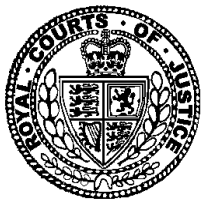

Neutral Citation Number: [2022] EWHC 2162 (QB)

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: 15/08/2022

Before:

MR JUSTICE FREEDMAN

- -

Between:

(1) BES COMMERCIAL ELECTRICITY LIMITED

(2) BUSINESS ENERGY SOLUTIONS LIMITED

(3) BES WATER LIMITED

(4) COMMERCIAL POWER LIMITED

Claimants

- and –

CHESHIRE WEST AND CHESTER COUNCIL

Defendant

- -
- -

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

Hearing dates: 17, 18, 19, 22, 23, 24, 25, 26, 29 & 30 November 2021 and 1, 2, 3, 6, 7, 8, 9, 20 & 21 December 2021

Correspondence from 8 April 2022 from the Claimants seeking to postpone any hand-down until after an application to take into account further disclosure from the criminal proceedings. This was resolved following submissions of the parties in June and July 2022 referred to in the judgment.

On 15 July 2022, the Defendant referred the Court to an expected judgment of HH Judge Knowles QC of an application to stay the criminal proceedings, asking the Court if it wished to defer the hand-down until after the judgment. The judgment was provided to the Court on 29 July 2022: see paras 469-471.

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Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30am on Monday 15 August 2022. Following a lifting of reporting restrictions the judgment was released to National Archives on 25 May 2023.

~~**REPORTING RESTRICTION**~~

~~**By reason of the order made by the Court on 29 November 2021 imposing reporting restrictions in this case, the publication of this judgment in any manner whatsoever is prohibited until the conclusion of the Criminal Proceedings or further order of the court.**~~

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 2021 have been lifted.

MR JUSTICE FREEDMAN:

I Contents

II Introduction

1. This is a case of non-domestic energy suppliers based in Fleetwood/Blackpool, Lancashire who work exclusively in the small to medium sized enterprise ("SME") business market. It concerns allegations about mis-selling which allegations have brought about a criminal investigation. In particular, it culminated in the obtaining of search warrants on 22 July 2016. The search warrants have been fully executed.

2. A notable aspect of the case before the Court is that there have been charges against various individuals behind or said to be involved in the Claimants comprising Mr Andrew Pilley, his sister Ms Michelle Davidson, Mr Lee Qualter aka Mr Goulding and Mr Joel Chapman. There are charges of fraudulent trading and money laundering against Mr Pilley and Ms Davidson and a charge of fraudulent trading against Mr Qualter. There are charges of fraud by false representations against Mr Joel Chapman. On the information presented at trial, there is a criminal prosecution due to take place against these persons in the last 3 months of this calendar year.

3. There was a long investigation which preceded the application for search warrants. This action alleges misfeasance against the Defendant through an investigator employed by the Defendant, namely, Mr David Bourne who worked for the Defendant between January and June 2015. It is further alleged that the search warrants were obtained unlawfully (particularly by an allegedly unfair presentation of the application before the Preston Crown Court) and therefore the searches and removal and subsequent retention of documents were unlawful. It is further alleged that the Defendant committed acts of trespass and/or conversion of the Claimants' property by virtue of the manner in which the search warrants were executed by the Defendant and the Lancashire Police, and by the Defendant's subsequent conduct in particular by retaining the seized property for an unreasonable period of time. All of these allegations are denied by the Defendant.

4. The Court raised with the parties at the outset of the trial whether the trial of this action should be postponed until after the criminal trial. All parties had considered this. Even after the charges had taken place, none of them sought a postponement. However, there was an application inter alia for press reporting restrictions, and this was granted in a judgment which itself is the subject of reporting restrictions.

III The parties

5. BES Commercial Electricity Limited ("the First Claimant") and Business Energy Solutions Limited ("the Second Claimant"), together referred to as "BES Utilities" each operate in the non-domestic utilities market throughout England, Wales and Scotland. In particular:

    (1) The First Claimant, a company incorporated under the laws of England and Wales, company number 06882734, on 21 April 2009, sells electricity, predominantly to small businesses. On 30 September 2009, it obtained an electricity supply licence. It commenced trading as a licensed electricity supplier in March 2010.

(2) The Second Claimant, a company incorporated under the laws of England and Wales, company number 04408013, on 2 April 2002 sells gas, predominantly to small businesses. It commenced trading as a licensed gas supplier in February 2005.

6. The chairman and managing director of BES Utilities is Mr Andrew Pilley. His sister Michelle Davidson is also a director of BES Utilities. In addition, Mr Pilley is the current chairman and owner of English Football League One club Fleetwood Town F.C. He also has interests in other companies.

7. The Third Claimant ("BES Water") is a company incorporated under the laws of England and Wales on 19 November 2015 under company number 09881210 with a view to supplying water to non-domestic users in Scotland, England and Wales.

8. The Fourth Claimant, Commercial Power Limited ("CPL") is a company incorporated under the laws of England and Wales on 15 September 2004 under company number 05232226. CPL was founded by Mr Pilley who is its managing director. It acts as an energy aggregator through which non-domestic energy suppliers (including BES Utilities) pass details of their products to a network of brokers.

9. The Claimants are all private limited companies. They are part of the BES group of companies (collectively referred to as "BES"). The ultimate owners are and always have been Mr Pilley and his sister Ms Michelle Davidson. According to a case summary prepared for the Magistrates' Court, BES has grown exponentially over the past 12 years. By 2019, the turnover was £100 million with large profits. A period of rapid growth was between 2010 and 2015 when the turnover grew by about 300%.

10. There are also a number of broker companies, Commercial Reduction Services Limited (dissolved on 6 February 2018), Energy Search Limited and Commercial Energy Limited (dissolved on 4 August 2015). Mr Qualter was a director of the companies until the dissolutions and remains a director of Energy Search Limited. They are said to be independent of BES and are said by BES to be their strategic partners.

IV Background

(a) The Radio 5 programme and OFCOM complaint

11. On 22 April 2012, Radio 5 Live Investigates made a programme about BES which was also a podcast. This alleged a large degree of mis-selling of electricity and gas by a brokering service called Commercial Energy. The allegation was that its salespersons rang businesses to arrange a new deal before their existing deals came to an end and lied to customers about costs savings available by a new contract. This included by false price comparisons. It was alleged that they sought to frighten customers about catastrophic consequences of not moving to the new supplier promoted by Commercial Energy Limited. Instead of providing the savings promised, sometimes they provided more expensive contracts.

12. The allegation in the programme was that Mr Pilley was closely related to Commercial Energy Limited. A director of Commercial Energy Limited was Mr Qualter (also known as Lee Goulding). It was alleged that Commercial Energy often recommended customers to BES. Mr Pilley denied that he was in charge of Commercial Energy, but an undercover reporter, who spent two days at Commercial Energy, heard staff referring to him as the boss. Mr Pilley offered staff at Commercial Energy incentives and bonuses. These allegations were denied by Mr Pilley through a lawyer: he said that he was not the boss, he did not run Commercial Energy and he was not responsible for any mis-selling on its part.

13. A complaint was made about this programme to OFCOM as detailed in Ofcom broadcast bulletin issue number 216 dated 22 October 2012. The complaint was not upheld. Ofcom found that:

> *"Mr. Pilley was not treated unfairly in the programme as broadcast in that the programme makers took reasonable care in presenting the material facts in relation to the allegations made about Mr Pilley in the report and the programme included a fair representation of the responses which were given to criticisms included in the programme on Mr Pilley's behalf.*
>
> *Mr Pilley was given an appropriate and timely opportunity to respond to the claims made about him in the programme."*

14. On 26 September 2013, Mr Mooney published an article headed "*BES Energy/Utilities SCAM – Central Network Registrations and the Meter Registration Service."* It was written by Mr Mooney who (together with Mr Scrivener) has been sued to judgment for making statements alleged to be defamatory against the Claimants. This will be referred to in greater detail. This article in fairly trenchant terms was about a call to Mr Mooney's business in which allegations were made by Mr Mooney of mis-selling and where he sought to give advice to anyone receiving such calls. There was a follow up article written in December 2014.

15. The next event is between 1 April 2013 and 31 July 2014 which referred to an "Intelligence Package for Operation Best" claiming that 186 complaints were recorded on the Citizens' Advice Partner Portal and Trading Standards intelligence systems, MEMEX and IDB. The complaints spanned 80 trading standards services across England, Wales and Scotland. It opened with the following words of introduction:

> *"a complaint regarding the energy supplier Business Energy Solutions has resulted in the commencement of an investigation into the company, its directors and associated companies and directors. It appears that the associated companies are using fraudulent and aggressive measures to commit small and*

medium enterprises into a long and expensive contract for energy supply".

16. The complaints centred on either aggressive selling practices by the broker companies or the provision of misleading information about BES by the broker companies. Although the complaints were made by small and medium businesses which may not be thought to be vulnerable, many were in a vulnerable situation since they were going through the process of starting a new business. Complaints have commented on emotional distress in addition to excessive financial burdens. There were internet forums where contributors said that they had been experiencing high levels of distress and feeling duped as they were told that having BSS as a supplier would be the best deal for them. There was concern expressed about the long period of the contracts (up to five years) and about the level of prices including no visibility on mid-contract price changes.

(b) Trading Standards Investigation

17. There was an investigation commenced by Lancashire Trading Standards in December 2013 because the BES companies operated in their area. In June 2014, there was a request by Lancashire CC requesting national support. On 8 July 2014, there was a Trading Standards North West meeting recording a Level 3 investigation by Lancashire CC and a request by Lancashire for support to produce an intelligence product. On 14 November 2014, Lancashire CC again made a request for national support and referral to Trading Standards North West. This was considered by National Trading Standards in a document dated 18 November 2014. The referral was considered a national issue due to widespread detriment and the number of businesses involved. There was particular concern in respect of new start-up businesses which are generally targeted, which could push them into serious financial difficulties or cause the business to close entirely. Since the case was likely to receive media interest, there was said to be a serious risk to the reputation of Trading Standards if action was not taken.

18. Lancashire Trading Standards took witness statements and answers to questionnaires through an investigating officer, namely Sam Harrison.

19. In the course of the trial, there was significant emphasis on the fact that complainants communicated with one another on online forums. Examples in the papers are between June and September 2014. Those forums included one authored by Onjance 1 on a website called Consumer Action Group which was said to be authored by Mr Chris McLeod. There were letters dated 10 October 2014 to Mr McLeod and also letters to Mr and Mrs Maybury (who gave evidence in the trial which will be referred to below) and to Mr Scrivener (of whom more below). The allegation was that the matters posted on the internet about mis-selling comprised an "internet campaign", containing defamatory allegations. Undertakings were sought not to repeat such postings, failing which steps would be taken to protect the Claimants including seeking interim injunctive relief.

20. In December 2014, there were emails between Mr Scrivener and Ms Dawn Robinson of Lancashire CC, relied upon by the Claimants as evidencing that Mr Scrivener was providing information to the investigation. They include passing on complaints and/or assisting alleged victims. There are also documents which Mr Scrivener claimed to have found on the internet about such complaints and which he passed on to Lancashire CC. The Claimants say that Mr Scrivener and Mr Mooney were combining to orchestrate complaints which were false about the Claimants, and which they have sought to protect through correspondence and legal action.

21. When the large scale of the investigation became apparent, it was transferred to the North West Regional Investigation Team of Trading Standards ("TSNW"). The Defendant is a local authority which has been conducting an investigation through a trading standards department known as Chester West and Chester Trading Standards, into alleged fraudulent conduct of the Claimants and others. It has been considering allegations of fraudulent mis-selling by brokers and the extent to which, if at all, any such fraudulent mis-selling is to be attributed to the First, Second and Fourth Claimants and their officers including Mr Pilley and his sister, Ms Michelle Davidson. This in turn led to the application for the search warrants above referred to and to charges against Mr Pilley, Ms Davidson, Mr Qualter and Mr Chapman whose cases are due to be tried in the Preston Crown Court.

22. The core allegation being investigated was that telephone sales representatives working for the broker companies were committing fraud by lying to customers in order to induce them to enter into energy supply contracts with BES. The fraudulent mis-selling was alleged to have taken place within the broker companies (not claimants in this case), who claim to be independent of BES. The prosecution alleged that there was a large number of victims and deliberate targeting of small businesses. The alleged common denominator is Mr Pilley. The extent to which the broker companies are in fact independent of Mr Pilley's companies was an important facet of the investigation.

23. On the evidence presented to the Court on the without notice application for the search warrants, it was submitted that there were reasonable grounds to believe that the brokers were not independent of BES for the following reasons, namely:

    (1) The evidence of Ms Sakly. It is right that she was not called to give evidence, but her evidence was a part of the information before the Court.

    (2) Although it was contended by the Claimants that the brokers were independent, Mr Pilley and Ms Davidson are directors of the aggregator that is to say the Fourth Claimant. That takes BES Utilities a stage closer to the brokers.

    (3) Further, Mr Qualter was a director of Commercial Reduction Services Limited, now dissolved, and a director of Energy Search Limited and of Commercial Energy Limited (dissolved on 4 August 2015). The best friend of Mr Qualter is Mr Pilley, according to Ms Sakly, and Mr Pilley accepted that he was a long-standing friend. This tends to show that the brokers were not each separate businesses.

(4) On any view, a large part of the customers secured by the brokers came to BES.

(5) An undercover reporter in the Five Live Investigates programme reported that Mr Pilley went to the premises of the brokers, which were close to his premises, and provided bonuses and incentives to the staff.

(c) Engagement of Mr Bourne

24. As part of the investigation, in January 2015, the Defendant engaged Mr Bourne as an employee. Mr Bourne's background was as a police officer from 1979: he retired from the police force as a Detective Constable in November 2009. Having taken short term opportunities in connection with various investigations of crime, he took a job as an investigator working primarily for Operation Best and working for a fixed term of 6 months. His line manager was Paul Williams (who had signed a witness statement, but who was not called) and above him was Walter Dinn (who has since died). Mr Bourne worked with Mr Ray Noble and travelled to various locations as far apart as Devon and Scotland.

25. Attention was drawn to contact between Mr Bourne and Mr Scrivener. On 15 January 2015, Mr Scrivener first got in touch with Mr Bourne. He sent emails and passed on information about complainants who were alleging similar instances of mis-selling by brokers for the benefit of BES. On 19 January 2015, Mr Scrivener referred Mr Bourne to Mrs Brown (Bailey) and asked whether he had contacted Mr McCleod and Mr and Mrs Maybury. Mr Bourne said that the majority of the statements which he obtained were from complainants directed by Mr Williams or Mr Dinn. Where complainants were introduced by Mr Scrivener, he says that he interviewed the complainants and ensured that the statements were their own evidence.

26. A part of the information forwarded from Mr Harrison of Lancashire CC to Mr Bourne included memory sticks provided by the Utilities Intermediaries Association ("UIA"). The Claimants say that the UIA is a group of brokers in competition with the brokers identified in this case as referring customers to the Claimants.

27. By 5 March 2015, there was a document headed "How to complain to BES Utilities BES Commercial Energy" which the Claimants say was jointly published by Mr Mooney and Mr Scrivener. It was headed "iamOlly", presumably a reference to Mr Mooney's first name Oliver. It stated that since there were so many people who had been "scammed" by BES Utilities, there had been created a form to enable complaints to be made. It contained a menu of "desired outcomes". The Claimants say that this was a part of a campaign to create and then orchestrate complaints. Mr Mooney also wrote blogs about how not to be scared about threats of legal action from the Claimants.

28. On 26 March 2015, there was an email from Mr Bourne to a customer Ms Stephanie Foster, asking her to complete it and return it. He referred to there being an investigation by Trading Standards North West of BES Utilities and their connections to the "Independent Brokers". He then wrote:

> *"This investigation is covert at the moment so I would appreciate your discretion at this current time.*
>
> *In the meantime, I would continue to carry on and make as much fuss as you can. Complain to as many people as you can, including your MP.*
>
> *(I believe that the law should be changed to protect microbusinesses such as yours).*
>
> *Copy any complaints you make in to Joel Chapman at BES…. It appears he gets rid of troublesome complainants by eventually releasing them from their contracts."*

29. On the same day, Ms Foster replied enclosing the filled-out questionnaire and referring to mis-selling.

(d) Correspondence on behalf of the Claimants to the Defendant

30. There were a number of letters from solicitors on behalf of the Claimants starting from Fieldfisher to the Defendant dated 27 March 2015 in which concerns were expressed. By this letter, the Claimants claimed that the terms of the communications of Mr Bourne to Ms Foster were inappropriate and unprofessional. They also claimed that they were defamatory, with the innuendo that there were serious matters to be investigated regarding [the Claimants'] probity and honesty and that [the Claimants] were unlikely to cooperate with a transparent and conventional investigation. It was noted that Mr Bourne was *"quite clearly undermining the integrity of any Trading Standards investigation"*. The letter required the removal of Mr Bourne because he was "not impartial", and he was "tainted." Information was sought as to how many complaints had been orchestrated by Mr Bourne. A meeting was sought to discuss this with Trading Standards.

31. By a response dated 15 April 2015, Mr Dinn confirmed that an investigation was taking place about the conduct of brokers who appeared to be placing customers with BES Utilities. He identified the team including saying that Mr Bourne was employed as an investigator. He said that he was unable to address the specific points raised because there was an active investigation underway, but a complaint could be made at the conclusion of the investigation.

