birmingham required by section 401(2)(b) of the Financial Services and Markets Act 2000 ("FSMA 2000") to obtain the Director of Public Prosecution's consent before prosecuting the charge of illegal moneylending under that Act?

   (3) Was HHJ Burn's indication in the York case requiring the prosecution to elect between conspiracy to defraud and money laundering charges in relation to BIM (a) an appealable ruling, and if so (b) correct?

   (4) Was the agreement between Bristol and York under section 101(1)(b) of the Local Government Act 1972 ("the LGA 1972") sufficient to give York jurisdiction to prosecute counts 1 to 3?

   (5) Does York have jurisdiction to prosecute counts 4 to 7 by reason of satisfying the expediency test under section 222 of the LGA 1972?

   (6) Does the Court have jurisdiction to consider the substantive issue raised by BNZ's cross appeal on reserved legal activity and if so, did the prosecutor engage in reserved legal activity under Part 3 of the Legal Services Act 2007 ("the LSA 2007") so as to (a) render the indictment a nullity, or (b) result in an abuse of process?

3. If the answer to the first issue is "yes", the fourth and fifth issues do not arise. The sixth issue only arises if, by whatever route, we were to conclude that York has jurisdiction to prosecute the indicted offences.

4. As before, no written report of either the preparatory hearings or these proceedings shall be published until the conclusion of the trial of the accused. We will consider in the light of written submissions whether this judgment, in whole or redacted, can be published.

5. For present purposes all that need be stated about the features of the cases is that the York indictment alleges the offences of conspiracy to defraud, contrary to common law, and of money laundering, contrary to sections 327(1) and/or 328(1) of the Proceeds of Crime Act 2002 ("POCA 2002"). The Birmingham indictment alleges the

offences of operating an unlicensed consumer credit business, contrary to section 39(1) of the Consumer Credit Act 1974 ("the CCA 1974"), of unauthorised moneylending, contrary to section 23(2) of FSMA 2000, and of money laundering, contrary to section 327(1) and/or 329(1) of POCA 2002.

The First Issue: Meaning of Consumer Offences

Statutory Provisions

6. Paragraph 46 of schedule 5 to the CRA 2015 provides:

> "46(1) A local weights and measures authority in England or Wales may bring proceedings for a consumer offence allegedly committed in a part of England or Wales which is outside that authority's area.
>
> (2) In sub-paragraph (1) "a consumer offence" means—
>
> (a) an offence under legislation which, by virtue of a provision listed in paragraph 10 of this Schedule, a local weights and measures authority in England or Wales has a duty or power to enforce,
>
> (b) an offence under legislation under which legislation within paragraph (a) is made,
>
> (c) an offence under legislation listed in the second column of the table in paragraph 11 of this Schedule in relation to which a local weights and measures authority is listed in the corresponding entry in the first column of the table as an enforcer,
>
> (d) an offence originating from an investigation into a breach of legislation mentioned in paragraph (a), (b) or (c), or
>
> (e) an offence described in paragraph 36 or 37 of this Schedule."

7. The offences under sub-paragraphs (a) to (c) do not include conspiracy to defraud and money laundering. They do not fall under sub-paragraph (e) because paragraph 36 covers offences of intentionally obstructing an officer, withholding information and giving materially false information, and paragraph 37 creates an offence of purporting to act as an officer. It follows that, for conspiracy to defraud and money laundering to be within the scope of paragraph 46(2), the only viable candidate is sub-paragraph (d).

8. There was some discussion as to whether "an offence" means the completed offence in the sense that it must be proved to have taken place. In our judgment, paragraph 46(2) serves to identify offences with reference to a list (sub-paragraphs (a), (b), (c) and (e)) or in terms of possessing certain defining features. In context, the power to investigate is triggered if the offence in question is suspected, and the power to prosecute may arise if the local authority determines both that sufficient evidence exists to warrant proceeding and that it is in the public interest to do so.

9. The point was made on behalf of the respondents that the CRA 2015 is a consolidating Act. That may be true of certain of its provisions, as the Explanatory Notes make clear, but paragraph 46 of schedule 5 is an entirely new provision. The intention behind it was to free the prosecution of consumer offences from the constraints of requiring those responsible to satisfy the requirement of local expediency under section 222 of the LGA 1972.

10. This part of the CRA 2015 also reflected the enhanced role of local weights and measures authorities in view of what has been described by Government as "new and emerging trading environments". By way of example, the House of Commons Report published in 2010, leading to the enactment of the CRA 2015, referred to:

> "pressure selling … [and] mass market scams, counterfeiting, … [and] new forms of scams such as credit card fraud, chip and pin fraud, and e-mail scams [which] are constantly changing and evolving."

11. No doubt Parliament had in mind the obvious consideration that consumer "scams" could constitute a wide range of offending, not all of which has been specifically itemised in what was to become schedule 5.

The Judgments

12. It is common ground in both cases that the indicted offences were discovered by relevant investigations into consumer breaches: in York, of the Consumer Protection from Unfair Trading Regulations 2008 ("the Unfair Trading Regulations"); and in Birmingham, of section 161 of the CCA 1974. At first instance, both York and Birmingham proposed a broad interpretation of paragraph 46 of schedule 5: any offence *disclosed by* an investigation qualifies. The defendants proposed a narrower construction: only offences *connected to the conduct* of an investigation – that is, public justice offences committed against the investigation – suffice.

13. In the York case HHJ Burn favoured the defendants' narrower interpretation of paragraph 46(2)(d), for three reasons.

(1) It best reflects the ordinary sense of the words "originate from", which according to the *OED* mean *have as its origin*. The offence must be generated, not merely revealed, by the investigation. This can only be the case if it relates to the conduct of the investigation.

(2) The broader reading would undermine the logic and coherence of paragraph 46(2). If any offence disclosed by a consumer investigation qualifies, why not replace (a) to (d) with a single definition such as "any offence disclosed by an investigation into offences listed in…"? Since the kinds of offences disclosed by consumer investigations would typically fall under (a) to (c) anyway, why not refer in (d) to "any *other* offence" to avoid duplication? And if the power granted by (d) really is so far-reaching, surely it warrants its own sub-paragraph separate to 46(2)?

(3) The broader reading would have the unpalatable consequence of transforming local authorities into national prosecution services capable of charging any offence across England and Wales – even murder – so long as the offence was

discovered in the course of a consumer investigation. This absurd and alarming arrangement would be inconsistent with the National Trading Standard's devolved regional structure.

14. In the Birmingham case, however, HHJ Southern favoured the broader construction, also for three reasons.

(1) Contrary to the narrow linguistic analysis, any offence discovered by an investigation does *have its origins in* that investigation. This is because the impugned conduct only becomes regarded as an "offence" under the investigative glare. Thus the "offence" is spawned by the investigation.

(2) The addition of subparagraph (d) to subparagraphs (a) to (c) evinces a deliberate intention to include offences which would not otherwise typically fall under a consumer investigation.

(3) Money laundering flows so naturally from many consumer offences that it would be absurd to suppose that Parliament intended to empower local authorities to prosecute the offences listed under subparagraphs (a) to (c) while leaving them impotent in respect of any ancillary laundering of the proceeds.

The Arguments

15. Mr Jonathan Kirk KC for York refined the submission that he had advanced at first instance and contended that paragraph 46(2)(d) should be construed "as applying to an offence originating from the consumer breaches that were investigated". In other words, an offence falls within the meaning of the provision if it "originates from" the *subject matter* rather than the *conduct* of a relevant investigation. This construction is achieved by reading the words "investigation into a breach" to include the factual circumstances under investigation. Mr Kirk submitted that this interpretation accords with the purpose of the provision identified in the pre-legislative materials. That is to tackle national consumer scams and fraud. He submitted that it seems inconceivable that Parliament intended to exclude consumer-oriented fraud and money laundering from the ambit of paragraph 46. Mr Kirk further argued that HHJ Burn's narrow interpretation is inconsistent with the drafting of paragraph 46. Subparagraph (2)(d) would be otiose if confined to offences committed in obstruction of an investigation, since subparagraph (2)(e) already designates the obstruction offences listed in paragraphs 36 and 37 of schedule 5 as "consumer offences".

16. Mr Richard Barraclough KC for Birmingham adhered to the slightly broader approach that was advanced below, contending that HHJ Southern's judgment was "impeccable" in all material respects. Thus, further offences discovered during the course of a relevant investigation were encompassed by the sub-paragraph. Mr Barraclough's emphasis was on criminal conduct "inextricably linked to" or "derived from" consumer offending. Many of the same arguments were marshalled against a narrow reading of the provision. Mr Barraclough additionally highlighted the inefficiencies that would result if the Crown Prosecution Service were required to launch separate prosecutions to charge the laundering of consumer offence proceeds. He argued that, although on this wider approach there was nothing to prevent a local authority prosecuting serious crimes such as blackmail, assault and rape provided that they are disclosed by an investigation into the listed consumer offences and are linked

to them, concerns about empowering local authorities to proceed in this way are misguided. Local authorities already enjoy a power to prosecute any offence, subject ordinarily to local connection, under section 222 of the LGA 1972 and in practice they may defer to the CPS when appropriate. Moreover, it is unrealistic to suppose that the broader construction of paragraph 46 would transform local authorities into national prosecution services because the scope of investigations under CRA 2015 is narrowly circumscribed by paragraph 19 of Schedule 5.

17. Ms Nina Grahame KC for BIM adopted HHJ Burn's analysis in full, arguing that "paragraph 46(2)(d) applies only to offences committed in connection with an ongoing investigation (for instance obstruction-type offences)". She submitted that York's expansion of the term "investigation" to include "what was investigated" distorts the plain meaning of the word seen in its proper context. Ms Grahame KC invited us to consider the location of sub-paragraph (d) within paragraph 46(2) as significant. She submitted that it was part of the "reactive" provisions which also include sub-paragraph (e). Those contrast with sub-paragraphs (a) to (c) which set out the parameters of the primary offences with which paragraph 46(2) is concerned. She submitted that sub-paragraph (e) is there for reasons of clarity. Finally, she argued that on Birmingham's approach a local authority was being conferred with exorbitant powers which fell outside its competence and constitutional ambit.

18. Ms Sallie Bennett-Jenkins KC for BIY advanced similar arguments in support of HHJ Burn's approach. But she diverged slightly from Ms Grahame KC's submission on the reasons lying behind the enactment of sub-paragraph (e). Her point was that this provision served a "real purpose" in that it identified two specific matters which she said were not wholly covered by sub-paragraph (d).

Discussion

19. We are unable to accept an interpretation of paragraph 46(2)(d) which insists that the offence must have its origins in the manner or conduct of the investigation, narrowly viewed, rather than anything that may be under investigation. Such a construction fails to take account of the wording of the provision as a whole and suffers from the problem, contrary to Ms Bennett-Jenkins KC's submission, that it leaves sub-paragraph (e) with no purpose

20. An examination of where sub-paragraph (d) falls in paragraph 46(2) does not assist. Sub-paragraph (e) is "reactive" in the sense suggested by Ms Grahame KC but that is a neutral factor in deciding whether sub-paragraph (d) is its companion.

21. Furthermore, the point has been well made, in particular by HHJ Southern, that the narrow interpretation achieves an absurd result. Moneylending is a listed offence, and capable of prosecution by a weights and measures authority but the money laundering which is undoubtedly designed and intended to siphon off and conceal the fruits of the primary offence is not.

22. The correct starting point in a case such as the present is to respect the language Parliament has used and to consider the provision as a whole within the entire statutory scheme in the light of its evident purposes.

23. In *Hurstwood (A) Properties Ltd v Rossendale Borough Council and another* [2021] UKSC 16; [2022] AC 690 at [16] Lords Briggs and Leggatt JJSC, giving the judgment of the Court, stated:

> "Both interpretation and application share the need to avoid tunnel vision. The particular charging or exempting provision must be construed in the context of the whole statutory scheme within which it is contained. The identification of its purpose may require an even wider review, extending to the history of the statutory provision or scheme and its political or social objective, to the extent that this can reliably be ascertained from admissible material."

24. The language of Paragraph 46(2)(d) is capable of more than one feasible interpretation, but in our view, Mr Kirk was correct to submit that the phrase "an investigation into a breach of legislation etc." is apt to accommodate the subject-matter of that investigation, that is to say, what is being investigated. The adjectival phrase "originating from" requires there to be some sort of connection between the particular consumer offence or offences being investigated and the further offence or offences which are revealed by the facts and matters being investigated. In this way, an investigation into alleged breaches of the Unfair Trading Regulations may reveal that what may be described as typical consequential offences – for example, money laundering – have been committed. Equally, an investigation into moneylending may reveal that violence or intimidation has been used or threatened to enforce repayment: that would also be within scope as originating from the underlying offence. Conversely, an identical investigation which revealed unconnected offending (e.g., interrogation of a mobile phone revealing photographs of child cruelty) would not be within scope.

25. Our conclusion that Mr Kirk's submission is correct is reinforced by considering where the alternative, narrow interpretation leads (that is to say, to absurdity) and by considering the wider policy and social objectives of this provision. We agree that it would have been obvious to Parliament that consumer offences did not notionally stop at those listed in sub-paragraphs (a) to (c), although these represent the paradigm examples. Conspiracy to defraud and money laundering offences did not find their way into the schedule 5 lists for the straightforward reason that they are not always consumer offences. They may acquire that characteristic if linked to a listed offence in the sense explained.

26. For these reasons, we conclude that both York and Birmingham did have power to prosecute the offences at issue under paragraph 46(2)(d) of schedule 5 to the CRA 2015.