32. By a second letter from Fieldfisher dated 14 April 2015, the Claimants reverted to repeating and expanding upon their allegations about Mr Bourne and complaining in particular about his connections with Ms Bailey and Mr Scrivener and their campaigns against the Claimants. They gave information about the Claimants' good standing. They affirmed that the brokers that were being investigated were independent of the Claimants. They offered themselves to take part in the investigation.

33. By a third letter from Fieldfisher dated 11 May 2015, it was noted how the previous letter of 15 April 2015 written "in a spirit of cooperation" had not been responded to, and it was assumed that the Defendant did not wish to pursue the suggestion of a meeting because the enquiries had been concluded.

34. Legal assistance was sought from Counsel. Conferences took place with Ms Sarah Morgan, Counsel in Chester on 23 March 2015 and on 8 July 2015, and on 1 December 2015 (the last one being also with Mr Andrew Thomas QC). Ms Morgan was again referred to in an email of 9 April 2015 which was sent from Mr Williams on behalf of the Defendant to DI Martin Kane seeking the assistance of the Lancashire Police. Mr Williams wrote as follows:

> *"Our office has received numerous complaints from the proprietors of small businesses, alleging fraud by misrepresentation regarding the supply of energy and telephone contracts. We have obtained in excess of 50 witness statements from such individuals which appear to make out a prima facie case. The m.o. involves a cold call from alleged independent brokers to the business involved which contains various lies and results in unfair contracts with BES and has caused detriment and severe financial harm to each business, forcing several into administration and rendering individuals unemployed. We have been in consultation with Sarah Morgan…a barrister at Chester, regarding the progression of this case. We are approaching the stage of the investigation where warrants are to be sworn, served and executed."*

35. The last of the witness statements relied upon in the subsequent application for a search warrant was dated 7 May 2015 from Mr McMichael. On 30 June 2015, the employment of Mr Bourne by the Defendant came to an end, and he was occupied for most of his time from the end of March 2015 on matters other than BES.

36. On 8 September 2015, there was a fourth letter from Fieldfisher to the Defendant referring to what was described as an unlawful campaign of Mr Scrivener, Mr Mooney, Ms Bailey and Mr McCleod against the Claimants and communications which they had had with Mr Bourne. It was suggested that they had made defamatory statements and made and encouraged complaints which were false and unjustified in the belief that this would prompt the Claimants to make payments to them. They claimed that they were removed from the independent brokers and that they had built up successful and reputable businesses and were well regarded.

37. On 19 November 2015, there was the fifth such communication, this time from Mr Newell, company solicitor for the Claimants, referring again to suspicions that Mr Scrivener was orchestrating a campaign to damage the business of the Claimants and attaching various emails. It was said that this had led to a sharp escalation in complaints. The email concluded by saying that they remained happy to allay any concerns and to address any queries regarding BES and its relationships with brokers.

38. On 25 November 2015, there was published an article entitled "BES Utilities Ltd – How to get OUT OF CONTRACT! All you need to know" which the Claimants say was jointly published by Mr Scrivener and Mr Mooney. There were further such articles identified on 14 March 2016 and 18 April 2016.

(e) Ofgem final report

39. There was an Ofgem final report dated 18 December 2015 following a detailed investigation about the practices of BES. The background in the report referred to BES as a licenced non-domestic energy supplier based in Fleetwood, Lancashire with no in-house sales team. Energy contracts were sold on its behalf by third party intermediaries, energy brokers conducting telesales calls. BES was a relatively small independent supplier with approximately 40,000 electricity and gas customers, mostly small businesses. The investigation opened on 30 October 2014 following receipt and consideration of information from a number of sources. These included a formal referral from Citizens Advice to Ofgem on 21 May 2014 and a high number of complaints about BES from consumers and from Members of Parliament on behalf of their constituents.

40. In a detailed report, Ofgem considered the evidence gathered during the course of the investigation in the making of the decision. They set out details of contraventions and their duration. They were grouped as follows:

(1) Breaches 1 and 2 related to a failure to take all reasonable steps to bring the principal terms of contracts, (terms relating to the price and termination fees) to the attention of micro business customers, and to ensure that such information was communicated in plain and intelligible language prior to that contract being entered into. The supplier failed to explain the existence or calculation of possible termination fees to customers if the contracts terminated early (141 customers had paid a total of about £80,000 in termination fees to BES). It was stated that there would be price reviews during the currency of the contract, but there was a failure to explain the details of how and when price reviews might take place. Further, there was a failure to explain how customers faced increased standing charges for not using a minimum amount of energy: over 7,000 customers were affected. Since the majority of the customers had signed up for 4-year or 5-year contracts, these failings were particularly serious. This breach occurred through the contract validation scripts provided to and used by brokers to communicate prior the contract being made.

(2) Breach 3 arose from the same actions and behaviour described in breaches 1 and 2 and related to a breach of the standards licence conditions.

(3) Breach 4 was also a breach of the standards licence conditions and related to the statement of renewal letter sent by BES to its customers when nearing the end of their energy contract with the company.

(4) Breach 5 related to terms of standard contracts, which wrongly required notice from customers on deemed contracts seeking to transfer to another energy supplier.

(5) Breach 6 related to transfer blocking by BES of those non-domestic customers in deemed contracts seeking to transfer to another supplier. They thereby caused them to pay higher prices for their energy than they would have done at their preferred supplier. 108 customers on deemed contracts had been identified to have been blocked. BES had agreed to amend its terms and conditions in this respect.

(6) Breach 7 related to complaint handling, that is having inadequate complaints procedures.

41. BES agreed to repay termination fees and standing charges to the customers who had suffered losses. BES also agreed to contact customers who had contacted them about their contracts and to give them the option to end their contracts without paying termination fees. BES had since improved its processes and had cooperated throughout the investigation. BES had agreed to amend the scripts provided to its brokers.

42. BES agreed to pay £980,000 for customer service failures between June 2010 and July 2015. Of this, BES would return about £311,000 to directly affected customers (calculated by reference to customers whose minimum usage was not explained arising from breach 1, those who paid termination fees arising from breach 2 and those who were unable to transfer arising from breach 6). The remaining £669,000 (less a penalty sum of £2) would be paid to an appropriate consumer charity to be identified by BES and approved by Ofgem. The charity identified was Business Debtline and the money was to provide debt advice services to business customers who were experiencing difficulties in paying their energy bills.

43. Ofgem stated that if BES had not agreed to settle the investigation by these redress and compensation payments, Ofgem would have considered it appropriate to impose a much larger penalty in view of the seriousness of the contraventions. The majority of the breaches were considered serious. The absence of an effective complaints procedure compounded the seriousness of Breaches 1 and 2. BES was consistently throughout the breach period of 2010 to 2015 the subject of a disproportionately high level of complaints (in comparison with other suppliers in the non-domestic market) which should have alerted BES to the fact that the breaches were occurring.

44. On 15 January 2016, there was a sixth communication, between the Claimants and the Defendant, this time from Mr Newell to Mr Williams referring to a bankruptcy hearing of the Claimants against Mr McCleod which was being attended by Mr Scrivener as McKenzie friend and at which it appeared that Mr Williams might be attending. The email repeated the desire to meet with the Defendant and to discuss any concerns regarding the Claimants' business. Mr Dinn responded to say that Mr Williams would not be attending as a witness.

45. On 19 January 2016, there was a meeting attended by various police officers, including DC Scott Griffin of the Lancashire Constabulary, Mr Dinn and Mr. Williams following counsel's advice. It was confirmed at the meeting that the investigation was ready to move into the search and interview phase.

46. On 25 January 2016, there was a seventh communication, this time from Berg solicitors to Mr Dinn on behalf of the Defendant. The purpose of the letter was said to be to update the Defendant about further recent activities of Mr. Scrivener, and to establish whether or not the Defendant was currently investigating the Claimants. If so, the Claimants invited the Defendant to meet with them in order to address any queries they may have. The letter referred to the Ofgem investigation and stated that that related to regulatory issues only and not to allegations of criminal, dishonest or fraudulent behaviour suggested by Mr Scrivener and others. Berg stated that Mr. Scrivener and other individuals were motivated by improper motives. Berg expressed concern that Mr. Scrivener and other individuals were being treated as reliable witnesses by the Defendant who is accepting their complaints at face value and without giving the Claimants an opportunity to respond. It referred to attempts to engage with the Defendant for almost a year without a response. It stated that it was in the interests of impartiality and transparency that the Claimants had an opportunity to set out their position and participate in any actual or potential investigation.

47. On 22 March 2016, Berg wrote the eighth such communication to the Defendant expressing continuing concerns, asking whether an investigation was proceeding and notifying the Defendant that the police had been contacted regarding a prosecution of Mr Scrivener and Mr Mooney.

48. On 4 May 2016, legal proceedings were brought against Mr Scrivener and Mr Mooney. On 16 May 2016, interim undertakings were given by Mr Scrivener and Mr Mooney recorded in an order of HHJ Bird. By mid-2016, the Defendant was in possession of a large number of signed witness statements from members of the public, together with other material. The Defendant says that the statements gave rise to reasonable cause to believe that the First, Second, and Fourth Claimants were engaged in fraudulent business practices.

(f) The application for the Search Warrants

49. On 22 July 2016 a number of Search Warrants were obtained from Preston Crown Court pursuant to s.9 and Sch. 1 of the Police and Criminal Evidence Act 1984 ("PACE"). The application was made by DC Griffin of the Lancashire Constabulary, and was presented by Leading Counsel, Mr Andrew Thomas QC. The application was based upon a substantial body of material, including over 50 signed witness statements (including a statement from a whistle-blower Leila Sakly), Ofgem Notice of Decision, OFCOM Findings, a transcript of BBC Radio 5 Live Investigates, a case summary and note to the Court.

50. On 18 July 2016, there was a conference with Mr Thomas QC with final amendments to the application for search warrants. On 22 July 2016, the application for search warrants was made before HH Judge Brown, the Honorary Recorder of Preston.

51. The application was made by DC Griffin of the Lancashire Police for 11 search warrants. The application comprised a written document signed by DC Griffin. He has considerable experience in several high-profile search warrants. His involvement began in April 2015 following an email from Mr Williams to DI Kane. Trading Standards was to have primacy for the investigation and the Lancashire Police would provide search resources. The allocation of responsibilities between the Defendant and the Lancashire Police was identified in an email from DI Kane to Mr Williams on 23 April 2015. Independent counsel was to attend at the searches. DC Griffin advised that the search warrant applications should be settled and approved by Counsel. This was because of the high-profile nature of the Defendants and the fact that the warrant were likely to be challenged. DC Griffin had no experience before of Counsel being used in this way but believed that the involvement of Counsel would add a further layer of scrutiny and independence: see his witness statement para. 9.

52. The application was supported by an application for search warrants under Schedule 1 of the Police and Criminal Evidence Act 1984 ("PACE") which was signed by DC Griffin. It identified offences of fraud under the Fraud Act 2006 s.2, 3 and 12 and fraudulent trading under the Companies Act 2006 s.993 and conspiracy to commit fraud under the Criminal Law Act 1977 s. 1 and/or at common law. It referred to 63 statements of complaint obtained by trading standards officers and 321 similar complaints made Trading Standards, Citizens Advice Bureaux and Action Fraud. The remainder of the application contained a summary of the Radio Five Live Investigates programme, the rejected Ofcom complaint and the Ofgem report. A summary of 38 statements of complaint was provided. It was also stated that complaints were still being received about BES and Associated Brokers. Although Commercial Energy Limited had been dissolved on 4 August 2015, it was believed that they were still operating from the same premises.

53. I shall not seek to summarise all of the statements, but I shall refer to those complainants who gave oral evidence, namely Mr and Mrs Maybury, Mr McMichael and Ms Whitfield.

(g) The evidence of the complainants who gave oral evidence

54. The evidence of Mrs Maybury and Mr Maybury was as follows. They acquired a hotel in Torquay. On 4 May 2014, Mrs Maybury received a call from a man called Graham. He made representations to induce her to enter into a 5-year contract, stating that she was on emergency rates, referring to the amount which had been paid by the previous owners and saying that he could beat these rates with a new supplier. He said that contracts were 4-5 years and there was no point in having a one-year contract, implying that the price was fixed on the longer-term contract. He was from the company which dealt with registrations. Later in May 2014, she learned from a different broker that the prices did not remain static and there was no reason to agree a 5-year contract. She rang BES and asked to cancel the contract but was told that it would cost £5,000. She also asked for the recording of the first call (with Graham),

but she was told that it was not recorded. She then found out about large scale dissatisfaction with BES from research on the internet.

55. In a letter dated 30 May 2014, BES Utilities confirmed that they had reviewed the 'verbal contract recording' and that there was no evidence of misleading information or misrepresentations. BES stated that it could not comment on any previous conversation *"as all that the brokerage company are legally obliged to record and provide is the actual contractual recording"*. BES enclosed a copy of a disc with the recording on it and stated that *"this is the full version that is sent by the brokerage company"*. On 6 June 2014, Mr Maybury requested a full copy of the recording as it appeared to have been edited or shortened. On 11 June 2014, BES again confirmed in a letter that the verbal agreement was the full recording received from the brokerage company and that they "*do not have access to any further recordings*."

56. In a letter dated 24 June 2014, BES stated that: *"We are not in possession of any paperwork from the brokerage company, and can confirm that all information held has been provided to you. You state that the contract recording was modified on 7 May 2014, however, we cannot find any evidence to support this allegation and can confirm that we do not edit the recordings received by the brokerage company in any way."*

57. Mr McMichael gave evidence about his business Ramsey McMichael Consulting. Although the evidence of the initial conversations with the broker was second hand in that it was his wife to whom the representations were made, it was he who took over the complaint. The challenge was about a conversation to the effect that the current gas supplier British Gas was unable to supply (which was not the case) and leading to a contract being entered into with BES. BES responded with a recording, but Mr McMichael said that it was not a recording of the original misrepresentation. He also complained about a charge of in excess of £4,000 more than agreed the tariff, which was resolved in the face of a statutory demand which he caused to be issued.

58. Ms Catherine Whitfield gave evidence that she received a call from a broker stating that he was from Commercial Power and that he could provide the best existing rates. He provided rates said to be favourable relative to those of E.ON. She was informed that she was being charged at fixed rates. She resisted pressure to enter into a 5 year contract but entered into a 2-year contract which turned out not to be a fixed rate. When she cancelled her direct debit the unit price was increased.

(h) The written application

59. The application stated:

Reasons for the applications

*This application is as a result of complaints initially made to Blackpool and Lancashire Trading Standards concerning the alleged mis-selling of **BES** energy contracts. The offences being;*

- *Fraudulent misrepresentation contrary to* ***Section 2 of the Fraud Act 2006.***
- *Fraud by failing to disclose information contrary to* ***Section 3 Fraud Act 2006*** *(which includes offences by company officers, pursuant to Section 12 Fraud Act 2006).*
- *Fraudulent Trading contrary to Section 993 of the Companies Act 2006.*
- *Conspiracy to commit fraud, contrary to Section 1 of the Criminal Law Act 1977.*
- *Conspiracy to Defraud, contrary to* ***Common Law.***

Nature of the alleged fraud

The nature of the alleged fraud is that two businesses are operating in tandem. The first, trading under the names Energy Search Limited, Commercial Energy Limited and Commercial Reduction Services Limited, purports to be an independent broker recommending the best energy supply contracts to business customers. The second is BES Utilities a supplier of energy services including gas, electricity and telephone. The reality is that staff of the broker company is misrepresenting the cost by supplying fake benefit figures with the intention, in almost all cases of inducing the customer to enter into expensive and onerous contracts with BES.

Surrounding this various false representations are made such as sales representatives falsely represent that they are calling on behalf of the existing supplier.

The evidence suggests that this is systemic and the lies cannot be due to the individual actions of the sales representatives themselves.

BES supply utilities or energy packages to commercial premises occupied by small and medium size businesses. When new business takes up occupation of premises, or current businesses move to new premises, there is a requirement for utilities (i.e. gas, electricity or telephony) to be supplied. Often outgoing occupants will settle utility bills and leave the premises supplied by the current providers. All businesses will generally research the market themselves to find the best utilities deals available. However, it appears as soon as the businesses occupy the premises and the phone is connected they are contacted ('cold called') by 'allegedly' independent brokerage companies who offer to find them the best utility deals available to them.

The broker companies referred to in this application being ***Energy Search limited, Commercial Energy limited*** *and* ***Commercial Reduction Services Limited.*** *The brokers then inform the new businesses that the best deals for them are with* ***BES*** *Utilities for the supply of gas, electricity or telephone or a*

*mixture of the three. The brokers then go through what appears to be a written script which forms the contract with **BES.** The businesses enter into a verbal contract and are told the paperwork will follow usually via email. What they do not tell them is that this is a verbal contract with, legally, no cooling off period and in the case of most of the complainants they are not fully aware of what they have agreed to until they receive the written contract usually the next day via email. It appears that parts of the calls are recorded. The parts that do not appear to be recorded are the initial contact and negotiation with the broker. It appears that the premises 2, 3, 4, 5, 6 and 7 Darwin Court, Hawking Place, Blackpool, Lancashire, FY2 OJN are the call centres were the brokers make their calls and it is in these premises that the calls are recorded and stored on servers.*
*The brokers pass customer details to the **BES** Group aggregator, **Commercial Power Ltd.,** who in turn passes them on to **BES.** BES will then correspond with the customers from their correspondence addresses situated in Darwin Court, Blackpool, Lancashire, FY2 6TX*

Allegations

It is alleged that:
1. Brokers speak very quickly during the call and make dishonest statements inducing the business proprietors to enter into the contracts.
2. Brokers purport to be from their current supplier or another broker saying they can no longer supply them, however, BES can.
3. The calls made are unfair to the business as they are told that they are on emergency rates with BES, which they are not, and they must re-sign with them.
4. The brokers are not independent. BES Utilities and associated brokers are one and the same.
5. Brokers inflate rates comparisons with other suppliers and omit to mention additional costs such as minimum usage cost.
6. The brokers make numerous often harassing calls as soon as the new business opens.
7. BES transfer contracts without the knowledge of the customer who is tied into a contract he cannot get out of and never agreed to.
8. Complainants are not fully aware of the terms and conditions of the agreements made due to the speed and forceful nature of the broker's call.
9. Complainants are wrongly told that they have a 'cooling off period' of 14 days or 6 days and agree a contract. When they try to cancel within the cooling – off period they find out they cannot and are tied into extended and expensive contracts.