27. In those circumstances, the fourth issue (section 101(1)(b) LGA 1972) and fifth issue (expediency under section 222 LGA 1972) do not arise.

The Second Issue: Consent of the Director of Public Prosecutions

28. The charge of illegal moneylending contrary to section 23(1) of FSMA 2000 is "enforcer's legislation" for the purposes of paragraph 11 of schedule 5 to the CRA 2015 because it "relates to a relevant regulated activity within the meaning of section

107(4)(a) of the Financial Services Act 2012 ["the FSA 2012]". Thus, it is not in dispute that this offence falls under paragraph 46(2)(c) and the issue is the narrower one of whether the consent of the DPP is required to prosecute under section 401(2) of FSMA 2000.

29. We are satisfied that the DPP's consent is not required. The point is a straightforward one but calls for some exploration of the legislation.

30. Before 31 March 2014, illegal moneylending (i.e. the lending of money without a licence from the Office of Fair Trading) was an offence contrary to section 39 of the CCA 1974. By section 161 of the same Act, local authorities had a duty to prosecute such offences and the consent of the DPP was not required.

31. FSMA 2000 came into force on 18 June 2001. It established the Financial Services Authority ("the FSA"). At that stage, illegal moneylending continued to be an offence contrary to section 39 of the CCA 1974 and local authorities continued to prosecute these offences on the same basis.

32. Section 401 of FSMA 2000 provides:

> "**401 Proceedings for offences.**
>
> (1) In this section "offence" means—
>
> (a) an offence under this Act,
>
> (b) an offence under subordinate legislation made under this Act, or
>
> (c) an offence under Part 7 of the Financial Services Act 2012 (offences relating to financial services).
>
> (2) Proceedings for an offence may be instituted in England and Wales only—
>
> (a) by the appropriate regulator or the Secretary of State; or
>
> (b) by or with the consent of the Director of Public Prosecutions.
>
> …"

33. At this stage, section 401 did not apply to the offence of illegal moneylending because, as we have said, it remained an offence under the CCA 1974.

34. On 24 January 2013 the FSA 2012 inserted a new part 1A into FSMA 2000, and at the same time the FSA became the Financial Conduct Authority. The functions of the Office of Fair Trading were transferred to the latter.

35. Section 107 of the FSA 2012 provided:

"**107 Power to make further provision about regulation of consumer credit**

(1) Subsection (2) applies on or at any time after the making, after the passing of this Act, of an order under section 22 of FSMA 2000 which has the effect that an activity (a "transferred activity")—

(a) ceases to be an activity in respect of which a licence under section 21 of CCA 1974 is required or would be required but for the exemption conferred by subsection (2), (3) or (4) of that section or paragraph 15(3) of Schedule 3 to FSMA 2000, and

(b) becomes a regulated activity for the purposes of FSMA 2000.

(2) The Treasury may by order do any one or more of the following—

(a) transfer to the FCA functions of the OFT under any provision of CCA 1974 that remains in force;

(b) provide that any specified provision of FSMA 2000 which relates to the powers or duties of the FCA in connection with the failure of any person to comply with a requirement imposed by or under FSMA 2000 is to apply, subject to any specified modifications, in connection with the failure of any person to comply with a requirement imposed by or under a specified provision of CCA 1974;

…

(g) provide for any provision of sections 162 to 165 and 174A of CCA 1974 which relates to—

(i) the powers of a local weights and measures authority in Great Britain or the Department of Enterprise, Trade and Investment in Northern Ireland in relation to compliance with any provision made by or under CCA 1974,

…

to apply in relation to compliance with FSMA 2000 so far as relating to relevant regulated activities, in relation to the commission or suspected commission of a relevant offence or in relation to things done in the exercise of any of those powers as applied by the order;

> (h) enable local weights and measures authorities to institute proceedings in England and Wales for a relevant offence;
>
> …
>
> (4) In subsection (2)(g) to (i)—
>
> (a) "relevant regulated activity" means an activity that is a regulated activity for the purposes of FSMA 2000 by virtue of—
>
> (i) an order made under section 22(1) of that Act in relation to an investment of a kind falling within paragraph 23 or 23B of Schedule 2 to that Act, or
>
> (ii) an order made under section 22(1A)(a) of that Act;
>
> (b) "relevant offence" means an offence under FSMA 2000 committed in relation to such an activity.
>
> …
>
> (7) In exercising their powers under this section, the Treasury must have regard to—
>
> (a) the importance of securing an appropriate degree of protection for consumers, and
>
> ..."

36. Section 39 of the CCA 1974 was repealed by subordinate legislation made under FSMA 2000 with effect from 1 April 2014. Illegal moneylending became an offence contrary to section 23 of FSMA 2000 on the same day and a "relevant offence" for the purposes of section 107(4)(b) of the FSA 2012.

37. It may be seen that section 107(2)(h) of the FSA 2012 conferred a specific power on the Treasury to enact secondary legislation enabling local weights and measures authorities to prosecute "relevant offences", including offences for illegal moneylending under FSMA 2000.

38. The Financial Services Act 2012 (Consumer Credit) Order 2013 (2013 SI No 1882) ("the 2013 Order") provides, by Article 9:

> "Local weights and measures authorities may institute proceedings in England Wales for a relevant offence."

39. The contention that section 401(2) of FSMA applies to local authorities is misconceived. Before 1 April 2014 this provision did not apply to local authorities (section 39 of the CCA 1974 did) and after that date this provision does not apply (Article 9 of the 2013 does). The purpose of this latter provision is to enable such authorities to continue to do what they had done for decades: to prosecute illegal

moneylending. They were never subject to any requirement to obtain the DPP's consent.

40. Accordingly, and approaching this question first without reference to authority, we do not accept the submission that section 401(2) has any relevance to the present case.

41. There is authority which is almost precisely on point. In *R v Rollins* [2010] UKSC 39; [2010] 1 WLR 1922, the Supreme Court addressed the power of the FSA to prosecute money laundering offences under POCA 2002. It was argued on appeal that this power was subject to section 401(2) of FSMA, and that section 402 (which we need not set out) supplied an exhaustive list of other offences the FSA could properly prosecute without the DPP's consent.