10. Complainants were falsely told that they were on an emergency contract when they weren't.
11. Brokers tell customers they are about to be disconnected when they are not.
12. Contracts are made with employees of the customer businesses who have no authority to enter into contracts on their employer's behalf.
13. The verbal contracts in isolation sounds like a legitimate contract, however, businesses are often coached to answer the questions or are told to just listen and say nothing.

Summary of Complaints

It can be summarised to say witnesses allege that during these calls numerous false representations are made to them in respect of the following for example only and amongst others:
a) The identity of the caller - often brokers impersonate existing suppliers.
b) The unit tariff - often brokers provide fictitious quotes from competitor energy providers favouring ***BES***
c) That the businesses are currently out of contract with suppliers and are paying emergency tariffs at grossly inflated rates.
d) The utility meter has to be registered by law.
e) The meters are not compatible with suppliers other than ***BES.***
f) A 14 day cooling off period exists
g) Omitting information regarding minimum usage tariffs

These are an example of the type of false representations made to the new business in a high pressure manner which result in contracts detrimental to the business requirements. Witnesses complain that once the alleged contract is entered into, ***BES*** *mis handle complaints and retain supplies fraudulently. This practice results in substantial financial losses to the businesses and in cases have forced closure of the business causing innocent employees to lose employment.*

"Whistle Blower" Evidence

A previous employer... [Layla Sakly]...has come forward and made a witness statement...evidence can be summarised as follows

- *Commercial Power trade under a number of different names or 'styles' including Commercial Reductions.*
- *Commercial Power is, allegedly, independent energy brokerage dealing with commercial customers only. It is owned by GOULDING whose best friend is PILLEY who owns BES Utilities.*

- *For all practical purposes Commercial Power and BES Utilities is one and the same outfit.*
- *From the outset the true objective of the sales calls would be to pose as Independent advisors when in fact the intention was to sign customers up to expensive contracts with BES.*
- *An estimated 98% of customers would be steered to contracts with BES.*
- *Staff would lie to customers and invent quotes in order to induce them into thinking they are on inflated 'out-of-contract' rates with their existing supplier.*
- *Favoured targets were medium sized shops, cafes, pubs, nightclubs and hairdressers.*
- *Staff would be given 'scripts' which were constantly updated.*
- *Staff would ring customers and say there were from non-existent organisations such as 'Meter Registration Services' or 'Energy Search'.*
- *Energy Search is a trading style for Commercial Power and entirely made up.*
- *Staff would falsely tell customers that there was a National Database in order to obtain their meter numbers which would then assist them in getting the meter from their existing supplier.*
- *PILLEY is running the brokerage which is not independent from BES.*
- *BES made the phone call to customers as if they are from Commercial Reductions so that PILLEY can distance himself from the process."*

60. There was also a case summary which that included the following paragraph:

> *"**POSSIBLE DISRUPTION TO BES CUSTOMERS***
>
> *Ofgem have provided the following advice in relation to the possible effect on BES customers as a result of the execution of the warrants;*
>
> *"You asked whether there are any serious concerns from an Ofgem perspective in terms of the company's customers having their supply disrupted in the immediate short term in the event of any planned action on your part.*
>
> *In the immediate short term, there are no such concerns.*
>
> *There is a significant risk to the company being able to maintain customer service during any such period of disruption.*

There are other possible risks which could possibly occur, but these are not thought to be likely and certainly not on any significant scale.

Ultimately we conclude that there is nothing so significant so as to cause you to curtail your planned action."

61. There was also a note which was provided to the Court of Leading and Junior Counsel dated 22 July 2016. The note set out at para. 3-6 the particular need for vigilance about search warrants and the need for an applicant to satisfy each of the statutory grounds: see *R (Redknapp) v Commissioner of City of London Police* (2009] 1 WLR 2091 and *S v Chief Constable of British Transport Police (Practice Note)* (2014) 1 WLR 1647 at paras. 38-39. It was then set out how this was a Special Procedure case (paras. 7-10). It then identified the conditions to be satisfied and explained why they were each satisfied, referring to the application and the case summary. There was then a section headed counter-arguments which read as follows:

"Counter-arguments

16. The applicant expects that, when confronted, the defendants will vigorously deny any allegations of fraud or other wrongdoing. We anticipate that the issues which they might raise in opposition to this application include the following:

a. There must be reasonable grounds to believe that one or more indictable offences have been committed. In the present case, that would necessitate showing that the directors (or otherwise the directing minds of the business) were acting dishonestly.[1]

b. Even if individual sales staff have made dishonest statements in order to secure sales, it does not automatically follow that this was systemic conduct caused or encouraged by the directors. Likewise, even if one of the businesses was being conducted in a fraudulent manner, it does not automatically follow that all businesses were fraudulent.

[1] Because this case involves business-to-business sales, the investigation is focussed on offences of fraud, fraudulent trading and conspiracy. Although many of these were small businesses (including sole traders), as a matter of law consumer protection provisions do not apply.

c. Energy tariffs can be complex, and the best rates are not always available to every customer. There may have been valid reasons why packages were offered when on the face of its other suppliers would have been cheaper.

d. There is nothing per se wrong with a broker promoting a particular supplier. It is only unlawful if it is accompanied by false representations.

e. There is only a single 'whistleblower' statement, and the former employee may simply be exercising a grudge. Although elsewhere she claims to be speaking from direct knowledge of the activities of directors, parts of her statement appear to be based on hearsay.

f. The journalistic investigation provides only a limited snapshot of the conduct of the business, and that was conducted more than three years ago.

g. The subjects cooperated with the investigation by the statutory regulator in 2015, made appropriate admissions and reached an agreed settlement. The adverse findings are not of themselves findings of dishonest conduct, although the applicant submits that they constitute clear evidence of dishonest practices (see for example paras 3.21 and 3.22, and 5.4 to 5.8 of the report).

17. The subjects would no doubt also point out that the premises are in separate ownership/occupation. Although that means that the statutory grounds must be satisfied in each case (including fundamentally the fact that they may hold relevant material and that notice cannot be given) it does not require reasonable grounds to believe that each individual is guilty of dishonesty.

18. All of these matters have been taken into account by the applicant. Nonetheless, it remains satisfied that the statutory conditions are satisfied in this case. This case is still at an investigatory stage and such potential lines of defence are matters which will of course have to be scrutinised.

19. It is acknowledged that even a temporary interference in the operation of the businesses is a significant detriment. The statutory conditions do not of themselves specify a requirement that any interference should be proportionate (although that may be inherent in the 'public interest' test in Para 14(c)). The applicant submits that any requirement of proportionality is satisfied in the present case, in that this is an investigation into allegations of serious and systemic fraud involving serious financial harm to individuals and small businesses. The aggregate gains by the suspects from the alleged fraud would amount to millions of pounds. In devising its search strategy, the applicant has taken reasonable steps to minimise the disruption to the subject businesses."

(i) The note of the hearing

62. The note of the hearing shows that HH Judge Brown was concerned as to why the voluminous material had not got to him sooner than the day before the hearing and said that he had had very little time to prepare for the hearing. Mr Thomas QC said that it was very important for the reasons set out at paras. 3-6 of Counsel's Note for the Court to scrutinise the basis on which the applications are made. He said that *"applications of this kind are not made on the nod"*. He then said this:

> *"And we are here to answer any questions that the court may have about the detail of the material. We are also conscious, we were aware of a communication yesterday, indicating that the hope for judicial reading time was not going to be made available. If it means deferring the decision and the court requires reading time post-hearing before reaching a decision, then there is no objection to that course being followed.*
>
> *JUDGE BROWN: No, no. Well, I will obviously, I just need to go through the document you have provided me with this morning. As is often the wont or as is often the way, I have had to find reading time.*
>
> *MR. THOMAS: Yes.*
>
> *JUDGE BROWN: But it was not a satisfactory state of affairs to be given a file yesterday when I was away from the building from lunchtime for the whole of the rest of the day.*
>
> *MR. THOMAS: Well, I apologise. We would---*
>
> *JUDGE BROWN: And I had to rejig yesterday morning's list because of it. I mean it is not your personal fault, Mr. Thomas, and I appreciate that these things can happen, but it is in a sense compounded by the fact that I have just been given this document [a reference to Counsel's note]."*

63. The Judge then said that he would rise to read the note and said that he had read DC Griffin's statement, which must have been a reference to the application signed by DC Griffin. The Court rose just after 11.20am with a view to returning to Court after 25 minutes.

64. The Judge asked more questions. He then gave a judgment which showed that he had absorbed the application of DC Griffin, the case summary, the statement of the whistleblower Leila Sakly (which was summarised by DC Griffin) and the information provided to the Court by Mr Thomas QC. He had also identified the conditions to be fulfilled and satisfied himself that they were each made out. He therefore granted the applications in respect of each of the 11 Search Warrants.

65. In particular, the Judge was satisfied that there were reasonable grounds to believe that there had been an indictable offence of conspiracy to commit fraud. He was also satisfied about each of the qualifying conditions including that the material was likely to be of substantial value to the investigation in connection with which the application was made. No application has been made at any stage to quash the warrants pursuant to CPR Part 54.

66. The warrants were issued on 22 July 2016 and were framed in wide terms permitting the seizure of computer and other devices on which data was stored. The Search Warrants expressly provided for the seizure of electronic documents. For example, they permitted the seizure of the following categories of material:

> *"All records and recordings of telephone calls held on computers and servers made by [company name] and all brokers ... including records and recordings made to customers and/or clients relating to contracts and sales, prospective or substantive.*
>
> *"All files and correspondence whether by e-mail, letter or otherwise of contracts held made and made between customers and/or clients and [company name] and all brokers ..."*
>
> *"Any material recorded on servers accessible from the subject premises.*
>
> *"All files and correspondence whether by e-mail, letter or otherwise of complaints made by [company name] customers and/or clients ..."*
>
> *"All records, details, notes and files held whether on computer or otherwise of the employees of the above named companies ..."*
>
> *"All notes held either on computer or otherwise of managers meetings, performance statistics ... etc."*

(j) Execution of the Search Warrants

67. The Search Warrants were then executed on 28 and 29 July 2016 by Lancashire police officers with the assistance of colleagues from the National Crime Agency ("NCA"). The Defendant's staff were present to advise. A huge quantity of hard copy and digital material was seized both pursuant to the warrants and s.50 Criminal Justice and Police Act 2001 ("CJPA 2001").

68. Following seizure, the material was passed to the Defendant for examination for the purposes of the ongoing criminal investigation. The servers seized from the premises were prioritised by agreement and were returned on a rolling basis between 1 August and 18 August 2016. Following the execution, the following servers were returned to the Claimants:

(1) 6 servers on 5 August 2016;
(2) 3 servers on 10 August 2016;
(3) 1 server on 12 August 2016;
(4) 3 servers on 16 August 2016.
(5) 2 servers on 18 August 2016.

69. The execution of the warrants resulted in the seizure of a vast quantity of electronic documents. The total capacity of the equipment seized was 53 terabytes, a vast quantity of material. In a witness statement of Mr Childs dated 27 July 2021 at para. 12, he said as follows:

> *"In total, across all the exhibits submitted by the North West RIT for examination, there was in excess of 53 Terabytes (TB) of storage capacity, which is a huge volume of material. 1 Terabyte is the equivalent of 1,000,000 Megabytes (MB). To illustrate the capacity of a Terabyte, a file containing the full text of Jane Austen's novel 'Pride and Prejudice' is 784 Kilobytes (KB) in size and so it would be possible to store 1,275,510 copies of that file on a 1TB hard drive. According to Barnes & Noble booksellers, that novel has 434 pages and so this would amount to 553,571,340 pages of Pride and Prejudice on a 1TB hard drive. Obviously, the exact amount of material depends on the size and type of the data being stored, but this does give a realistic idea of the potential amount of data per Terabyte of hard drive space."*

From the information provided to the Court on an application to the Divisional Court, the quantity of the copied data on the servers of the investigating authorities was described as exceeding 200 million documents and including about 770,000 audio recordings of telephone conversations: see *R (on the application of Business Energy Solutions Ltd) v Preston Crown Court* [2018] EWHC 1534 (Admin); [2018] 1 WLR 4887 at para. 4.

70. The contents of the seized devices were imaged and copied and backed-up and the physical devices were returned. Examination of the remaining material continued over the following months and there was ongoing dialogue between the Defendant and representatives of BES. The ingestion process of this data was from 15 August 2016 until 25 January 2017.

71. On 28 July 2017, Mr Pilley and the First, Second and Fourth Claimants made a number of applications to the Crown Court at Preston. Specifically, they made an application for the provision of unredacted copies of the evidence used in support of the application for the warrants; an application for the return of material pursuant to s.59 CJPA 2001; and an application concerning the manner in which material attracting legal professional privilege ("LPP") was being handled. It was this application which was the subject of an appeal to the Divisional Court reported as *R (on the application of Business Energy Solutions Ltd) v Preston Crown Court* above.

(k) Charges of criminal offences

72. The investigation has resulted in the following charges, which have been committed for trial:

(a) Andrew Pilley, Director of BES Utilities and CPL, 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, Director of the BES Utilities and CPL and sister of Mr Pilley, 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 (aka Lee Goulding) is the Director of Energy Search Limited ("ES Ltd") and of Commercial Energy Limited (dissolved on 4 August 2015) and was previously director of Commercial Reduction Services Limited (dissolved on 6 February 2018). 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 CPL. He has been charged with two offences of Fraud by False Representation contrary to sections 1 and 2 of the Fraud Act 2006. One element of the charges against Mr Chapman arises from his involvement in the complaint made by Mr and Mrs Maybury, who are witnesses in these proceedings. It is alleged that Mr Chapman knew that the audio recording of the relevant telephone call was available and that it supported their complaint. Mr Chapman lied and concealed the existence of this recording from Mr and Mrs Maybury.

V General observations

(a) General observations – use of CP materials

73. Before considering the issues in this case, there a number of matters considered in the submissions which are worthy of mention. As is stated in the first paragraph of the Claimants' Closing Submission, the central issues to be resolved are relatively limited despite the extensive evidence before the Court. The issues concern misfeasance, the disclosure to the Court before obtaining the order for the Search Warrants, the scope of the Search Warrants sought and whether they were necessary and proportionate, the execution of the Search Warrants and the retention of the items obtained pursuant to the Search Warrants. The Claimants sought just before the trial to exclude from the trial the materials which had been revealed by the Search Warrants. They submitted that the materials in the criminal proceedings did not bear on the narrower issues in the case.

74. Thus, the Claimants stated repeatedly that it is not a part of the function of the Court to make a determination as to the matters which are the subject of the criminal charges including but not limited to whether there was fraud practised on customers whether by way of the content of the representations made to prospective customers or by way of a pretence of brokers being independent rather than under the control of Mr Pilley/the Claimants. All of that is for the criminal proceedings and not for this civil action.

75. Indeed, at the heart of the Claimants' submissions are that the belief of the Defendant, the scope of the application and the disclosure given in the application for the Search Warrants stand to be considered on the basis of the information available to the Defendant/the police at the time of the application. Likewise, the issue of misfeasance is by reference to the knowledge of Mr Bourne and the Defendant at the time when the misfeasance is alleged to take place. In the case of Mr Bourne, it was in the first half of 2015, and in the context of the allegation, it fastens on the investigation and the application made on the basis of the investigation in July 2016.

76. By contrast, the Claimants submitted that the question of whether there has been a fraud may be resolved in due course by reference to information known to the Claimants which was not known about by the Defendant at the time of the application. That might take forward or backwards the Claimants' case in defence to the allegations of fraud, but it does not arise for determination in this case.

77. The Claimants also submitted that the materials obtained in the criminal proceedings should not be considered because the pleadings of the Defendant comprised a series of non-admissions. For this reason too, that which was called the CP materials, the criminal proceedings materials should not be admitted in this trial.

78. I rejected the attempt to have a blanket exclusion of the CP materials in the trial. The detailed reasons appear in the judgment which I gave on Day 6 of the trial. I do not intend to set out all the details of that judgment. I shall set out various specific points.

79. First, the case was pleaded by the Claimants in a broader way than was strictly required by reference to the specific allegations contained in the claim. Likewise, the witness statements of Mr Pilley and Mr Newell were more expansive than was required to prove the case of the Claimants. It included evidence designed to show that there had not been a fraudulent design and to show that there was no reasonable cause to believe that there had been any fraud. There is heavy emphasis in the opening part of the submissions of the Claimants of the evidence of Mr Pilley and the extent to which it was not challenged. For example, there is emphasis on what he says about broker behaviour and consumer protection, strategic partners, complaints, BES's pricing and contract terms and BES's cooperation with the regulators. There was evidence designed to show that the brokers were independent and at arm's length. Mr Pilley had referred to the independence of the brokers in his witness statement at paras. 17, 21, 37, 156, 160 and 171.

80. Second, Mr Pilley had referred to the willingness of the Claimants to cooperate in the investigation at paras. 51, 54, 150 and 183 of his witness statement. The pleaded case of the Defendant was that the Defendant did not respond to offers of cooperation because there were reasonable grounds to believe that evidence would have been destroyed, and likewise if only production orders were obtained instead of obtaining

search warrants, material would have been withheld or destroyed: e.g. see paras. 41 and 78 of the Defence.

81. Third, contrary to the Claimants' contentions, 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 Production Orders had been sought, the evidence and the material would have been destroyed and withheld: e.g. see paras. 8 and 16(a-h) of the Amended Defence.

82. I concluded the following:

> *"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.*
>
> *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."*

83. There is a further point about the expansiveness of the way in which the Claimants have put the case. As will be set out in more detail below, the Defendant has adduced the evidence of Mr and Mrs Maybury, Mr McMichael and Ms Whitfield. A strict attempt to confine the evidence could have led to this evidence being confined to the narrow subject as to whether Mr Bourne had acted improperly in the proce of obtaining their evidence. In fact, there was cross-examination over a period of almost three days in respect of these witnesses. There was therefore tested whether or not there were misrepresentations made to these witnesses, and not solely whether the Defendant had a reasonable basis to believe that there were misrepresentations. The Court does not have to go on from that to make final findings as to whether there were misrepresentations, mindful of the limited nature of the issues in this case. Nonetheless, such a detailed examination of their evidence does give an important window into the practices of the Claimants as they would have appeared to the Defendant in the course of their investigations. This feeds especially into the determination of the misfeasance issue and the appraisal of whether or not on the information available at the time of the investigation and before the decision to apply for Search Warrants gave rise to a reasonable belief that frauds had been committed.

84. What then of information which became available as a result of the Search Warrants? A stark example will be the revelation of tapes of the front-end conversations whose existence had previously been denied, and of evidence which supported the evidence of complainants. Related to this is evidence of emails within the Claimants evidencing suppression of these tapes. There will be a discussion as to the inability of the Defendant to rely on such information retrospectively to justify the making of the application for the Search Warrants. However, if the Court decides that the Search Warrants were applied for lawfully, it does not follow in the expansive way in which this case has been fought by the Claimants that the Court must shut its eyes on this evidence for all purposes. It must be relevant to the appraisal of the evidence of the complainants in connection with the misfeasance claim. The misfeasance claim would be advanced insofar as it appears to be the case that the evidence of the complainants was not only poor but appeared to be the product of improper influence. That influence might have been from Mr Bourne or to the knowledge of Mr Bourne from others e.g. in this case as put, from Messrs Scrivener and Mooney or UIA or others.

85. In the expansive way in which the case has been fought, it would be unjust to consider this case on the basis that the Claimants were able to portray their business in a favourable light whether through their evidence in chief or from many days of cross examination by reference to contemporaneous documents. The Defendant must be able to answer this evidence even if it involves a cross over between the civil and the criminal proceedings.

86. There are qualifications to the foregoing. First, the Court will not decide in the civil proceedings whether the fraudulent conduct has been established. It may be necessary to show that there was a reasonable basis for suspicion or belief in fraudulent conduct at the time of the application for the Search Warrants without which they would not have been justified. The question of whether there was fraudulent conduct is ultimately for any criminal trial.

87. Second, in respect of the application for the Search Warrants and the assessment as to what was reasonable and proportionate and also whether there was full and frank disclosure, this stands to be considered at the time of the application, and not by reference to the information obtained as a result of the Search Warrants. I shall consider this more fully later in this judgment. In other words, it is not possible to make good an application by reference to that which is revealed by the Search Warrants in the event that there was no basis for the Search Warrants.

(b) General observations – disclosure issues

88. The next matter is that the Claimants have contended repeatedly that there has been inadequate disclosure on the part of the Defendant. It has been submitted on the back of this that there are inferences to be drawn about this against the Defendant's case and in favour of the Claimants' case.

89. The Claimants allege that there are very substantial gaps in the Defendant's disclosure. They refer to some deletions in Mr Bourne's emails, there was missing data from Mr Dinn's iPad which included the audio interview with Ms Sakly, the notes of the interviews conducted with witnesses have not been disclosed, there were only 6 questionnaires taken by Mr Bourne which had been disclosed, and some exhibits recorded as having been handed over by Mr Bourne to Mr Harrison on 30 January 2015 are missing.

90. The Claimants ask the Court to infer that the missing disclosure would contain more material to advance the Claimants' case. In the instant case, there is no evidence of deliberate destruction or suppression of evidence in connection with disclosure on the part of the Defendant. I shall assume for this purpose that an inference can be drawn absent a finding of deliberate destruction or suppression. However, there is no scope in this case to draw the inference. This is because so extensive has been the disclosure provided that it negates any scope for an inference from incompleteness. In a case involving disclosure of this magnitude, there would almost always be scope for particular criticisms, but if that were to find an inference, then inferences of this kind would become the norm rather than the exception. In my judgment, either there is no scope for such an inference in this case, or if there is, in the exercise of my discretion, I decline to draw any such inference.

91. This is not the end of the matter because of criticisms of disclosure made following the conclusion of the oral argument. There has been an attempt to introduce into this civil action documents disclosed in the criminal disclosure which are said to provide revealing further documents, and to lead to inferences to be drawn about the inadequacy of disclosure. It is to this that this judgment now turns.

(i) Disclosure from the disclosure in the criminal proceedings

92. The history of this is as follows. In April 2022, the Court was asked to delay the handing down of a judgment because it was sought to introduce evidence obtained in the criminal proceedings which it was contended should have been produced by the Defendant. This would involve seeking the permission of the criminal courts in order to be able to adduce this evidence in the civil proceedings. There were various updates over the weeks which followed.

93. It culminated in this Court requiring a hearing which took place on 17 June 2022. Shortly in advance of the hearing, there was provided by the Claimants a skeleton argument summarising their position. The Defendant responded on 27 June 2022 and the Claimants replied on 4 July 2022. Until the first document from the Claimants, it was not clear the nature and extent of what was involved. It was apparent that the Claimants would be seeking permission to rely on documents not disclosed in the course of the case, but it was not apparent whether they would be seeking permission to reopen cross-examination or to have a further round of submissions. In the event, there were a relatively small number of documents and some discrete argument as to the following in respect of each document or class of documents, namely on (1) relevance, (2) any fault of the Defendant for failing to disclose prior to trial, (3) whether the evidence should now be admitted, and (4) how this affected the submissions before the Court.

94. As regards the relevant law, there is a presumption of antiquity that omnia praesumuntur contra spoliatorem, namely that all things are presumed against a wrongdoer. That applies to a person who suppresses or destroys evidence where this is done deliberately. The principle has been applied where the destruction was not deliberate: see *Infabrics Ltd v Jaytex Ltd* [1985] FSR 75. This to the effect that the principle is fault-based such that it should apply even where a person has not troubled to retain documents. It may also be that a failure to keep records in circumstances where the person would be expected to do so may give rise to an unfavourable inference: see General Tire [1975] RPC at 267. The question is whether there is a duty which has arisen either by the commencement or even contemplation of proceedings.

95. In this case, there has been a vast amount of disclosure which has been provided. It has been pored over by the parties. In the nature of things, it is almost inevitable that parties will be dissatisfied with the nature and extent of the disclosure or that documents may for some reason go missing by accident. There is then a question which is very fact specific as to whether the accidental destruction or disappearance of a document or a class of documents will give rise to any inferences against the party not producing the documents.

96. After the case was over and when the draft judgment was at an advanced stage, the Claimants asked the Court to withhold the finalisation of a judgment. This was because a review of disclosure provided by the Defendant in the criminal proceedings against Mr Pilley, Mr Chapman and Ms Davidson ("Criminal Disclosure") had emerged which, it was said, ought to have been provided by the Defendant in the current proceedings. At first, there was lengthy correspondence between the parties in which it there was canvassed the possibility of an application for specific disclosure. However, this has now been revised so that the Claimants sought permission to

adduce a number of documents in the Criminal Disclosure on the ground that they were of significance and there was a risk of injustice if they were not adduced: see *Vernon v Bosley* (No.2) [1999] QB 18 at 35D-F. They also seek to expand on some of the submissions relating to allegeded failures in disclosure.

97. There have been submissions as follows:

(1) the Claimants' submissions dated 16 June 2022 (13 pages);
(2) the Defendant's submission dated 27 June 2022 (12 pages);
(3) the Claimants' reply submission dated 4 July 2022 (13 pages).

98. There then ensued lengthy letters said to correct errors as follows:

(1) the Defendant's solicitors dated 6 July 2022 (3 pages);
(2) the Claimants' solicitors dated 8 July 2022 (4 pages).

99. The documents which the Claimants wish to introduce are as follows:

(1) A witness statement of Debra Vaughan taken by the Defendant for the criminal proceedings and in particular a reference to "emergency rates" by her;

(2) A document containing an analysis of the witness statement of the whistleblower Leila Sakly as against the available transcripts;

(3) An analysis of the Citizens Advice Consumer Services ('CACS') prepared by an unknown employee of the Defendant dated 9 March 2018 about contact or linkage between complainants and Mr Scrivener, Mr Mooney and Mr Bourne;

(4) Emails from the Utilities Intermediaries Association ('UIA') between March 2015 and May 2016 said to evidence influence of the UIA on the Lancashire Trading Standards before the matter passed to the Defendant;

(5) Attachments to an email of Mr Bourne sent by him to Ms Christine Swan on 28 April 2015 who was a complainant in the application for Search Warrants;

(6) A text message between Kelly Bailey and Mr Dinn sent on 26 June 2017;

(7) A further transcript of Ms Whitfield, a complainant who gave oral evidence in the trial.

100. The Defendant points to the fact that five of these documents were not within a date range ordered for searches by Turner J, namely between 1 October 2014 and 22 July 2016. That date range had been agreed between the parties on 17 October 2019. The Defendant also said that these documents went to non-pleaded issues. The other two documents raised issues which were said to be marginal to the pleaded issues. The Defendant objects to the admission of these documents on the basis that they are not

of real significance and there is no injustice caused by the fact that they were not disclosed in these proceedings.

(1) Debra Vaughan witness statement.

101. This was dated 6 July 2018, almost 2 years outside the date range. She was an employee of the Ombudsman and therefore involved in complaints resolution. She said that it was not uncommon in the industry to hear the term "emergency rates". Its purpose was to impose a sense of urgency on the customer to agree a contract. It can be "scary language", generally the customer is better off with contract rates than non-contract rates. This is said to be supportive of the Claimants' expert Mr Evans and unsupportive of Ms Frerk, the expert for the Defendant.

(2) Ms Sakly's witness statement

102. This is an analysis document prepared by Mr Roy Earl of the Defendant on 13 May 2019, which identifies inconsistencies between what is stated on the transcripts held by the Defendant and the content of the statement itself. The Claimants submit that there are so many inconsistencies that it undermines that which was presented to the Court at the time of the application for the Search Warrants as being the evidence of Ms Sakly. The Defendant says that the document is outside the search period, and that it could have been created by the Claimants without receiving this comparison. The Claimants submit that the Defendant has failed to prove the authenticity of the statement and to infer that the statement does not reflect Ms Sakly's evidence.

(3) The CACS analysis

103. The Claimants say that this was a document which identified actual or potential contacts or links between complainants and customers. The Defendant says that this document was outside the date range by almost 2 years: it is dated 9 March 2018. Some of the statements were not used (Mr and Mrs Weemes and Mr and Mrs Marshall). Some of the complainants were listed as having had links with Messrs Scrivener and Mooney in a list on a schedule provided by the Defendant and the Weemes were so identified in correspondence. The Claimants say that with the exercise of reasonable diligence, this information could have been available at the time of the presentation of application for the Search Warrants. There was a complainant said to have links with the UIA (Ms Mardle). There are competing allegations as to whether this was pleaded sufficiently to draw attention to the UIA: the Defendant points out that the UIA was not referred to in the pleadings, but the Claimants say that it sufficed that rival brokers were referred to and the UIA was a body comprising brokers who were rivals of BES. Assuming that it was pleaded, the Defendant draws attention to the fact that this statement was obtained by Lancashire Trading Standards in July 2014.

(4) UIA emails

104. There are identified by the Claimants various communications within the date range which are from a group of brokers working for the UIA. There were some emails from Mr Sinden to Mr Williams and communications from UIA to Michael and Angela Aubrey of Beauty Spot. As noted above, there is an issue between the parties as to whether the UIA link was pleaded adequately so as to identify that they were acting unlawfully in their contact with the Defendant.

(5) Attachments to the Bourne email

105. This is a reference to three attachments to an email sent by Mr Bourne to Ms Christine Swan on 28 April 2015. There are said to be material discrepancies between the signed statement of Ms Swan and earlier draft statement, and these modifications were said to be good examples of Mr Bourne deliberately suppressing evidence. The Defendant had said that the attachment had not been produced on the grounds of relevance. It was also submitted by the Claimants that the production of a small number of internal emails from Mr Bourne underscores a submission that there is not a complete picture of Mr Bourne's action and that there are likely to be further unlawful disclosures of information, incitements to harass, partiality and the ignoring of lines of inquiries. The Defendant submits that the differences between the earlier and the final draft of the statement of Ms Swan is of no significance and does not justify the inferences sought to be drawn by the Claimants. Nor does the failure to produce each and every internal email of Mr Bourne justify the inference about other emails.

(6) Text messages between Ms Bailey and Mr Dinn

106. The Claimants draw attention to a text message sent on 26 June 2017 between Ms Bailey (who is said to have been a supporter of Mr Scrivener and Mr Mooney) and Mr Dinn. Mr Dinn took a screenshot of the message and uploaded it on to the Defendant's system. The Claimants say that this shows that the mobile phone of Mr Dinn remained available to the Defendant, and it was not preserved. This is said to evidence the approach of the Defendant in failing to preserve evidence. The Defendant says that there was no reason to preserve phones of an investigator in respect of whom there was no evidence of impropriety. The Claimants say that there was no need for such an allegation to be made, and all phones needed to be preserved of anyone involved in the investigation. It was this lax approach that led to the loss of the recording of the interview with Ms Sakly and to the loss of access to Mr Bourne's email accounts. There is therefore no scope for believing that there was only one text message between Ms Bailey and Mr Dinn.

(7) Further transcript of Ms Whitfield

107. There was introduced into evidence at the trial evidence of two further calls from Commercial Power and Electricity Renewals to Ms Whitfield in October 2011. There was a transcript in the Criminal Disclosure of a call between Ms Whitfield and

Commercial Power on 8 April 2009. It is not understood why this point is being made about the 2009 call, and if it was considered relevant to the case, it could have been introduced by the Claimants since it was a call of Commercial Power.

(ii) Conclusions

108. I have come to the following conclusions, namely:

(1) there has been something of an information overload in these post-trial submissions by both sides with a failure to discern which are the most important points to emphasise and having regard to the stage at which these submissions are made;

(2) the Defendant has not shown that they are prejudiced by the lateness of these points in that its answer to the desire to admit the same is that there would be no injustice to the Claimants if they were not admitted because they raise points of no significance;

(3) the Claimants have not sought to contend that if the documents were admitted that it would be necessary to have further oral evidence, and despite my concern about the over-long submissions, they are not such that they cannot be managed into the case alongside the much longer submissions received at the close of the oral hearing;

(4) as a matter of case management and in accordance with the overriding objective, I shall admit the documents and receive the submissions of the parties in respect of the same.

109. As to the substance of the submissions and the documents, I have come to the following conclusions:

(1) there is nothing in the submissions which leads the Court to consider that there are fundamental criticisms about the disclosure such as to give rise to inferences about what else might not have been disclosed. In general terms, it is not accepted that there has been a serious failure in the duties of the Defendant's disclosure. It is not necessary to go through each and every allegation in this regard. I come to that conclusion taking into account the rejection elsewhere in this judgment of the trenchant criticisms made by the Claimants of the Defendant's disclosure. On the contrary, the matters of criticism stand to be appraised in the context of the numerous documents which have been disclosed, and how this has generally stood up to what, demonstrably by the very detailed closing submissions and these additional submissions, has been a very close scrutiny.

(2) In my judgment, the specific points which have been addressed at this stage are generally not telling in the sense of raising questions about the adequacy of the disclosure of the Defendant. It is significant that five out of the seven categories of documents fall outside the defined period for search terms by

agreement of the parties. The Claimants have been inclined where they find something which has gone wrong to draw inferences which are not justified e.g. the non-preservation of the tape of the interview with Ms Sakly or the missing parts of Mr Bourne's emails or not preserving the phone of Mr Dinn against whom there was no allegation of misfeasance.

110. As regards the seven categories, I do not intend to consider each of them in the same detail as in the submissions. That would be to give disproportionate emphasis to them. I shall use the numbering of the seven categories in the sub-paragraphs which follow:

(1) There is nothing sinister in failing to provide this report. The reference to emergency rates by Debra Vaughan is something which can be factored into the analysis of the expert evidence. It assists the Claimants to the extent that the term was used, but it also reinforces the point of the witnesses about how the term 'emergency rates' was 'scary language'.