42. Giving the judgment of the Supreme Court, Sir John Dyson JSC held that it was relevant that prior to the enactment of FSMA the FSA had had the power of a private individual to bring any prosecution which fell within the scope of its memorandum and articles of association and was not otherwise precluded (paragraph 11). The purpose of section 401(2) was not to confer the power to prosecute but to limit the persons who may prosecute for such offences (paragraph 15). Furthermore, this provision read in conjunction with section 402(1) should not be interpreted as establishing an exhaustive code delimiting the FSA's power to prosecute, still less as providing that unless an offence was expressly stipulated in the latter section the DPP's consent was required (paragraphs 17 to 20)

43. Sir John Dyson set out the overall position at [21]:

> "So what purpose is served by section 402(1)? It is necessary to consider each paragraph separately. In order to understand the reason for section 402(1)(a), regard must be had to section 61 of the Criminal Justice Act 1993 which provides for penalties and prosecutions in relation to the offence of insider dealing. Section 61(1) specifies the maximum penalties that may be imposed. Section 61(2) provides that proceedings for offences under this Part shall not be instituted in England and Wales except by or with the consent of the Secretary of State or the DPP. The effect of section 402(1)(a) and (2) in relation to prosecutions for insider dealing by the FSA is twofold. First, where a prosecution for the offence is instituted by the FSA, the need for the consent of the Secretary of State or DPP is dispensed with. It was correctly held by the Divisional Court in *R (Uberoi and another) v City of Westminster Magistrates' Court* [2009] 1 WLR 1905 at para 29 that the effect of section 402(1)(a) is that the FSA can prosecute offences of insider dealing without first obtaining consent of the Secretary of State or the DPP. Sir Anthony May P reached this conclusion by construing "may institute" in section 402(1) as having the same meaning as "may be instituted by" in section 401(2). But the better view is simply that the effect of the plain language of section 402(1)(a) is to dispense with the requirement for consent imposed by section 61(2) of the 1993 Act. Secondly, in prosecuting for this (and any other offence under section

> 402(1)), the FSA must comply with any conditions or restrictions imposed in writing by the Treasury."

44. *Rollins* does not provide a complete answer to this issue because we are not addressing the scope of section 402. However, if anything, the instant case is stronger because the argument that the relevant sections of FSMA provide a complete code is inapplicable to the present situation. The source of the power to prosecute resides in separate legislation setting out the *vires* for secondary legislation covering any "relevant offence", of which moneylending is clearly an example. As in *Rollins*, that separate prosecutorial power is not subject to the express constraint of section 401(2).

45. If ambiguity were thought to exist, Mr Barraclough draws attention to the Explanatory Note on section 107(2) of the FSA 2012: see the principle set forth in *R (D and another) v Secretary of State for Work and Pensions* [2010] 1 WLR 1782, at paragraphs 44 to 51. We are satisfied that there is no ambiguity surrounding the true construction of this provision, but had we come to a different view it may be pointed out that the Explanatory Note makes clear, from the perspective of the sponsoring government department at least, that weights and measures authorities may prosecute in this domain without the DPP's consent.

46. It follows that the second issue must be resolved in favour of Birmingham.

The Third Issue: HHJ Burn's "Indication" in the York Case

47. By section 31(3)(c) of the Criminal Procedure and Investigations Act 1996 ("the CPIA") a judge at a preparatory hearing may make a ruling on a question as to the severance or joinder of charges.

48. By section 35(1) of the CPIA an appeal shall lie to the Court of Appeal from any ruling of a judge under section 31(3) of the Act but only with the leave of the judge or the Court of Appeal.

49. It follows that the judge must have made a ruling on an issue under section 31(3) before this court has any jurisdiction to hear an appeal. The question arises in this case as to whether the judge made a ruling in the preparatory hearing that the prosecution should elect between the conspiracy to defraud counts (1 and 4) on the one hand and the money laundering counts (3, 5 and 6) on the other in respect of BIM, and that he would order severance of the counts if they did not.

The issue at the Preparatory Hearing

50. At the end of his judgment following the preparatory hearing HHJ Burn said this:

> "There was some discussion about whether any exercise of my powers as trial judge to put the prosecution to an 'election' as to whether they proceed on one set of counts or the other, or to invite the prosecution to proceed on the conspiracy counts only on the basis that the money laundering counts in reality add nothing, were properly a matter to be dealt with in this preparatory hearing. As the authority of *R v G* [2015] UKSC 24 suggests that is more a matter for an indication by the court

> rather than a matter of fact finding or legal ruling. It was generally agreed that these matters should be ventilated because it may affect the shape of the case. Whether that makes it a matter for appellate scrutiny is for others to decide."

51. The judge said that he would first express his *views* as trial judge as to the utility or otherwise of the money laundering counts and second add *a few comments* about their possible effect upon the task of any jury and upon the structure, length and coherence of the case.

52. The judge went on to analyse the cases of both the prosecution and the defence for BIM on this matter and agreed with the general contention of the defence that the prosecution should elect to try her either as a co-conspirator on the conspiracy to defraud charges or as the partner of a co-defendant who suspected that the deposits into their bank accounts were from his criminal activity. He said he took the view that the money laundering counts added nothing to the ability of the court to sentence BIM appropriately should she be convicted of the fraud offences.

53. He concluded that:

> "I would therefore give a firm indication – I do not believe that I can make any order – in accordance with *R v GH* as outlined by Lord Toulson, to invite the Prosecution to proceed under counts 1 and 4 only (or alternatively counts 2,3,5,6 and 7) as regards BIM. Although not possibly fashionable the possibility of preferring counts of handling or receiving stolen goods remains if that is truly the prosecution's case against her."

54. Although counts 2 and 7 were mentioned by the judge, BIM was not charged with those offences.

55. He cited Lord Toulson's view that it was unlikely that the prosecution would fail to respect the view of the court in giving the indication which he had given. Should they fail to do so in this case the judge said:

> "… there are some further observations which I add below; these may be relevant to <u>whether the court</u> <u>should</u> exercise the case management powers, which it certainly has, to order separate trials of the conspiracy counts and the money laundering counts." (Our emphasis)

56. The judge set out his concerns about the prosecution proceeding on both counts as in his view the scale of the money laundering charges was much greater than the evidence which supports the conspiracy. He expressed concern that the trial would become unmanageable if the Prosecution proceeded with them. However, he did not come to a final view on this matter, saying this was not least because he was not sure that the potential complexities of a trial on all counts had been fully addressed by counsel on both sides.

The Issue at the Permission Hearing

57. The judge handed down his judgment covering all the issues argued before him on 4 March 2021. He indicated that he was minded to give permission to appeal in relation to the issues which had been raised. On 8 March 2022, a hearing took place to determine whether he should give permission to appeal in connection with the form of the indictment.

58. At that hearing the prosecution argued, as before us, that the judge had effectively given a ruling on the issue by ordering the prosecution to consider and elect on the counts faced by BIM and saying that if they did not the sanction was likely to be an order severing the indictment. The defence submitted, as before us, that he did no more than give an indication under his case management powers. There was no ruling and nothing therefore to appeal.

59. The judge said that he had adopted the terminology of Lord Toulson in *R v GH*. Lord Toulson speculated about the consequences of failing to elect between charges following an indication by a judge. The judge said he would have had the power under section 31 to make an order. "In all other respects" what he said would have to be characterised as a ruling. He gave permission to appeal but indicated that if he were wrong about that then the Court of Appeal would put him right.

Conclusion

60. We respectfully depart from the judge's final view that he gave a ruling about the prosecution's need to elect between the counts faced by BIM. On the contrary, the language he used invited the prosecution to consider whether they should elect but had expressly made no order or ruling on the matter.

61. Nor did the judge rule that should the prosecution disagree with his indication he would order severance. He expressly offered some observations about the future conduct of the trial and his concerns about manageability if no election was made but was clear in his language that he had come to no final view on the matter and may need to hear further submissions.

62. In those circumstances we consider Ms Grahame KC correct in her submission that the judge gave an indication under his case management powers rather than a ruling. The prosecution was being encouraged to elect but he had made no final decision about what he would do should they refuse to do so. The judge was right in his assertion at the permission hearing that he could have made a ruling under section 31(3) of the CPIA but he did not do so. It follows that this Court has no jurisdiction to hear this issue which remains live and which remains to be resolved by the trial judge after hearing full argument.

The Sixth Issue: Reserved Legal Activity and its consequences

The Judge's Ruling

63. The judge accepted the submission made on behalf of AQE that Colin Rumford, the Head of Regional Investigations at City of York Council, was not qualified to conduct the proceedings on behalf of the prosecutor in the Crown Court for the purposes of the Legal Services Act 2007. He rejected the further submission that, in consequence, the proceedings in the Crown Court were a nullity. He also declined on that account to

stay the proceedings in the Crown Court as an abuse of process. BNZ appeals against the judge's refusal to stay or otherwise terminate the proceedings. York submits that the judge's ruling that Mr Rumford was not an exempt person for the purpose of conducting the proceedings in the Crown Court was wrong and seeks to uphold his ruling on this issue on that additional basis.

64. We received written submissions on behalf of the Law Society touching on some aspects of this issue which emphasise the importance in the public interest of adherence to the statutory scheme governing the regulation of legal services, including the conduct of litigation.

Jurisdiction of the Court of Appeal to Hear an Appeal

65. No point on jurisdiction to hear this aspect of the appeal was originally taken by York. The Registrar drew the parties' attention to the decision of the House of Lords in *R v H* [2007] 2 AC 270 in which the scope of both preparatory hearings and appeals from such hearings were considered. The statutory scheme under scrutiny was the predecessor of that found in the CPIA but it was almost identical in respects material to the question of whether an appeal lies. For present purposes, both schemes require there to have been a determination or ruling "on a question of law". The parties developed arguments on the question whether this matter could be the subject of an appeal. They addressed the issue whether the ruling relating to Mr Rumford determined a question of law for the purposes of section 31(3) of the CPIA and in consequence whether the Court of Appeal had jurisdiction to consider an appeal pursuant to section 35.

66. In *R v H* the Committee was divided on one of the substantive questions before it. That was whether the application for disclosure in issue could be determined as *part* of a preparatory hearing or merely at the *same time* as a preparatory hearing. Lords Nicholls of Birkenhead and Scott of Foscote favoured the first approach but the majority (Lords Hope of Craighead, Rodger of Earlsferry and Mance) the second. That difference does not affect the question before us. Nonetheless, all five Law Lords agreed that the disclosure ruling in question did not "determine" a "question of law relating to the case". The words just quoted come from section 9 of the Criminal Justice Act 1987. They agreed that there was no determination of a question of law but rather an orthodox evaluation of factual matters resulting in the decision on disclosure. Therefore, an appeal did not lie to the Court of Appeal under the legislation governing preparatory hearings. The language is the same in section 31(3) of the CPIA save that the word "determine" has been replaced by "make a ruling as to". We heard no argument on whether that change has made a difference to the statutory scheme but, in any event, are satisfied that for the purposes of this appeal it is immaterial.

67. In our view HHJ Burn's consideration of the way in which York conducted the proceedings in the Crown Court and the consequences of Mr Rumford's lack of legal qualifications involved his making a ruling on questions of law relating to the case. Whilst it was common ground factually that Mr Rumford is neither a solicitor nor a barrister with rights to conduct litigation, the judge determined a question of law, namely whether he was nonetheless an "exempt person" for the purposes of Paragraph 2(4) of schedule 3 to the LSA 2007. Having concluded that he was not an exempt

person, the consequences which flowed from that required the judge to determine questions of law relating to nullity and abuse. The appeal is competent.

Mr Rumford and the Statutory Scheme

68. The main purpose of Mr Rumford's role, as recorded in his job description, is "to lead a grant funded trading standards investigation and enforcement team to tackle the complex cases of consumer fraud perpetrated on a regional and national basis." He was in overall charge of the investigations with which the York case is concerned and ran the case on their behalf in both the Magistrates' and Crown Courts.

69. The conduct of litigation is a "reserved legal activity" for the purposes of Part 3 of the LSA 2007: section 12(1)(b). Paragraph 4(1) of schedule 2 defines "conduct of litigation" as meaning "(a) the issuing of proceedings before any court in England and Wales, (b) the commencement, prosecution and defence of such proceedings, and (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)." Paragraph (2) excludes from "conduct of proceedings" any activity "in relation to any particular court or in relation to any proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry out that activity." York does not rely upon that caveat. They do not suggest that there were no restrictions on those who could conduct litigation in the Crown Court.

70. Section 13(1) of the LSA 2007 provides that "the question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act." Section 13(2) provides that a person is entitled to carry on a reserved legal activity when he is authorised to do so or is an exempt person in relation to that activity. Schedule 4 identifies approved regulators and specifies the reserved legal activities they may authorise. Those relevant to litigation in the Crown Court are the Law Society and the General Council of the Bar. An "authorised person" for the purposes of section 18 is someone authorised by the relevant regulator. Paragraph 2 of schedule 3 determines who is an "exempt person" for the purposes of conducting litigation. Sub-paragraph (2) recognises that a court may grant the right in relation to specific proceedings and sub-paragraph (3) recognises rights conferred by other legislation. Sub-paragraph 4 provides:

> "(4) The person is exempt if the person—
>
> (a) is a party to those proceedings, and
>
> (b) would have a right to conduct the litigation, in the person's capacity as such a party, if this Act had not been passed."

71. It is this provision upon which York relies for authority for Mr Rumford to conduct the litigation in the Crown Court.

72. There is an express statutory provision which authorised Mr Rumford to act for York in the Magistrates' Court and to conduct the litigation there. Section 223(1) of the LGA 1972 provides:

> "Any member or officer of a local authority who is authorised by that authority to prosecute or defend on their behalf, or to appear on their behalf in, proceedings before a magistrates' court shall be entitled to prosecute or defend or to appear in any such proceedings, and, to conduct any such proceedings."

The words "to conduct any such proceedings" were inserted by paragraph 28 of schedule 21 to the LSA 2007.