(2) There was no reason to alight upon the analysis of the competing notes about Ms Sakly's statement. The Claimants could have produced such an analysis of the differences. There has not been a qualitative compare and contrast analysis, and the broad judgment is that there are inevitably differences between three different versions of notes, but they do not invalidate the summary of what Ms Sakly said as related in the application for the Search Warrants.

(3) As regards the CACS analysis, there is nothing particularly revealing about this document. It does not descend into the nature and extent of the links or contact with the complainants. This was identified elsewhere in the schedule in respect of some of the complainants and especially Mr and Mrs Maybury. There was the opportunity to cross examine both of them about the contact which they had. Having heard them give evidence, I am satisfied that their account was because of their own experiences and not because of the influence of any other person.

(4) There is nothing qualitative about the UIA emails. It does not indicate that there were communications of a kind which were likely to have any influence in the nature of the investigation or in the decisions to be taken. These communications do not seem significant.

(5) There is nothing significant about the differences between the earlier and the final draft of the statement of Ms Swan. The inferences which the Claimants seek to draw are in my judgment speculative and not warranted by the nature of the changes. It is not unreasonable to treat the earlier draft as irrelevant, and it does not become more relevant because at a later stage the Claimants seek to attach such significance to the same.

(6) As regards the text messages between Ms Bailey and Mr Dinn, the failure to preserve the telephone of Mr Dinn was because he has not been the subject of allegations of misfeasance. There is no reason to infer that there was anything

sinister about this. There is no reason to infer that there would have been something significant in other messages. There is nothing significant in the particular message which has been preserved.

(7) The further transcript of Ms Whitfield from 2009 is not in any way significant. It was well outside the agreed period. It does not become relevant because there had been disclosure of calls in 2012. In any event, it could have been provided by Commercial Power if it was of importance.

111. As regards the further remarks contained in the correspondence of 6 July 2022 and 8 July 2022, the points are so detailed that they do not take the analysis any further. In fairness to the Claimants, the first letter in time was that of the Defendant, and the Claimants provided a response to the letter of Clyde & Co for the Defendant.

(c) General observations –witnesses not called

112. A related matter is the scope for an inference from not calling a witness. There are many witnesses who have been identified by the Defendant. The law in respect of adverse inferences has to be considered in this context, and drawing inferences must not be lightly undertaken. Relevant authorities were summarised in Hollander on Documentary Evidence 14th Ed. at para. 11-23:

> "*In Wisniewski v Central Manchester HA [1998] P.I.Q.R. P324; [1998] Lloyd's Rep. Med 223, Brooke LJ set out the principles as follows:*
>
> > *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> >
> > *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
> >
> > *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
> >
> > *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."*

> *However, as Ryder LJ made clear in Manzi v King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882; [2018] Med. L.R. 552 at [30].*
>
> > *"Wisniewski is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. 'the court is entitled to draw adverse inferences'".*
>
> *In Magdeev v Tsvetkov [2020] EWHC 887 (Comm) at [154], Cockerill J said:*
>
> > *"(i) This evidential 'rule' is, as I have indicated above, a fairly narrow one ..., the drawing of such inferences is not something to be lightly undertaken. (ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the 'missing' witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue. (iii) The court then has a discretion and will exercise it not just in the light of those principles, but also in the light of: (a) the overriding objective; and (b) an understanding that it arises against the background of an evidential world which shifts—both as to burden and as to the development of the case—during trial."*

113. In the instant case, the Claimants invite the Court to draw adverse inferences from the failure of the Defendant to call numerous witnesses including Mr Williams (who had provided a witness statement), Ms Murphy who took over from Mr Williams in about February 2016, Mr Noble (who went round getting witness statements with Mr Bourne) and Mr Earl the exhibits officer. These people were referred to as the officers who had first-hand knowledge of Mr Bourne, and the Claimants say that this was a tactical decision to shield from cross-examination these officers. It was said that Mr Rees and Mr Pierce who did give evidence had limited first-hand knowledge.

114. I shall consider each of those witnesses. However, the point about these witnesses not being called is not especially strong for the following reasons, namely:

(1) The only allegation of misfeasance was made against Mr Bourne and none of the other officers. Mr Bourne was called, and he was the subject of cross-examination for more than 2 days. There would have been scope for an adverse inference if Mr Bourne had not been called by the Defendant, absent a very good explanation.

(2) There were numerous witnesses who were called for the Defendant in addition to Mr Bourne. The evidence of Mr Rees in particular was not as

marginal as is now suggested. Indeed, there was about a half of a day of cross-examination directed to him. Mr Pierce was called at the end of the evidence, and his evidence was short. However there were many days of cross-examination of the witnesses for the Defendant over Days 8-15, that is the large majority of the time of the trial. There were many witnesses who were called including in addition to Mr Bourne, 4 complainants (including Mr and Mrs Maybury) whose evidence lasted almost 3 days, Mr Childs who oversaw the electronic material after the Search Warrants had been executed (and who was cross-examined for the entirety of Day 14 and for half of Day 15) and PC Griffin of the Lancashire Police (who was called for about 2 hours on Day 12).

(3) The events occurred years before the trial such that the scope for recollection of witnesses was less than could be gleaned from contemporaneous documents. That is not to discount oral evidence, but it is a factor in reducing the impact of the submission that witnesses were being shielded.

115. Bearing in mind the totality of the above points, this is not a case where there is much scope for the submission that inferences should be drawn lightly from not calling a witnesses. I shall now consider the four witnesses identified in the submission of the Defendant.

116. The first witness is Mr Williams. There was a statement from him, and he was the immediate senior officer to Mr Bourne. His conduct is not the subject of criticism and indeed a contrast is drawn between the conduct of Mr Bourne and the conduct of Mr Williams. The Claimants submit that the inference of not calling Mr Williams is that Mr Williams would have regarded Mr Bourne's conduct as wrongful, particularly in Mr Bourne taking steps in the case after he was asked to step down. The only reason provided for not calling Mr Williams was that the Defendant had been considering the timetable and the issues that were crystallising and so did not intend to call Mr Williams. The reaction of Mr Marshall QC was that it might not be as simple as that and so cross-examination might be extended with other witnesses in the absence of Mr Williams.

117. The significance of not calling Mr Williams is that there is no allegation made against Mr Williams. He had left the employ of the Defendant by the time of the application for the Search Warrants. His involvement in the matter is largely documented and his witness statement is almost entirely drawing attention to documents. His evidence could have been tested as regards his views of Mr Bourne's conduct. I bear that in mind in appraising the evidence as a whole and there is the possibility that he would have been critical of aspects of Mr Bourne's conduct, especially the matters which are now conceded about inappropriate conduct. I bear in mind that he was to have been called: he had given a witness statement, and a decision was made at some point thereafter and certainly by Day 8 at transcript page 152 no longer to call him. He would have been critical of Mr Bourne having any continued involvement in the case when told to step back. Nonetheless, in the exercise of my discretion, I am not prepared to go so far as to draw an inference to the extent of finding that Mr Bourne knew that what he was doing was wrongful. There is enough evidence before the

Court from which it can make that assessment, primarily assessing Mr Bourne following two days of cross-examination, but also having evidence of the complainants with whom he interacted and a vast number of documents which told their own tale.

118. The second witness is Ms Murphy who drafted the Search Warrant Application and who led the investigation at the moment of the application being made. She appeared to express misgivings about Mr Scrivener. It is submitted on behalf of the Claimants that the Court ought to infer that she would have gone further and said that she was aware of Mr Bourne's conduct and that a decision was taken not to disclose these matters or the influence of Mr Scrivener and Mr Mooney. They further submit that from her absence, there is scope for an inference that no proper consideration was given to using consensual or less intrusive means of obtaining the materials which were the subject of the Search Warrants.

119. In my judgment, there is no inference to be drawn from not calling Ms Murphy. DC Griffin, who prepared and presented the application, gave evidence and that evidence sufficed. That is not to say that Ms Murphy's evidence would have been irrelevant, but it does mean that there is no obvious scope for an inference from her not being called. In any event, there is no scope for the particular inferences sought to be drawn. There is no reason to believe that the failure to call Ms Murphy evidenced deliberate decisions to conceal the various matters or that no proper consideration was given to a less intrusive means of obtaining the materials. If this had been the case, DC Griffin would be likely to have known about these matters, and his evidence does not support this speculation.

120. The third witness was Mr Noble who went on the road with Mr Bourne seeing witnesses. It is claimed that the inference for his not being called is that he would have confirmed the wrongful nature of Mr Bourne's actions. There is no scope for this inference. There is no contemporaneous document bearing this out in a heavily documented case. The complainants spoke volumes about the professionalism with which the statements were taken. If the court accepts from the evidence that was adduced that the statements were obtained properly, there is no scope for the inference in respect of Mr Noble's absence, and I do not draw any such inference.

121. The fourth witness was Mr Earl, the exhibits officer. The evidence of Mr Bourne was that it was not his responsibility to go through the exhibits. The Claimants say that Mr Earl would have been able to give evidence as to how exhibits came to be destroyed or missing and whether there was any analysis of the exhibits to check the accuracy of what the witnesses were saying. The inference which the Claimants seek to draw from Mr Earl not being called is that documentation relating to the investigation has, indeed, been destroyed, and that there was no process of revisiting statements to check their accuracy once they had been taken. I do not accept that this inference is justified. The criticisms about disclosure and about the witness statements are considered in this judgment and do not justify the nature and extent of the criticisms of the Claimants. Mr Earl was not a central witness who was required to be called in addition to the witnesses who were called. In the circumstances, the Court will not draw the inference sought in respect of Mr Earl not being called.

122. It is not only the Claimants who have raised the question of adverse inferences. The Defendant submitted despite the wide ranging evidence of Mr Pilley and Mr Newell

especially about the independence of the brokers and the execution of the Search Warrants, there was not called Mr Chapman. He would also have been able to speak to communications within the Claimants as regards what to do about the front end recordings. I shall in fact in the exercise of my discretion draw no adverse inferences in this regard. There is a surfeit of evidence from which I am able to determine the issues between the parties.

123. There is a last related point about a potential witness who was not called, namely a former employee Michelle Roskell. The Defendant sought to rely on allegations contained in documents of Michelle Roskell against her former employer. This is about an allegation which is distinct from the systemic fraud practised on customers and potential customers. I shall place no reliance on these matters which have not been developed elsewhere in this case. I therefore make no determination in respect of the same one way or the other and accordingly I disregard it.

VI Expert evidence

124. The Claimants' case in this regard can be summarised as follows:

(1) The Defendant was guilty of non-disclosure by not engaging expert evidence for the purpose of the application for the Search Warrants. The Claimants rely on the case of *R (Rawlinson and Hunter Trustees)* [2013] 1 WLR 1634 at [88], [97] and [175] for the proposition that it is a part of the high duty expected of persons applying for a search warrant to place before the Court suitable expert evidence.

(2) The expert evidence called by them, namely Mr Evans, was to be preferred to that of Ms Frerk. Mr Evans was active on the ground and had more relevant experience than someone who had spent most of her professional life working for the regulator.

(3) That evidence was to the effect that:

(i) there was nothing sinister in the use of the expression "emergency rates": it was commonplace in the industry to refer to non-contract rates;

(ii) there was nothing wrong in there being no cooling off period: there was no requirement to have a cooling off period, which point was conceded in the expert evidence;

(iii) there was nothing wrong in the tapes of the initial non-contractual conversations not being recorded – there was no requirement for this.

(4) If that expert evidence had been sought, it would have cast a different light on the nature of the alleged pre-contract representations and the Court might have treated the case of the Claimants in a very different way.

125. I do not accept these points in the way in which they are made. In particular, as regards the point that expert evidence should have been obtained:

(1) The obligation to assist the Court with expert evidence is derived from the case of *Rawlinson*. That was a case of highly complex financial transactions where the applicant for the search warrants was dependent on highly specialist information from Grant Thornton and did not have the internal resources to provide evidence to explain it. In the instant case, the information is not complex and did not require expert evidence to help explain to the Court the particular terms and practices of the industry.

(2) I accept the answer provided by DC Griffin when the need for expert evidence was put to him, and he replied that expert evidence was not required to prove that someone was 'conned' in this case. It is a case about deceit which did not require expert assistance.

(3) In my judgment, the expert evidence was of very limited assistance to the court in the context of the issues in this case. It is important to note that the nature of the fraud was far wider than the subjects on which it is said that expert evidence should have been sought. The deceit was about representations being made by so-called independent brokers purporting to give independent advice when in fact they were controlled by or agents of BES or otherwise not independent of BES. Further, the representations about the information about what BES had to offer were impugned e.g. the provision of false rate comparisons, the claim that the brokers had the best rates available, that the contract had to be for 4-5 years, that the existing supplier could no longer supply them, but BES could.

(4) If in fact expert evidence had been sought, then neither would, nor might it have made any difference to the Court. Even if the matters relied upon by the Defendant's expert evidence had been before the Court, this would not have provided an answer to false representations as described above in high pressure selling. Whether used commonly or rarely, the term "emergency rates" would obviously instil fear in the consumer and is to be seen in the context of high-pressure tactics. In my judgment, seen in this context, the expert evidence neither did nor might it have invalidated the evidence provided to the Court upon the application for the Search Warrants.

126. In any event, I prefer the evidence of Ms Frerk to the evidence of Mr Evans as regards "emergency rates". I reach that conclusion for the following reasons:

(1) Mr Evans failed to declare his connections with BES. Within the last 6-7 years, his company had provided advisory services to BES. He was chair/legal secretary of an organisation in the industry of which BES had membership and Mr Chapman had been a diversity officer. Ms Frerk was entirely independent. I take into account the fact she had not had direct experience of doing commercial work or working with brokers.

(2) Mr Evans was unable to support his statement about the common use of the expression "emergency rates" by providing formal supplier documents that are publicly available containing the use of the expression. He accepted that it was not regulatory term: see T16/43-44. If it were used as part of unreasonable pressure in the course of cold calling, this would not legitimise its use. The statement of Ms Debra Vaughan of the office of the Ombudsman was to the effect that the expression was used, albeit that this is not supported by any formal document with such language. In any event, even if it were used, Ms Vaughan referred to the expression as being "scary language" which adds to the concern about its use. It provides indirect support to the statement of Ms Frerk that "the use of the term "emergency rates" creates a false sense of urgency, putting the customer under pressure to enter a contract, in particular in the context of a cold call."

127. If and insofar as the expert evidence took the case any further, and its assistance was limited, I preferred the evidence of Ms Frerk who was independent and whose measured evidence stood up to the test of cross-examination better than that of Mr Evans.

128. Nor is it a matter of significance that cold calling was prevalent in the industry and there was no requirement to have a cooling off period. This is not an answer to the alleged misrepresentations which were alleged. On the contrary, the absence of a cooling off period, which was not suggested to be a requirement, was worthy of mention because it made the misrepresentation more serious since there was no opportunity to cancel.

129. The information provided to the court that there were no recordings of the front-end conversations was not true. However, it was made in reliance on information provided by the Claimants to Ofgem. It cannot be relied in those circumstances as a non-disclosure to the Court. The subsequently acquired information can be relied on as an answer to the allegation of misrepresentation. In any event, the fact that the front-end calls were recorded and that the recordings were maintained and not provided when sought to complainants is such that this point ought not to be available to the Claimants. This is all without seeking to use subsequently acquired information to justify the disclosure provided to the Court in the application for the search warrants.

VII Misfeasance in public office

130. The Claimants rely upon the tort of misfeasance in public office. The Claimants allege that an investigator who worked for the Defendant between January 2015 and June 2015 committed in numerous respects misfeasance in public office for which the Defendant is vicariously responsible. So multifarious are the allegations against him that a summary does not suffice. It is suggested that instead of gathering information for the Defendant, he infected and sullied the whole process. It is alleged that he joined in a campaign to disparage the Claimants and that he dishonestly and

maliciously created, influenced and/or contaminated a case so as to bring about an application for search warrants which ought never to have taken place. It is important to note at the outset the matters which must be proven in order to establish the tort.

(1) The nature of the tort of misfeasance in public office

131. The tort of misfeasance is an intentional tort, that is to say negligence or gross negligence falling short of reckless indifference will not suffice. The leading authority in respect of misfeasance in public office remains the case of *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 ("Three Rivers"). As explained in the speech of Lord Steyn, the constituent elements of the tort (set out at 191-196) are that:

(1) The defendant is a public officer;

(2) The defendant was exercising powers as a public officer;

(3) the defendant either acted with targeted malice or untargeted malice;

(4) an act or omission of the defendant caused loss to the Claimant.

132. There is no issue in this case as regards the first and the second of the above matters. The third matter emphasises that malice is an essential ingredient of this tort. Lord Steyn said that there were not two separate torts, but that there was one tort with two forms, namely misfeasance in public office with targeted malice and with untargeted malice. He said at p.192A-B that although there were differences between the two different forms, *"...there are unifying features, namely the special nature of the tort, as directed against the conduct of public officers only, and the element of an abuse of public power in bad faith."* In other words, the unlawful element had to be established in both forms.

133. Lord Hobhouse referred at [229H] to a requirement that *"the official must have dishonestly exceeded his powers and he must thereby have caused loss to the plaintiff which has the requisite connection with his dishonest state of mind"*. Lord Hobhouse identified the ingredients of the tort of misfeasance as follows [230F]:

> *"The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose. Here again the test is the same as or similar to that used in judicial review.*
>
> *The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In the Mengel case, at p 546, the expression honest attempt is used. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore*

one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest.

The next requirement also relates to the official's state of mind but with regard to the effect of his act upon other people. It has three limbs which are alternatives and any one of which suffices.