73. Mr Rumford initiated the proceedings on behalf of York in the Magistrates' Court by laying an information which resulted in summonses being issued. He conducted the proceedings in the Magistrates' Court which were sent on 9 October 2020 for trial in the Crown Court. No complaint can be made about the initiation of these criminal proceedings nor the way in which they were conducted by Mr Rumford on behalf of the prosecutor, York, in the Magistrates' Court. Nor can any complaint be made about the sending of the case to the Crown Court for trial. The proceedings reached the Crown Court in an entirely regular way untainted by any irregularity.

Analysis and Discussion

Conduct of Litigation

74. The first question is whether Mr Rumford was conducting the litigation in the Crown Court on behalf of York. Both in argument below and before us there was a tendency to describe Mr Rumford as "the prosecutor" but that is not strictly correct. York was the prosecutor, authorised by statute. There are many statutory prosecutors, not least the Director of Public Prosecutions. A private prosecution may be brought by an individual or a corporation. In such cases the individual or corporation is the prosecutor even if acting through approved professionals or, when allowed by statute or rules, when the body corporate acts or appears through a director or employee.

75. The arguments before the judge centred around the circumstances in which the draft indictment, drafted by counsel, was circulated by Mr Rumford in October 2020 and served by him on the Crown Court officer by email on 12 November 2020 in accordance with rule 10(4)(2) of the Criminal Procedure Rules ("CrimPR"). It was later redrafted and preferred by counsel in a hearing on 4 January 2022. The defendants were arraigned on that amended indictment on 22 January 2022 at the beginning of the preparatory hearing. More generally, once the case was in the Crown Court Mr Rumford instructed leading and junior counsel on behalf of York. Junior Counsel completed the Plea and Trial Preparation Hearing ("PTPH") form and Mr Rumford corresponded with solicitors acting for the defendants. By reference to the definition in paragraph 4 of schedule 3 to the LSA 2007 it is clear that Mr Rumford was prosecuting the proceedings in the Crown Court on behalf of York within paragraph 4(1)(b). There could be much debate about whether any particular action or step taken by Mr Rumford was an "ancillary function" within paragraph 4(1)(c) in relation to the proceedings, but it is not necessary to consider individually all the actions for which Mr Rumford was responsible by reference to that sub-paragraph. The term "ancillary function" is not defined in the Act. No decided case attempts a comprehensive definition but, given the potential penal consequences of conducting litigation when not authorised to do so, it has been interpreted narrowly and does not extend beyond formal steps in the litigation. It does not extend to "purely clerical or

mechanical activities" and is intended to encompass "formal steps required in the conduct of litigation": *Agassi v. S Robinson (HM Inspector of Taxes)* [2006] 1 WLR 2126 at [43] and [56].

Is Mr Rumford an Exempt Person?

76. York's argument is that a corporation can conduct litigation only through the actions of its officers, servants or agents. Mr Rumford is authorised by York to conduct the criminal proceedings. He is therefore a "party to the proceedings" in the Crown Court and would have a right to conduct those proceedings personally as a party. This is said to be a relationship of "embodiment" rather than agency: Mr Rumford is not acting *on behalf of* York; he *is* York for the purposes of conducting proceedings. This argument failed before the judge for a variety of reasons including that he did not accept the "embodiment" proposition. Mr Kirk submits he was wrong to do so and encapsulates his submission in this way.

> "… as a local authority is a body corporate under Section 2(3) of the LGA 1972, it is incorporeal and can only act through its authorised officers. [Colin Rumford] was authorised … to bring criminal proceedings. He is the embodiment of the local authority and was entitled to act as such."

77. The reasoning underlying the submission recognises that York is a party to the Crown Court proceedings but suggests that Mr Rumford should be treated as a party for the purposes of paragraph 2(4)(a) of schedule 3. It also assumes that were York an individual who was the prosecutor (and so a party in the Crown Court) that the individual would have the right to conduct the proceedings for the purposes of paragraph 2(4)(b).

78. The embodiment argument, if correct, would have far reaching consequences for the conduct of litigation and rights of audience across the spectrum of civil and criminal proceedings in which a corporation, statutory or otherwise, were a party. In agreement with the judge, we are unable to accept that paragraph 2(4)(a) exempts an employee of a local authority from the provisions of the LSA 2007 relating to the conduct of litigation.

79. Paragraph 2(4) is concerned to preserve pre-existing rights to conduct litigation (and its parallel provision in paragraph 1(6) the rights of audience) of parties to legal proceedings. At all times York was the party to the criminal proceedings. Its nomination and authorisation of Mr Rumford did not make him a party to the proceedings. The construction advanced by York would drive a coach and horses through the regulatory regime of the LSA 2007. It would also impose onerous personal obligations and liabilities on the person authorised by the corporation in question in both civil and criminal proceedings.

80. The question arises whether York was able to conduct the litigation otherwise than through an authorised lawyer.

81. York was authorised by statute to prosecute, not generally but in accordance with the statutory scheme governing its activities. It does not have a general power to prosecute any offence it chooses as do individuals and ordinary corporations. As a

statutory body corporate "it can do only those things which it is authorised to do by statute" by contrast with a natural person: *R v AB* [2017] 1 WLR 4071 at [77] per Lord Thomas of Cwmgiedd CJ.

82. Section 223 of the LGA 1972 provides the power to authorise individuals to prosecute or defend in Magistrates' Court proceedings on their behalf and to conduct any such proceedings. That provision enables persons so authorised to conduct litigation and to appear notwithstanding that the activities are reserved legal activities. No equivalent power is given by statute for the Crown Court.

83. The common law position was clear. In criminal courts the rule was that "a corporation can only appear by attorney": *R v Birmingham and Gloucester Railway Company* [1842] 2 QB 223 at 233. The position was similar in the civil courts (see *Charles P Kinnell & Co Ltd v. Harding Wace & Co* [1918] 1 KB 405 per Swinfen Eady LJ at 413). Both in criminal and civil proceedings the strict approach has been much attenuated by statute and rules.

84. The predecessor to section 223 of the LGA 1972 was section 277 of the Local Government Act 1933 which was to the same effect but referred to courts of summary jurisdiction. That power (which long pre-dated the creation of the Crown Court) did not extend to cases tried on indictment. As Lord Macmillan, the author of *Local Government Law and Administration in England and Wales* (1934), observed "the present section confines the proceedings to those taken under the Summary Jurisdiction Acts" (page 78).

85. Section 223 liberates local authorities from the ordinary rules governing the conduct of proceedings in the Magistrates' Courts. It was amended by the LSA 2007 by adding the words "and to conduct such proceedings" to make clear that in the Magistrates' Court there was no need to involve an authorised litigator. No such statutory provision covers the Crown Court. Indeed, if the argument advanced by York were correct, statutory and other corporations would be able to identify an individual to act as their *alter ego* and circumvent much of the statutory scheme of the LSA 2007.

86. At common law not only were corporations required to be represented for the purposes of conducting litigation on indictment but so too were, and are, private prosecutors, whether corporate or natural: see the discussion in Blackstone Criminal Practice 2023 at D3.114; and R *v. Southwark Crown Court ex parte Tawfick* [1995] Crim LR 658. In that case it was held that the discretion conferred by the Legal Services Act 1990 to allow an unrepresented prosecutor to conduct a prosecution in the Crown Court should be exercised sparingly and only in "exceptional circumstances" for clear public interest reasons. That is the discretion now found in schedule 3 to the LSA 2007.

87. The CrimPR make provision in general terms for how bodies corporate must conduct criminal litigation. Rule 2.2 defines legal representative as:

> "(i) The person for the time being named as a party's representative in any legal aid representation order made under section 16 of the Legal Aid, Sentencing and Punishment of offenders Act 2012, or

> (ii) subject to that, the person named as a party's representative in any notice for the time being given under rule 46.2 (Notice of appointment, etc. of legal representative: general rules) provided that person is entitled to conduct litigation in the court under section 13 of the legal services Act 2007."

Rule 46.1 is concerned with functions of representatives. As material it provides:

> "(1) Under these rules, anything that a party may or must do may be done –
>
> (a) by a legal representative on that party's behalf;
>
> (b) by a person with the corporation's written authority, where that corporation is a defendant;
>
> (c) …
>
> (2) A member, officer or employee of a prosecutor may, on the prosecutor's behalf –
>
> (a) serve on the Magistrates Court officer, or present to a Magistrates Court, an application for a summons or warrant under section 1 of the Magistrates Court act 1980; or
>
> (b) issue a written charge and requisition, or single justice procedure notice, under section 29 of the Criminal Justice Act 2003."

88. The notes that follow refer to section 33(6) of the Criminal Justice Act 1925, section 46 of the Magistrates Courts Act 1980 and schedule 3 to that act as making provision for the representation of corporations in criminal proceedings. They also refer to section 223 of the LGA 1972. Neither the Criminal Justice Act 1925 nor the Magistrates Courts Act 1980, which are concerned with corporations as defendants in criminal proceedings, authorises a corporation to conduct Crown Court litigation through a representative who is not authorised for the purposes of the LSA 2007. It is nonetheless of interest in the context of York's argument that section 33(3) of the Criminal Justice Act 1925 enables a duly authorised representative to enter a written plea on behalf of a corporation on arraignment but by section 33(6) provides "but a person so appointed shall not, by virtue only of being so appointed, be qualified to act on behalf of the corporation before any court for any other purpose".

89. Rule 46.1(1)(b) enables steps to be taken under the rules by any person so authorised by a corporation when that corporation is a defendant. The rule does not extend to corporations as prosecutors. 46.1(2) makes discrete provision in respect of the Magistrates' Court and not the Crown Court.

90. Corporations, whether statutory or otherwise, have the benefit of multiple legislative provisions which enable them to conduct proceedings, or certain aspects of them, in the Magistrates' Courts and the Crown Court. None to which our attention has been drawn enables a local authority to conduct litigation in the Crown Court other than through an authorised lawyer.

Nullity and Abuse of Process

91. We are satisfied that the judge was correct in his conclusion on these issues. We deal with them briefly.

92. The proceedings as a whole could not be said to be a nullity. The conduct of the proceedings in the Magistrates' Court were unimpeachable. They were transferred to the Crown Court in an orthodox way from the Magistrates' Court and had a life there before any formal steps were taken by York.

93. The question whether a failure to comply with statutory requirements renders what had been done invalid and of no effect is a question of statutory construction: see *R v. Soneji* [2006] 1 AC 340. There is no express provision in the LSA 2007 which speaks of the consequence so far as the litigation itself is concerned if it is conducted (or parts of it are conducted) by someone who is neither authorised nor exempt for the purposes of that statute.

94. In *Ndole Assets Ltd v. Designer M&E Services UK Ltd* [2018] EWCA Civ 2865 the issue arose in the context of the service of a claim form in civil proceedings by somebody who was not an authorised person to conduct litigation. Having decided that the service of a claim form was a reserved legal activity the Court of Appeal dealt with arguments about the consequences. At [76] Davis LJ, with whom McCombe LJ and Jackson LJ agreed, considered the terms and scheme of the LSA 2007 and explained that "nullity was not to be taken as the statutorily intended consequence." Mr Ashley-Norman invited us to distinguish this authority on the basis that it concerned civil and not criminal litigation. But the LSA 2007 does not distinguish between civil and criminal litigation in this respect. The reasoning of the Court of Appeal, by which we are bound and, in any event, respectfully agree, applies. The fact that litigation is conducted on behalf of a party by a person who is neither authorised nor exempt does not render the proceedings as a whole a nullity or invalidate steps taken which fall within the definition of "conduct of litigation".

95. At [78] Davis LJ referred to the judgment of Thomas J in *Crescent Oil and Shipping Services Ltd v. Importing UEE* [1998] 1 WLR 919. That concerned a writ which had been issued and served other than by a solicitor, as required by the then Rules of the Supreme Court. Thomas J rejected the argument that the service was a nullity. He concluded that because there had been an irregularity, consideration should be given to setting service aside. Davis LJ adopted the same approach to the issue under consideration in *Ndole Assets*. In civil proceedings setting aside service of a claim form might well deprive the litigant of the opportunity to pursue a claim because of the operation of the Limitation Acts, as it would have done in that case. The same would not be true in the Crown Court where, subject to an extension of time under the rules, an indictment might be reserved. At [79] Davis rejected the argument that service should be set aside. The claimant and those who served the claim form had acted in good faith and "to set aside the service would be to confer an uncovenanted advantage on the defendant in circumstances of (in the present case) adventitious technicality."

96. We will proceed on the assumption that service of an indictment on the officer of the Crown Court is an "ancillary step" in the proceedings for the purposes of paragraph 4(c) of schedule 2 to the LSA 2007 and so should have been served under the

authority of an authorised litigator. The prosecutor, York, served a draft indictment as it was required to do but did so using a person, who on this hypothesis, was not authorised to conduct the litigation on its behalf.

97. The rules relating to the indictment have evolved in recent years. For example, it was a requirement that the indictment be signed by a court officer. In *R v. Clarke* [2008] 1 WLR 338 the bill of indictment on which the defendant was tried had not been signed before the trial started as required by sections 1 and 2 of the Administration of Justice Act 1933 ("the 1933 Act"). The House of Lords decided that Parliament intended that the bill of indictment should not become an indictment unless and until it was duly signed by the proper officer; and that there could be no valid trial on indictment if there was no indictment: see Lord Bingham of Cornhill at [18] and [19]. The 1933 Act was amended by the Coroners and Justice Act 2009 to reverse that decision.