First, there is what has been called "targeted malice". Here the official does the act intentionally with the purpose of causing loss to the plaintiff, being a person who is at the time identified or identifiable. This limb does not call for explanation. The specific purpose of causing loss to a particular person is extremely likely to be consistent only with the official not having an honest belief that he was exercising the relevant power lawfully. If the loss is inflicted intentionally, there is no problem in allowing a remedy to the person so injured.

Secondly, there is what is sometimes called "untargeted malice". Here the official does the act intentionally being aware that it will in the ordinary course directly cause loss to the plaintiff or an identifiable class to which the plaintiff belongs. The element of knowledge is an actual awareness but is not the knowledge of an existing fact or an inevitable certainty. It relates to a result which has yet to occur. It is the awareness that a certain consequence will follow as a result of the act unless something out of the ordinary intervenes. The act is not done with the intention or purpose of causing such a loss but is an unlawful act which is intentionally done for a different purpose notwithstanding that the official is aware that such injury will, in the ordinary course, be one of the consequences: Garrett v Attorney General [1997] 2 NZLR 332 , 349-350.

Thirdly there is reckless untargeted malice. The official does the act intentionally being aware that it risks directly causing loss to the plaintiff or an identifiable class to which the plaintiff belongs and the official wilfully disregards that risk. What the official is here aware of is that there is a risk of loss involved in the intended act. His recklessness arises because he chooses wilfully to disregard that risk."

134. The emphasis on subjective rather than objective recklessness was described by Zacaroli J in *Brent LBC v Davies* [2018] EWHC 2214 (Ch) [Auth/5/84] as follows.

"Recklessness is used, in this context, in a subjective sense. That is, it is essential to find that the defendant appreciated the possibility that the action was unlawful but

acted anyway (and is to be contrasted with objective recklessness, where a person fails, recklessly, to appreciate the risk of unlawfulness at all)" (at [666(3)]).

(i) An unlawful act is required for both limbs of the tort

135. The act has to be unlawful for both limbs of the tort. The way in which this exists can sometimes be subtle in that it does not have to be a breach of a statute or a tort separately justiciable. It suffices if there is a lawful act where the public official uses the power for his own private purposes outside the public purpose. Then that which would have been a lawful act becomes unlawful. Lord Steyn at p.190 said that the tort of misfeasance in public office is an exception to the general rule that, if conduct is lawful apart from motive, a bad motive will not make him liable. Lord Steyn said also at p.191E that this type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive: per Lord Steyn at p.191E.

136. Lord Millett expressed the matter as follows (p.235):

> *"The rationale underlying the first limb is straightforward. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power: see Jones v Swansea City Council [1990] 1 WLR 1453. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation."*

137. It follows from the above that unlawfulness will be established ipso facto if there is deliberate use of a public power to injure. It also follows from the above that unlawfulness is a necessary pre-requisite of the tort whether for targeted or untargeted malice. This is contrary to the way in which the matter has been expressed in para. 475 of the closing submissions of the Claimants which assume that a lawful act coupled with an intention to injure suffice for the purposes of targeted malice. The true position is subtly different in that an intention to injure can convert a lawful act into an unlawful act.

(ii) Must there be knowledge of unlawfulness for the purpose of targeted malice?

138. On the formulation of Lord Hobhouse in *Three Rivers*, whether for targeted or untargeted malice, knowledge of unlawfulness is required. However, this is less clear from the other speeches in Three Rivers. For the purpose of targeted malice, the dicta in the case are strictly obiter since the case was not concerned with targeted malice.

However, they still command the highest respect. In Lord Steyn's speech, he was referring to "an abuse of public power in bad faith" which appears to connote knowledge that the conduct was unlawful, albeit that it was not set out definitively. In Lord Millett's speech, unlawfulness was the consequence of the deliberate use of a public power to injure and was sufficient for targeted malice: it constituted an abuse of power. Once that was established, the first limb of the tort was established, and therefore irrespective of whether there was knowledge of unlawfulness. Without deciding the point, I shall assume for the purpose of this judgment, that there is no requirement of knowledge of unlawfulness for the purposes of targeted malice.

(iii) The nature of intention to injure for targeted malice

139. For the purpose of the first limb of targeted malice, there has to be an intention to injure, that is doing the act for the purpose of causing loss to the claimant. The authorities have not decided whether the intention, as in conspiracy, has to be the predominant intention, or whether it suffices if there is a mixed intention including an intention to injure, that is to say the purpose of the Defendant is above the level of de minimis. In some cases, judges have assumed for the purpose of the judgment (without deciding the point) that a predominant intention is not required: per Lindsay J in *Weir v Secretary of State for Transport (No.2)* [2005] EWHC 2192 (Ch) and per Wyn Williams J in *Romantiek v Simms & Ors* [2008] EWHC 3099 (QB) at [84]. I shall make the same assumption for the purposes of this judgment, but without deciding the point.

140. It is important to concentrate on what an intention to injure means in the context of targeted malice. It is in contrast to untargeted malice where it suffices to have knowledge that risk of harm is likely to cause loss. In the context of targeted malice, there must be a specific purpose to cause loss to the claimant.

(iv) Untargeted malice: the unlawfulness relied upon by the Claimants

141. The Claimants' case is that unlawfulness is not relevant to targeted malice, but the Claimants rely on unlawfulness in connection with untargeted malice. This can be seen from the formulation at para. 476 of the Closing Submissions of the Claimants as follows:

> *"476. To establish that Mr Bourne committed the remaining elements of the tort in issue at this trial[1], and following the authoritative statement of the law by Lord Steyn in Three Rivers DC v Bank of England (No.3) [2003] 2 AC 1 at 191-196, the Claimants need to demonstrate:*
>
> *476.1 that Mr Bourne acted either:*
>
> *476.1.1 lawfully, but with the intention of harming the Claimants as one of his purposes (targeted malice); or*

1

476.1.2 unlawfully knowing or being subjectively reckless as to such unlawfulness, and either knowing that harm was likely to be occasioned or of being subjectively reckless to the same (untargeted malice).

476.2 subjective recklessness in this context means reckless indifference to legality and the likelihood of harm which will be established if Mr Bourne was aware of the possibility that his actions were unlawful and that harm was likely but acted anyway."

142. In terms of unlawfulness, the Claimants rely (at para. 478 of their closing submissions) upon the following duties:

(1) A common law public law duty only to disclose information in the course of performing public duties where reasonably required, and the minimum necessary**,** for the purpose of performing those duties to persons who have a reasonable and legitimate need for such information: see *AB v Chief Constable of North Wales Police ex parte Thorpe* per [1999] QB 396 referred to below;

(2) a duty only to disclose information concerning the Claimants, obtained in the course of the investigation, in respect of which the Claimants had a reasonable expectation of privacy, for a reason permitted by Article 8(2) of the Convention to a necessary and proportionate extent. The Claimants say that this included the fact of the investigation, and information acquired in the course of it suspicions held about them, the basis for such suspicions and of the Defendant's intention to apply for Search Warrants: see *ZXC v Bloomberg* [2019] EWHC 970 (QB) per Nicklin J esp. at paras. 119, 122 and in the Court of Appeal [2020] EWCA Civ 61 per Simon LJ upholding Nicklin J, and especially at para. 82;

(3) a duty to keep confidential information acquired in confidence and only to disclose it to the minimum extent necessary when the public interest in disclosure was more important than the duty of confidence: see *Marcel v The Commissioner of the Police for the Metropolis* [1992] Ch 225 per Sir Christopher Slade at p.262C-265A and *Omers Administration Corp v Tesco plc* [2019] EWHC 109 (Ch) and *Crook v The Chief Constable of Essex Police* [2015] EWHC 988 (QBD) at [37, 41 and 54];

(4) a duty not to delegate powers unless authorised, and when authorised only to do so to those who are competent and have the requisite degree of impartiality: *De Smith's Judicial Review* (8th ed.) at 5.159 [Auth/6/105]; *Noon v Matthews* [2014] EWHC 4330 (Admin) at [25]-[26]; *R (Chief Constable of Greater Manchester) v Lainton* [2000] ICR 1324 at [23]-[25];

(5) a common law duty, also part of the requirements of good public administration, to act impartially, not to assist a campaign to injure the Claimants and not to provoke complaints beyond appropriately inviting

customers to make a complaint; and

(6) a duty to pursue all reasonable lines of inquiry whether these point towards or away from a suspect, and to take reasonable steps to check information to be relied upon for a search warrant is accurate, recent and not provided maliciously or irresponsibly.

143. The first of those duties is largely derived from the words of Lord Bingham CJ in *AB v Chief Constable of North Wales Police ex parte Thorpe* [1999] QB 396 at 409-410. The duty is more fully set out in the words of Lord Bingham, and it is a little more nuanced than as summarised above. I shall add the emphasis to particular aspects of nuance.

> *"When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty. This principle would not prevent the police making factual statements concerning police operations, even if such statements involved a report that an individual had been arrested or charged, but it would prevent the disclosure of damaging information about individuals acquired by the police in the course of their operations unless there was a specific public justification for such disclosure. This principle does not in my view rest on the existence of a duty of confidence owed by the public body to the member of the public, although it might well be that such a duty of confidence might in certain circumstances arise. The principle, as I think, rests on a fundamental rule of good public administration, which the law must recognise and if necessary enforce.*
>
> *It is, however, plain that the general rule against disclosure is not absolute. The police have a job to do. That is why they exist. In Glasbrook Brothers Ltd. v. Glamorgan County Council [1925] A.C. 270 , 277, Viscount Cave L.C. said:*
>
> > *"No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury; . . ."*
>
> *Lord Parker C.J. spoke to similar effect in Rice v. Connolly [1966] 2 Q.B. 414 , 419:*

> *"It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."*
>
> *It seems to me to follow that if the police, having obtained information about an individual which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification, consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger, it is proper for them to make such limited disclosure as is judged necessary to achieve that purpose* [emphasis added]."

144. For the purpose of this case, there is little debate about the above propositions. In looking at relevant duties, they have to be seen in the context of an intentional tort involving an intention to injure at least (targeted malice) and the knowledge of or reckless disregard to unlawfulness (untargeted malice). The sixth of the duties is a duty to act reasonably whether in the nature of pursuing reasonable lines of inquiry or in checking information. Even gross negligence in failing to consider a risk or in deciding that there is no risk does not suffice. Nothing short of reckless indifference will suffice, given the requirement of bad faith in the exercise of public powers which is the raison d'etre of the tort: per Lord Steyn in *Three Rivers* at p. 193.

145. Likewise, lines between what is lawful and unlawful inherent in the duties involve qualifications which seem far removed from the intentional nature of the tort. They contain nuances which in many cases would be removed from both intentional unlawfulness and a reckless disregard to what is lawful. They include in the first of the duties a reference to being able to disclose information "where reasonably required, and the minimum necessary"; in the third of the duties to being authorised "to disclose [the information] to the minimum extent necessary"; in the fifth of the duties to a duty "not to provoke complaints beyond appropriately inviting customers to make a complaint".

146. Further, there are, in my judgment, concerns about the fashioning of duties which are narrow and specific to the instant case rather than part of a broader well-established duty which has application to the facts of the case. An example is the fifth duty about assisting a campaign to injure. The Claimants have made a submission about Messrs Scrivener and Mooney and latterly the UIA being involved in a campaign in respect of BES, which is not accepted by the Defendant, albeit that there is no positive case to contrary effect. There is a danger about having made this characterisation to treat as part of a duty of general application a reference to a campaign, as if campaigns and assisting them were treated as established categories of what the law will outlaw.

147. Subject to these caveats, there has not been any significant argument about most of the above, and it is unnecessary in any event, to rehearse the more extensive arguments of the Claimants to establish the same.

(2) The Claimants' case about Mr Bourne

148. It is now necessary to consider the acts of which complaint is made. I have considered the numerous and detailed ways in which the complaints are made, particularly in final submissions of the Claimants which comprised 168 pages and 82 pages of appendices and incorporating opening submissions comprising 50 pages. A large part of that comprises many pages of the Claimants' final submissions about the actions of Mr Bourne (pp.46-81 of the written submissions). This is a detailed analysis of 2 days of Mr Bourne's cross-examination and of many of the documents coming to or from him. It is not sensible expressly to deal with each and every point, but I have nonetheless gone into considerable detail in dealing with the overall picture. Even where I do not deal expressly with any submission, I have taken account of everything which has been said and written.

(3) Observations about Mr Bourne as a witness

149. The Claimants submit that Mr Bourne was an unsatisfactory witness in a number of respects and say further that in certain respects he was dishonest. Although there are serious limitations about assessing a witness other than by reference to the contemporaneous documents and the overall probabilities of the case (e.g. see *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm)), it is still not insignificant to say what impression I had of Mr Bourne. He was cross-examined over a period of almost two days, and I was able to form a reasonable impression of the man, particularly as he was challenged by reference to numerous documents.

150. I did not find Mr Bourne to be a dishonest witness in any of the numerous respects alleged by the Claimants or at all. I shall refer below to certain specific instances. I regarded him as a man who was limited in his understanding and appreciation of nuances. He had remained a Detective Constable for all his working life in the police. He was long retired from the police by the time of the trial. He was working at the bottom of the line of command within Trading Standards on a short-term contract.

151. I accept his evidence that he would interview only those witnesses whom he was asked to see by his superiors, Mr Williams and Mr Dinn. The interviews were limited in their ambit in that Mr Bourne (together with Mr Noble) would enable the people from whom he took statements to tell their story: he would take down what they said and then provide it to them for their consideration. They would amend it. He would not test their evidence against documents or check the likely probabilities. The documents would need revision by the other officers and would then be sent for compilation by officers dealing with documents. Were it otherwise, Mr Bourne would have had to spend far longer with each complainant with much more preparation before and after the interviews. If this had been his remit, he would only

have been able to interview far fewer witnesses than he did.

152. In this regard, I highlight the following evidence provided by Mr Bourne regarding his role which I accept, namely:

(1) *"Q. You weren't in charge of anyone, were you? A. No, I wasn't"* [T10/ 32/14 – 15] *"Q. […] according to your statement you were just a very junior employee? A. Yes. Q. And you didn't supervise any other investigator? No, as I say, the hierarchy was, above me was Mr Williams and above him was Mr Dinn*." [T10/33:6 – 11]

(2) *"I was taken on in the role of statement taker. […] I was merely taken on for three months to go and take statements round the country*." [T10 /75/8 – 11]

(3) *"Q. When you go and see these people -- I'm sorry, you can put F9 away now. I suggested to you that you hadn't followed reasonable lines of enquiry and I suggest to you that you had an agenda when you were meeting these witnesses, which was to obtain witnesses which would be damaging to BES. That is true, isn't it? A. My goal was to take statements from the witnesses. They had their own agenda, I suppose you could call it. That's because they believed they had been the subject of a fraud by BES. I didn't have to put words in their mouth. I didn't have to encourage them. They were more than happy to make statements*". [T10/129/25 – 130/5]

(4) *"Q. Did you send out any of those questionnaires of your own volition? A. I did not, no. Q. Who decided who should be in receipt of questionnaires? A. It would be Mr Dinn or Mr Williams. Q. You took a number of statements. Did you decide who to take statements from? A. No, the questionnaires had come back. We'd discuss it with Mr Williams and Mr Dinn and then myself and Mr Noble were tasked to contact them and go out on the road and obtain the statements."* [T11/120/2 – 12]

153. It is not a part of this judgment whether that system was satisfactory. That may be for another time. It does not, in my judgment, indicate any intentional wrongdoing on the part of Mr Bourne that this is how he conducted himself. In my judgment, he did not have an intention to prepare inaccurate or inadequate statements, nor did he know that the statements were or would be inaccurate or inadequate (if they were) nor did he have a reckless disregard as to the accuracy or adequacy of the statements.

154. I did not find Mr Bourne to be evasive as a witness. I found that he cooperated in the course of protracted cross-examination over the course of most of two days, where other witnesses could have become aggressive or sarcastic. It was suggested at para. 7 of Appendix B that he was argumentative because of one answer that his statements to Ms Foster were not potentially damaging because she was "one little hairdresser". The expression may not have been particularly felicitous, but I found the answer entirely understandable in context rather than argumentative.

155. Mr Bourne was also criticised for avoiding the consequences of his own evidence by

admitting when he had made mistakes. One only has to imagine what epithets would attach if Mr Bourne had not admitted to making errors. I reject this criticism.

156. Mr Bourne was generally composed and made clear, despite being pressed on many occasions, the limitations of his role. He was sympathetic to the lot of the complainants and he was anxious to keep them on side. To this end, he kept in touch with witnesses and gave them information (perhaps too much information) in respect of the investigation. Likewise, he regarded Mr Scrivener as a useful source and someone who could provide further evidence to assist the investigation. Here too, he provided information (perhaps too much information) in respect of the investigation.

(4) Allegations that Mr Bourne was dishonest

157. When there were aspects of his evidence which were contradicted by contemporaneous documentation, the Court still has to appraise whether that was the consequence of his lying to cover up something or that he had made mistakes. One aspect of the consideration is how fundamental or serious the contradiction was. There follow various examples of alleged dishonesty on the part of Mr Bourne.

(i) First example: expectation that a search warrant to be issued

158. The first example of alleged dishonesty was that Mr Bourne informed customers that search warrants were going to be executed before a decision had been made to apply for them. The Claimants allege that Mr Bourne made up a new and false story in his oral evidence that a decision had already been made to apply for search warrants: see T10/11/20- T10/12/1 and T10/23/20-T10/26/11 and Claimants' closing para. 158. Mr Bourne said that Mr Dinn had told him that raids would be carried out [T10/29/12]. The Claimants rely upon the para. 25 of Mr Bourne's statement that *"the role that I had in the investigation at this early stage was simply to obtain some statements, as directed by Mr Williams or Mr Dinn, with a view to establishing whether there was evidence that might support an application for search warrants."* Given that this was an "early stage", the Claimants put to Mr Bourne that there could not have been a decision to apply for a search warrant. Mr Bourne said *"That's true, but it wasn't the very early stages"* [T10/12/1].

159. Although the Claimants have emphasised the references to the first stage of the investigation for which Mr Bourne was recruited, it is apparent from information provided to a meeting attended by Mr Dinn on 4 November 2014 that there was a considerable amount of information by then available including 186 complaints received by Lancashire Trading Standards, Ofgem's average pricing for BES Commercial Electricity, the nature of the industry, individuals behind the BES businesses, various witness statements and various potential offences. It was also stated that *"considerable funding and office numbers will be needed for any strike day if multiple warrants are served, and computers are either seized or imaged on site."* This shows that at a very early stage the execution of search warrants was contemplated. The documents as a whole do not in the words of the Claimants "give the lie" to the statement of Mr Bourne that Mr Dinn had told him that "raids would be

carried out" [T10/29/12].

160. I do not accept that Mr Bourne was dishonest in this regard. There are far too many nuances here to reach a conclusion that he invented deliberately a false story. It clearly was not at such an early stage. There is an imprecision as to what was an "early stage". There was also imprecision in when the Defendant expected to apply for a search warrant. He believed that the Defendant expected to apply for Search Warrants, albeit that a final decision had not been made and would not be made until such time as the statements had been prepared and legal advice obtained.

161. Having seen Mr Bourne give evidence and looking at his evidence as a whole, I do not conclude that he was dishonest when he informed customers that search warrants were going to be executed. That was an expectation which he had, even if it was unwise for him to relate it.

(ii) Second example: denial of undertaking early internet research

162. The second example of alleged dishonesty was that Mr Bourne said that he had not undertaken research on the internet in his first week on the job, whereas according to his internal daybook and emails, he had done so. One of the emails was from Mr Bourne to Mr Mooney dated 22 January 2015 in which he sent to him an email saying *"I have had a read of your blog, you are saying the same as an awful lot of BES customers, hence the commissioning of this investigation into criminal matters under the Fraud Act."* The Court has had to consider whether this shows that the evidence about not referring to the internet was dishonest, as per the Claimants' submissions, or whether it was an error in his oral recollection. Having heard Mr Bourne's evidence and appraised this in the light of the evidence as a whole, I do not accept that he was dishonest in his evidence in this regard. In my judgment, this was not a "dishonest assertion" (Claimants' Closing Submissions para. 148) when he said that he had never, ever been on the Complaints Board. That shows that his oral recollection was wrong, but having heard his evidence, I do not regard Mr Bourne as a person who was deliberately lying to the Court. It is more likely that he had not adequately refreshed his memory by reference to the many thousands of documents in this case. It does mean that there is reason for caution about the quality of his recollection of events of so many years ago, but not due to dishonesty.

(iii) Third example: Mr Bourne's use of a questionnaire

163. The third example was that Mr Bourne had sought to say that he had used a questionnaire provided to him, and his only involvement had been to add to his name, whereas this could not be honest because records in the daybook show that he had worked on the questionnaire over two days. I do not accept that there was any dishonesty. Having seen Mr Bourne give evidence, I doubt that he did formulate the questionnaire himself. If, contrary to my doubt, he did formulate the questionnaire, I do not regard this as evidence of dishonesty, but rather as an instance of faulty recollection.

(iv) Fourth example: conduct after being taken off Operation Best

164. The fourth example is said to be evidence that Mr Bourne was taken off Operation Best after accusations about his lack of impartiality and how he had very little to do with it after the time. It seems to me to be likely that he was much less involved after 27 March 2015, and that the real issue is about the extent of his involvement thereafter. Here too, I do not accept that there has been dishonesty: either the answers were substantially correct or the answers were in error. There is no reason for finding that there was dishonesty here, particularly having regard to how unspecific are the matters about the degree, rather than the fact, of involvement.

165. In my judgment, there is an elision of criticisms of the unprofessional nature of aspects of Mr Bourne's conduct with allegations of dishonesty. I have found that the allegations of dishonesty against Mr Bourne in Appendix B of the Claimants' Closing Submissions are not made out. The elision is not justified, and criticisms of his evidence falling short of dishonesty have much less relevance to proving the case of misfeasance in public office.

166. I now look at a representative sample of the complaints in respect of Mr Bourne from page 46 of the argument. I shall not deal with each one because it would extend an already long judgment beyond that which is reasonable and would instead of providing reasons for the judgment, make the reasons for the decision lost in the detail. I shall use the headings at pp 46 and onwards of the Claimants' Closing Submissions.

(v) Mr Bourne's understanding of his duties

167. There was a series of questions at the outset of cross-examination in general non-specific terms designed to be used against Mr Bourne by subsequently applying them to the particular circumstances. Mr Bourne repeatedly sought to qualify his answers by saying that it all depended on the particular circumstances. That was a legitimate approach on the part of Mr Bourne. The suggestion or implication that he was seeking to avoid the questions (paras. 137, 138 and 140) is not a good one.

(vi) Admissions concerning Mr Bourne's conduct

168. It was admitted on behalf of the Defendant that aspects of Mr Bourne's behaviour had been unacceptable, unprofessional and inappropriate. The Claimants said that in view of that conduct, the Defendant could not seek to justify the conduct of Mr Bourne e.g. by defending his conduct in terms of keeping witnesses informed. There is no inconsistency here. It might be appropriate to keep a witness informed and to have acted for this purpose, and at the same time, to have gone too far e.g. by providing too much information or even to have engaged in tasteless banter about what might befall the Claimants. That did not prove an intention to injure or malice or knowledge of unlawfulness.

169. It is now necessary to consider the allegations concerning Mr Bourne's conduct in a more chronological way concerning his interaction with potential witnesses and Mr Scrivener, even though there is to some limited extent an overlap with some of the allegations of dishonesty thus far considered.

(5) Initial steps taken by Mr Bourne

170. Mr Bourne's understanding was limited, probably at all times. He did not know much about the industry in which BES Utilities worked. He had not examined exhibits to documents. It seems that he did not receive statements from Lancashire Trading Standards until they were handed over by Mr Harrison to him on 28 January 2015, although before then he had a box of exhibits to which he referred in an email to Mr Harrison of 22 January 2015. As noted above, his reading extended to the forums complaining about BES, Mr Scrivener's "BES Class Action website" and the Complaint Board. It was apparent from his reading that he gained a picture that there was a case about dishonest representations being made to customers with a view to getting them to place their business with BES Utilities.

171. It is pitching it too high to say (as do the Claimants at para. 151 of their Closing Submissions) that Mr Bourne *"rapidly developed an intense enmity towards BES and Mr Pilley"*. Rather it is the case that he formed a view that it was important to help those who had appeared to have suffered, and to that end the investigation should take place and those who had done wrong should be brought to justice.

172. Mr Bourne informed Mr Scrivener in an email of 19 January 2015 that the Defendant was *"currently assembling a group of investigators with the intention of building a prosecution case"*. In the next sentence of the email, which has been cut off, he added that statements were being taken from around the country in order to *"show the systematic me…"*. There was another email to Mr Hudson, a customer of BES sent on 22 January 2015 which stated that a list of witnesses was being collated:

> *"…to show there is a systematic Fraud going on. I have no doubt that the 'brokers' and BES are one and the same even though they are on the face of it separate entities. We are intending to obtain around 40 witnesses to build a compelling case against this Cabal"*.

173. It was not a mischaracterisation for Mr Bourne to refer to assembling investigators with the intention of building a prosecution case. As already noted, since a significant amount of work had been done by the Lancashire Trading Standards, the investigation had not just started with the Defendant. Mr Bourne did believe that a list of witnesses was being *"collated to show that there is systematic fraud going on"*. I referred above to the evidence about Mr Dinn informing Mr Bourne that raids would be carried out.

174. He wrote in the terms which he did because he wished to share what the Defendant was doing with witnesses and informants (he treated Mr Scrivener as an informant). He regarded this as a form of cooperation with witnesses as if it was a two way street, the investigator receiving information whilst also keeping witnesses informed about

how the information was being used. He accepted that with "hindsight", he provided too much information. The submission was made that he knew that it was wrong at the time. Having heard his evidence and seen the relevant documents, I accept Mr Bourne's evidence that if he had realised that there was something wrong at the time, he would not have been so sharing of the information.

175. In an email sent to "Susan" of the customer Hari Bella on 28 January 2015, Mr Bourne told her that information she had offered about who had called her *"might well help when we raid the different premises and see the staff lists"*. He added that *"they make names up as they ring"*, and expressed the view that *"They are, from what I have seen to date, dishonest to the core"*. This customer was a new complainant who had only made contact with Mr Bourne that morning. It was inappropriate for Mr Bourne to be sharing his thoughts about where the investigation was going including the reference to potential search warrants. However, these were honestly held views not motivated by malice, and his communication of them was in order to keep a potential witness informed. He did not consider that such a statement might injure the Claimants (if indeed it had capacity to do so in respect of somebody who already had come forward to complain about mis-selling).

176. In an email dated 2 February 2015 sent by Mr Bourne to a customer, who had been released from contract by BES, he said: "*"Thanks for getting back to me, It would seem that you are one of the lucky ones who have escaped BES clutches. It would also appear that most people are not so lucky."* The same observations apply as in respect of Ms Bella.

177. On 24 February 2015, in respect of an inquiry from Mr Scrivener as to whether Mr Bourne could confirm if Mr Pilley had a criminal record, Mr Bourne said that he could not because it was covered by the Data Protection Act and he did not have access to the same. However, he did say that he had heard rumours. This was to Mr Scrivener who according to his communication annexed to Fieldfisher's letter of January 2016 had made a specific accusation rather than imparted a rumour. The Claimants' case is that despite knowing his obligations, Mr Bourne confirmed Mr Scrivener's information by referring to rumours. That is not what he did because Mr Scrivener's information was more specific. It would have been prudent not to have said anything, but it did not add anything to the knowledge of Mr Scrivener, who was clearly looking for detailed information about Mr Pilley. Mr Bourne did not provide the information sought.

178. After being told by Mr Williams to take a step back from Mr Scrivener, Mr Bourne replied to a request from Mr Scrivener for advice in respect of a letter received from Fieldfisher on 2 March 2015. This was because *"as someone involved in the investigation I have to keep an open mind to both sides that way I can't be accused of being prejudiced"*. That did not show disregard to the advice about stepping back.

179. Mr Bourne is to be criticised for his communications with customers and with Mr Scrivener. He needed to keep a professional distance and he should have been much more discrete about the progress of the investigation if only so that the Claimants should not have this knowledge. I am satisfied that his reason for acting in this way was his belief that he was entitled to inform the witnesses about the broad nature of the enquiries and the progress being made as part of keeping them onside. "*"If they'd complained, I think they should be kept aware of where the investigation is going"*

[T10/8/3-5]. He did not think or know that he was doing anything wrong. He said: **"***Q. When you were corresponding with witnesses after they had given a witness statement to you or after they had completed a questionnaire, did you believe you were doing anything wrong? A. I did not actually. Looking back I think I've overshared some information. Q. What did you think you were doing at the time? A. I believe I was keeping them updated, supporting them, keeping them aware that the investigation was still going, we hadn't just dropped it, and providing a point of contact*." [T11/114/1 – T11/115/6].

180. As regards Mr Scrivener, he believed that he was like an informant and he was entitled to keep him updated. When he informed witnesses of an intention to have a raid, he did not do so dishonestly (he believed that there would be a raid), nor were his disclosures with the intention of causing damage to the Claimants, but with intent to have the witnesses feeling that they were valued. He was not trying to induce them to harm the Claimants. On the contrary, their complaints predated his involvement.

181. As he said:

(1) "*That's why these people have made statements, I believe. They believed they were victims of fraud before I ever spoke to them. That's why they came forward to Trading Standards. That's why they came forward to Ofgem. That is why they came forward to, you know, us. They believed -- I didn't put it in their mind, they already believed they were victims of fraud*" [T10/31/25 – T10/32/6].

(2) *"as a trading -- as a police officer I wouldn't have done it, but as -- working for the Trading Standards I did try and help a little bit people who are suffering terrible financial hardships, relationships are breaking down, marriages were threatened… "I felt terrible ... empathy for these people, but I didn't set up a campaign, I didn't set up a blog. Didn't do anything like that*" [T11/29/8 – 12 and 21-23].

(3) When asked why he was helping Ms Foster, he said the following: "*"Q. […] What are you doing, Mr Bourne? Why are you giving this advice to Ms Foster? A. Because I felt genuinely sorry for her and I was trying to acknowledge the role of the Trading Standards officer. That's what Trading Standards, I believe, are there to do."* [T11/34/22 – T11/35/2].

182. He also said that he did not realise that he was doing anything unlawful. He said in particular:

(1) *"Q. You knew perfectly well you should never have been saying these things at this early stage of the investigation to a member of the public, should you? A. With hindsight, you're right."* [T10 / 19:24 – 20:2] / *"[…] with hindsight maybe I should not have been as open and honest with people."* [T10/20/25 – 21/1]

(2) *"Q. […] you knew perfectly well therefore what you were doing was completely wrong and contrary to your obligations, didn't you? A. No, I'm sorry, I didn't, I thought I was just keeping an informant, sorry, a*

complainant up to date and online." [T11/88/2 – 6]

(3) *"A. Again, I'm sorry, it was oversharing. I was keeping him, as one of our complainants, keeping him on our side, up to date. Q. Then you go on to give some details about the meeting with counsel. How could that be appropriate? A. Looking at it now, it's not appropriate. Q. It couldn't have been appropriate then either, could it? You must have known that? A. Well, if I'd known it, sir, I wouldn't have sent it*." [T11/87/4 – 12]

183. In my judgment, in these respects Mr Bourne was not giving this information because of an intention to damage the Claimants, but because he believed that it was a good thing to keep the witnesses informed. It was unwise to provide such information, but I am satisfied that he did not intend to cause damage to the Claimants by comments made in the course of the investigation. He understood with the benefit of hindsight that it was not good to give such information not least because it could get out to the Claimants who might then have the opportunity to take steps to frustrate the benefit of a search warrant. However, I accept that he did not believe that there was anything unlawful in the way in which he acted.

(6) Mr Bourne's initial dealings with Mr Scrivener

184. In January 2015, Mr Scrivener told Mr Bourne he should talk to Ms Bailey, Mr and Mrs Maybury and Mr McCleod. On 22 January 2015, Mr Bourne wrote to Mr Scrivener saying that he had received positive replies from Mr McCleod and Mr and Mrs Maybury and he planned to meet with Ms Bailey. Mr Bourne said that he regarded Mr Scrivener as an informant because he was running a blog with Mr Mooney. He said: *"...when you handle an informant, you have to reward them somehow, whether it is monetary or getting a script done for the judge if there are criminal activities. But it can't be a one-sided street with an informant"* [T10/64/21-T10/65/4] and [T10/65/21-T10/66/1].

185. In his email of 22 January 2015, Mr Bourne informed Mr Scrivener:

> *"The statement gathering phase should start in about four weeks and will take my team another four weeks as the complainants live as far apart as Glasgow, Exeter, Stockton on Tees and Kent. If you don't hear anything for a week or two don't worry, it's not going away this time."*

186. On 2 February 2015, Mr Bourne responded to a comment from Mr Scrivener about a letter from Fieldfisher saying that BES were panicking, stating:

> *"If you think that is panicking…wait until the Police Vans arrive! We are setting off this morning to obtain the statements it will take two or three weeks…I am doing the*

Northern/Scottish/Newcastle ones, and my colleagues Paul Williams and Rob Scrannage are heading south."

187. The same day Mr Bourne was asked by Mr Scrivener to confirm whether anything in a draft email to Mr Lister *"drops you in it"*. In the draft email Mr Scrivener sought to buy time for his response by making reference to *"evidence under absolute privilege"* which he was prohibited from disclosing until earliest 27 March 2015. Mr Bourne confirmed that he was content for this email to be sent on 24 February 2015.

188. Mr Bourne knew at an early stage that Mr Scrivener had an internet site in connection with BES. He ought to have been more cautious than he was about contact with Mr Scrivener in the interests of maintaining the objectivity of the inquiry. Nevertheless, his contact with Mr Scrivener was because Mr Bourne believed that his communications about the Claimants with Mr Scrivener would enable him to obtain information which he could pass on to his superiors for them to consider obtaining further statements. He treated Mr Scrivener like an informant and believed that an informant needed to be rewarded, here by being informed about the investigation.

189. His evidence included the following:

(1) *"Q [...] Why are you reporting back to Scrivener? A. Because Mr Scrivener, who is equivalent of an informant I would describe him, normally in the police I would have registered as an informer, but as far as I'm aware Trading Standards doesn't have like an informant handling department, but yes, he was passing on good positive lines of enquiry."* [T10/64/14 – 20]

(2) *"Why are you giving him all this detail about your investigation? A. Partly we have to keep him, the flow of any information coming through. When you run a handler, handle an informant, you have to reward them somehow, whether it is monetary or getting a script done for the judge if there are criminal activities. But it can't be a one-sided street with an informant."* [T10/65/19 – T10/66/1]

(3) *"Q. So you are continuing to volunteer information to him? A. Yes, because as I say, I'm still trying to keep him on side. Q. Why do you have to give him information to keep him on side? A. Because that's what you do with informants: you have to give them something. Q. And why do you have to keep him on side anyway? A. Just to get potential leads of enquiry."* [T11/ 83/17 – 25].