98. Subsection 2 specifies that "no bill of indictment charging any person with an indictable offence shall be preferred" unless one of a series of conditions has been met which sets out the various mechanisms by which a case can reach the Crown Court, subject to various provisos. Subsection 3 states the consequences of a bill of indictment being preferred otherwise than in accordance with those provisions: "The indictment shall be liable to be quashed." Section 2(6) enables Criminal Procedure Rules to "make provision for carrying this section into effect and, in particular, provision as to the manner in which and the time at which bills of indictment are to be preferred before any court…" The statute does not say that a failure to comply with those rules invalidates the indictment.

99. Part 10 of the CrimPR is concerned with indictments. Rule 10.2 contains general rules about indictments including form and content. Rule 10.2(5) stipulates that a draft indictment is a bill of indictment for the purposes of section 2 of the 1933 Act. Rule 10.3 provides that arrangements can be made between Magistrates' Courts and Crown Courts for the automatic electronic generation of a draft indictment when the case is sent to the Crown Court. There do not appear to have been such arrangements in place between the courts involved in the York case, but it is, to our minds, significant when thinking of the consequences of York's failure to use an authorised person to conduct the Crown Court litigation that the rules do not even require the indictment to be drafted and served by the prosecutor. If the rule 10.3 route is used the draft indictment becomes the indictment immediately before it is read to the defendant in court: rule 10.2(5)(b)(i).

100. Rule 10.4 applies when a draft indictment is not electronically generated on the sending of a case by the Magistrates' Court to the Crown Court. By rule 10.4(1) the prosecutor must serve a draft indictment on the Crown Court officer not more than 20 business days after the service of prosecution evidence under rule 3.19. The draft indictment becomes the indictment when it is served on the court officer (rule 10.2(5)(b)(ii)). Rule 10.2(7) requires the court office to endorse a paper copy of the indictment and serve it on the parties.

101. York served the draft indictment but did not use an authorised litigator for that purpose. On the assumption that service of an indictment is an ancillary function amounting to the conduct of litigation, it thus failed to comply with the LSA 2007. Rule 46.1 CrimPR did not authorise the use of a non-authorised person for that purpose. We have already explained why a failure to comply with the LSA 2007 in

this respect does not automatically invalidate the step taken. It would be a particularly capricious outcome to invalidate an indictment on the grounds that it was served by an unauthorised person when, under the rules, it might have been electronically generated automatically had the necessary arrangements been in place.

102. Our conclusion is that the draft indictment served by York in November 2020 was valid. It was thereafter amended in an unexceptional way with its final form being produced in open court by leading counsel. It was on that amended indictment that the defendants were arraigned. In coming to this conclusion, we differ to some extent from the approach of the judge. He considered that the original draft indictment was defective because it was served by Mr Rumford, but that CrimPR 10.2 and 10.3 offered an alternative route to the preferment of the indictment; in any event the amended indictment preferred by prosecution counsel in court was valid. That approach appears to have flowed from the way in which the argument before the judge developed which treated Mr Rumford as the prosecutor for the purposes of the rules rather than York.

103. Finally, we turn to abuse of process. There is no suggestion that the defendants are unable to have a fair trial on account of York failing to conduct the Crown Court litigation through an authorised litigator. The appellant argues that these proceedings should be stayed on what is known as "limb 2" abuse on the ground that it would be unfair to try the accused because York thus far has conducted the Crown Court litigation without an authorised litigator. Such a stay would operate to protect the integrity of the criminal justice system. The effect of the stay would be to stop the proceedings permanently. It is argued that the conduct of these proceedings thus far by York is irredeemable; that the involvement of counsel at all stages makes no difference; and that the involvement of solicitors now the error has been identified would make no difference.

104. Examples of limb 2 abuse arise in connection with bad faith on the part of the prosecution, unlawfulness or executive misconduct. Well-known examples include *R v. Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42 where the defendant was brought back to the United Kingdom in breach of extradition arrangements and *R v. Mullen* [2000] QB 520 where the United Kingdom law enforcement agencies procured the unlawful deportation of the defendant from Zimbabwe to the United Kingdom; *R v. Bloomfield* [1997] 1 CR App R 135 where going back on an assurance that no evidence will be offered when there was no material change of circumstance would bring the administration of justice into disrepute; *AG's Ref (No 3 of 2000)(Looseley)* [2001] 1 WLR 2060, an example where entrapment by the police was so seriously improper as to bring the administration of justice into disrepute.

105. Like the judge, we consider that the circumstances in which York came to overlook the need to conduct the litigation in the Crown Court through an authorised professional is far removed from the sort of conduct that could found a successful limb 2 abuse argument. When the statutory scheme does not invalidate the proceedings as a result of what has occurred it is difficult to envisage that a mistake of this nature could bring the administration of justice into disrepute to the extent necessary to bring the proceedings effectively to an end. In this case the mistake had no adverse impact on the defendants. There was no bad faith.

106. The judge rejected a very much wider abuse of process argument concerning both the York and Bristol cases of which this aspect formed a small part. On the discrete point that is live before us he concluded that the "shortcut" (as he put it) in not instructing the inhouse lawyers to conduct the litigation could not be characterised as seriously improper or an attempt to "subvert or bypass protections and safeguards". He continued:

> "Although Mr Rumford is not a lawyer and has no professional duty as such, he has acted, in my view, as scrupulously as possible throughout. Where he acted in the capacity of "reviewing lawyer as decision maker", such as in commencing proceedings, having an indictment drafted and on disclosure, he has leaned heavily upon instructed counsel. He takes responsibility as prosecutor for those decisions - which is one of the main reasons why I have found that he was "conducting litigation" in this case. He may not have been authorised to do so, but I find that he made every attempt to do so fairly."

107. That was clearly right.

Overall Conclusions

108. In respect of the issues before us our conclusions are as follows:

i) The indicted offences of money laundering and conspiracy to defraud qualify as consumer offences under paragraph 46(2)(d) of schedule 5 to the CRA 2015 by virtue of "originating from an investigation into" a consumer breach (Issue 1).

ii) Birmingham was not required by section 401(2)(b) of the Financial Services and Markets Act 2000 to obtain the Director of Public Prosecution's consent before prosecuting the charge of illegal moneylending under that Act (Issue 2).

iii) HHJ Burn's indication in the York case requiring the prosecution to elect between conspiracy to defraud and money laundering charges in relation to BIM did not give rise to an appealable ruling (Issue 3).

iv) In light of our conclusions on the first and second issues, that concerning the agreement between Bristol and York under section 101(1)(b) of the LGA 1972 (Issue 4) does not arise and neither does the issue relating to York's jurisdiction to prosecute counts 4 to 7 by reason of satisfying the expediency test under section 222 of the LGA 1972 (Issue 5).

v) The court has jurisdiction to consider the substantive issue raised by ABU's cross appeal on reserved legal activity. The prosecutor, York, engaged in reserved legal activity under Part 3 of the LSA 2007 by conducting the litigation in the Crown Court through an individual who was neither authorised nor exempt. That did not render the indictment a nullity or result in an abuse of process (Issue 6).