190. This was an unwise sharing of information, particularly bearing in mind the internet activity of Mr Scrivener. If he was to do that, it would have been better for him to have fed this up the chain of command. Nevertheless, unwise thought it was, I accept the evidence of Mr Bourne that his intention was to help the investigation and not to injure the Claimants. Further, he had no knowledge that there was anything unlawful about what he was doing.

(7) Other communications with Mr Scrivener

191. Reference is made back to the remark about waiting *"until the Police Vans arrive"* sent on 2 February 2015. There was the remark of Mr Bourne to Mr Scrivener about BES that they thought that they were "untouchable". There then ensued matters which were at best tasteless banter for a person working with Trading Standards with a member of the public. Mr Scrivener asked Mr Bourne if it was proceeds of crime if he were to receive £50,000 to keep his mouth shut. Mr Bourne should have not descended to this level, but said that he believed it would be proceeds of crime if it turned out to be proceeds of crime. Instead, he descended to a lower level still by saying:

> *"it would be proceeds of crime but for 500K I would take out the problem with a .338 Lapua round. Dolphin rifles (class f) do a nice one! Accurate 1,000 yards plus. Two good statements yesterday from Hebden Bridge, Yorkshire."*

192. The question for the Court is not whether it approves of any of the above. It clearly does not, and it was deeply inappropriate for Mr Bourne to have written this as a serving trading standards officer. The question is whether it evidences misfeasance in public office. In my judgment, Mr Bourne did not have an intention to injure by these comments. These were incidental comments in the context of his trying to keep on side Mr Scrivener in the context of these inquiries. This was not a public officer acting with intent to injure, but a person who was seeking to keep Mr Scrivener on side with remarks of what he may have thought at the time, but not now, passed for humour.

193. There were other communications with Mr Scrivener in which he passed by Mr Bourne a letter of complaint from Fieldfisher complaining about posts which Mr Scrivener had made and his draft response. He appears to have sought information to help with the timing of his response. Mr Bourne was unwise to respond, but he prioritised his intent to remain on good terms to assist with the investigation. Here too, I find that he had no intention to cause injury to the Claimants, nor did he believe that he was doing anything unlawful.

(8) Contact with Mr Scrivener after advice of Mr Williams to take a step back

194. Due to threats of legal action against BES on the Complaints Board forum, Mr Williams wrote to Mr Bourne on 27 February 2015, saying that it *"looks like we may need to take a step back from Mr Scrivener sounds like he may be taking things too personally"*. Mr Bourne replied on 2 March 2015 at 08:33, stating *"I totally agree any contact should be kept to a minimum, while still being polite, I would hate him to blurt something out about our involvement"*.

195. Despite this, Mr Bourne then sent an email to Mr Scrivener fifteen minutes later stating:

> *"I had a meeting with Kelly [Bailey] on Friday. Very very interesting. It has filled some intelligence gaps and confirmed what we already know. I am off to see the Mayburys on Wednesday. Plus a Lady who's Aquarium business went bust with the help of BES."*

196. Also on 2 March 2015 Mr Scrivener and Mr Bourne exchanged further emails about correspondence that had been received from Fieldfisher in respect of the threatened claim against Mr Scrivener by BES.

(1) In an email to Mr Bourne sent at 10:11, Mr Scrivener told Mr Bourne that Fieldfisher wanted to know *"exactly what this evidence is I can't tell them"*. Mr Bourne replied at 11:24 saying:

> *"Hi Neil, I can't give any advice on ... I'm not a lawyer. As someone involved in the investigation I have to keep an open mind to both sides. That way I can't be accused of being prejudiced. It is a pity that this thing can't be put off until Ofgem report which is highly unlikely until we do our investigation."*

(2) Mr Scrivener responded at 11:28 replied saying *"I've put him on notice that I can't respond until the prohibition on info I have is lifted"*. In a later email, (12:09) Mr Bourne informed Mr Scrivener that the search warrants would be executed about the beginning or middle of April. Mr Scrivener said that he had *"got his teeth"* into another *"all star witness that would be invaluable for your investigation"*. Mr Bourne replied, stating:

> *"Yes, the more witnesses the better, when we go in it will be a co-ordinated strike on all the premises simultaneously and anyone who as much as touches a key board will be arrested for obstruct[ing] police. If we have the staff all the home addressees will be hit at the same time. Please try and get the new witnesses details, but as you say keep all details of our investigation out of plain site."*

(3) Mr Bourne had further communications with Mr Scrivener in which he said that there was nothing which would compromise the investigation. Within an email chain on 18 March 2015, Mr Bourne informed Mr Scrivener that statements had been obtained from Mothcrafts (Didy Ward and Dorcas Bray) and The Wherry Public House (Alice and Bradley Weemes). Mr and Mrs Weemes had been introduced to Mr Bourne by Mr Scrivener on 2 March 2015 and were among the 63 statements of complaints to which reference was made in the Search Warrants application. So were the Mothcrafts' complainants. The Claimants

criticise Mr Bourne for asking Mrs Weemes to complete her statement by describing: *"what effect the BES Utilities deception has had upon the Business, and your selves as new owners of a business. I don't just mean financial it could be any upset or loss of confidence"* (email 6 March 2015).

197. It was put that these communications showed that it was the intention of Mr Bourne to assist with a campaign against the Claimants and that Mr Bourne was in some way under the control or influence of Mr Scrivener. Mr Bourne responded as follows:

(1) *"[Mr Scrivener] has given me information. He's certainly not told me what to do. I would have to run this past my superior officers before I commenced any of that."* [T10/61:15 – 17] *"If you're trying to suggest that Mr Scrivener is controlling me in any way I'm afraid you're wrong, sir*." [T10/64:4 - 5]

(2) *Q. And what I suggest also happened is that you, having seen all of that, you then were quite happy to encourage them in their campaign. You were happy to reinforce their thinking, weren't you. A. I think their minds were pretty much set up what they were doing. I had no reason to encourage them. They seemed to be getting on with what they were doing without any encouragement from me."* [T11/27:15 – 28:9]

(3) Q. . *And you were happy to assist Mr Scrivener and Mr Mooney in their campaign to bring BES down, weren't you? A. No, absolutely not. Q. That is what they were about, weren't they? A. Yeah, they -- they had their own reasons for doing what they were doing. I was not part of that."* [T11/ 57:15 – 58:2]

198. In my judgment, this emphasises that Mr Bourne at all times believed that he was simply assisting the investigation. He was not influencing Mr Scrivener because the minds of Mr Scrivener and of the witnesses were already made up. He was not a part of any campaign and he was not controlled in any way.

199. I find here too that Mr Bourne was imprudent not to keep a professional distance. However, he did not act with an intention to cause injury to the Claimants nor did he have knowledge that anything which he was doing in his dealings with Mr Scrivener and the witnesses would or might cause injury to the Claimants, nor as with the rest of his acts, did he show a conscious or reckless disregard to the Claimants. He did not believe that what he was doing was unlawful.

200. Mr Scrivener had approached a former employee of BES called Mr Ben Jones who left after a short time. On 2 March 2015, Mr Bourne wrote to Mr Scrivener in the following terms: *"I would like to know the real reason why Ben Jones left after a few months. I wonder if he has seen what is going on and wants to get well clear before something nasty hits the fan. If you can turn him that would be Excellent."* Mr Bourne said in his evidence that he did not know how Mr Scrivener had made contact with Mr Jones [T11/76/8-21]. Mr Bourne said an initial approach from Mr Scrivener

would make more sense than an approach from Trading Standards since Mr Scrivener was already in touch with him [T11/76/15-21].

(9) Alleged delegation of investigative role

201. The reference to delegation is that of the Claimants, but in my judgment receiving assistance in an introduction did not amount to a delegation of functions. It is not said for example that Mr Scrivener had been asked by Mr Bourne to take a statement from Mr Jones. The statements were taken by Mr Bourne or Mr Noble or somebody from within the Defendant.

202. When this case about unlawful delegation was put, the evidence of Mr Bourne provided a complete answer to the allegation, which I accept, as follows:

(1) *"Q. Was that his function, to be going and getting witness details for you? A. Well. Q. He's not a trading standards officer? A. No, but we can't approach Ben Jones because we don't know what his -- if he still has connection with BES, so if we approach Ben Jones directly and his loyalties lay with BES, he could tell BES and the job would be blown wide. But if he made an informal one to see if he's willing to talk to us, I really don't see the harm in that."* [T11/75/7 – 17]

(2) *"he was in contact with him already, it would make more sense for him to approach Ben Jones and see if he'd be interested in providing us with information rather than us going directly to him which would have potentially blown the operation."* [T11/76/17 – 21] / *"I merely asked him to -- if he'd ask him if he wanted to talk to us*." [T11/78/20 – 21] / *"All I asked him to do was to approach him to see if he's willing to speak to us. No more no less*." [T11/79/15 – 16]

(10) Mr Bourne's interactions with customers submitting Olly Forms

203. There were communications in which customers submitted Olly Forms. They were based on a pro forma questionnaire produced by Mr Mooney. This was demonstrated in respect of Ms Lynn, Ms Foster, Jennifer Brown, Mr Surbir Singh of DIY and Goods Limited and Ms Henderson of Café Phoenix.

204. There were also communications from Mr Bourne in the nature of encouraging Ms Foster to make a fuss and make complaints to Mr Joel Chapman who gets rid of complaints by releasing customers from contracts. He wrote to her telling her to make trouble and saying he would probably not need a statement because they had 60 complaints from across the country. Ms Foster said that she would not let this mis-selling lie and refused to let her business fail because of this company. He wrote to Ms Henderson to like effect referring to "*the incompetence and viciousness of BES"*. He wrote to Mr Singh referring to the collation of statements to*" prove the deceptions that lead on to the miss selling (sic) of the contracts."*

205. In my judgment, this was all more of the same. Mr Bourne was not campaigning.

The witnesses had decided to pursue their complaints. Mr Bourne was keeping them on side, and was being empathic about their complaints. This was not likely to cause any damage to the Claimants and his intention was not to cause injury but to assist in the investigation.

(11) Mr Bourne's alleged suppression of evidence

206. There is an allegation of suppression of evidence. This is in connection with the statement of Ms Shelly Robinson-Major, one of the 38 customers specifically relied upon for the Search Warrants application. There was an email from Mr Noble sent on 8 April 2015 asking her to liaise with Mr Bourne about the updating of her statement because he was moving to Northern Ireland. The criticism of the Claimants is that the Ombudsman had only upheld her complaint to a limited extent. The complaint to the Ombudsman was put into the form of a statement without reference to the decision of the Ombudsman. Mr Bourne expressed a concern as to whether the recordings had been doctored, which turned out not to be the case.

207. There was also a question as to whether her claim had been the subject of a settlement with BES. Despite this and the decision of the Ombudsman, Mr Bourne wrote in the following terms:

> *"I have left off all the dealing with the Ombudsman and a lot of correspondence with BES as this is what we call unused material. What we are interested in was the criminality when the deception took place and she was tricked in to joining BES by the "independent" broker".*

208. The submission of the Claimants was that this revealed a failure to make proper inquiry with an open mind and a suppression of material which did not suit the story. Mr Bourne's account was that Ms Robinson-Major gave a compelling account of a deception: he included this in the statement and it was then for others to deal with exhibits and whether this statement was used for the inquiry.

209. I accept Mr Bourne's account. There was therefore no suppression of evidence on the part of Mr Bourne as alleged or at all.

(12) Mr Bourne's ongoing relationship with Mr Scrivener

210. Some two years after leaving the Defendant's employment, Mr Bourne remained in contact with Mr Scrivener. On 20 June 2017 he responded to a text message query from Mr Scrivener confirming that the investigation related not only to Commercial Power, but to BES and Mr Pilley. He also confirmed that he had been in touch with Mr Scrivener by telephone between 2015 and 2017 and that he has provided information which he acquired from Mr Dinn, but usually he had no information to pass on. This information did not relate to information which he received as an employee and the communications were passed on after the employment. It was

submitted by the Claimants that these communications demonstrate the degree of malice held by Mr Bourne towards BES. In my judgment, this was just more of the same thing, except less significant because Mr Bourne had ceased to be an employee of the Defendant. Just as there was no malice whilst he was an employee, so in my judgment, this does not add to the picture against Mr Bourne.

(13) Mr Bourne's relationship with Ms Bailey

211. Mr Bourne in evidence did not recall any dispute between BES and Ms Bailey. The Claimants were able to show that he had assisted her and indeed that she had attended meetings with him and Mr Dinn on 27 February 2015 and with him alone on 25 and 27 February 2015 and on 25 March 2015. Mr Bourne had read over the letter which Ms Bailey had received from Fieldfisher and had told her not to worry too much, saying that he was not a lawyer but confidentiality could not be used to hide criminality. I accept that Mr Bourne's absence of recollection was genuine, and such assistance as he gave was minimal and was a part of his communications with witnesses in the expectation that they would assist in the investigation. There was no intention to injure for the same reasons as above and Mr Bourne did not believe that he was doing anything unlawful.

(14) Mr Bourne's influence on Search Warrant application statements

212. The Court heard evidence from complainants. The Court heard extensive cross examination. This comprised cross examination of Mrs Maybury on Day 8 (most of the day), of Mr Maybury on Day 9 (most of the day), Ms Whitfield on Day 12 (the whole of the afternoon) and Mr McMichael (the whole of the morning). That comprised three days of court time. The significance of this evidence in the context of the case on misfeasance is that it would assist the Claimants' case if it were the case that Mr Bourne had deliberately sought to procure witnesses to include untrue information in their witness statements. It would also assist the Claimants' case if it was Mr Bourne who had taken the lead and was composing the statements speaking to an agenda of his own or of the Defendant. It would even assist the Claimants' case if the complainants' evidence was so weak that it could be suggested that they were pawns of a campaign and/or pressure of others. This might then be a building block to build up an inference that Mr Bourne had been participating in the creation of evidence at its lowest reckless as to its truth with the intention of causing injury to the Claimants.

213. The subject matter of the evidence is significant because the testimony is of:

(1) complaints which were the subject of the investigation;

(2) false representations which led to the witnesses signing up with the Claimants;

(3) cover up of the initial representations made;

(4) close connections between the brokers and the suppliers such that there is

an inference that the brokers act in tandem with or for the suppliers.

214. The Claimants submit as a result of the cross examination of the complainants that:

(1) the evidence of the witnesses was thoroughly unsatisfactory and did not bear out their complaints;

(2) their evidence about false representations was riddled with contradiction and/or unexplained unsatisfactory features;

(3) they were acting in cahoots with campaigners in particular such that their evidence could not be treated as independent or reliable;

(4) in reality, they did not like the product and wished to get out of the relationship without a legal basis and to that end made unreasonable demands which could not be substantiated;

(5) Mr Bourne was so closely connected with the campaign that he was at the heart of procuring statements which were unreliable and self-serving and the making of demands of complainants which had no reasonable basis.

215. The Defendant relies upon this evidence to support its case that Mr Bourne acted professionally and lawfully in the taking of the statements and in particular in showing that;

(1) he did not put words into the mouths of the witnesses;

(2) he gave them the opportunity to put their side of the story;

(3) he wrote out or procured his colleague (Mr Noble) to write out their accounts;

(4) he gave them the opportunity to make such corrections which they wished so that they should be content with their statements comprising their testimony.

216. I shall therefore in the next part of this judgment consider the following, namely

(1) the evidence of the way in which Mr Bourne took statements from the complainants;

(2) an appraisal of the evidence of the complainants.

(15) The way in which Mr Bourne took statements from the complainants

217. In my judgment, the evidence of the complainants, Mr and Mrs Maybury, Mr

McMichael and Ms Whitfield who gave evidence is highly supportive of the case of the Defendant and the general tenor of the evidence of Mr Bourne. By reference to these complainants, it is possible to extrapolate from these witnesses to the way in which Mr Bourne obtained evidence generally. It was apparent from the evidence of the complainants who were called that Mr Bourne simply gave them the opportunity to tell the story in their own words, and these were taken down by him or Mr Noble. Further, he gave them the opportunity to change the statements before signature. In greater detail, attention is drawn to the following which is representative of their evidence as a whole.

(i) Mr Maybury and Mrs Maybury

218. Mrs Maybury repeatedly said that there was no discussion about the details of the complaints of others passed on by Mr Bourne. Mr Bourne did not encourage the complaint because his involvement started in January 2015 whereas the claim started on 20 May 2014. Her business was released from the contract on 18 December 2014. They did not meet Mr Bourne until March 2015 to take the statement and "*the claim that he was helping us with our case is nonsense."* [T8/127/17 – 128/6]

219. Mr Maybury expressed the position as follows:

(1) *"[Mr Bourne] was very professional throughout. He asked us for our version of events, which is what we told him. I think he may have clarified one or two points along the way. […] He was interested in our story. I think the financial claim wasn't a major concern of his. I think it was more to do with how we'd been conned in the first place."* [T9/ 114/23 – 115/6]

(2) *"Q. And if we just go back to the position with Mr Bourne, if I may. When you had contact with him I suggest to you it must have been apparent to you that he disliked BES as much as you did, didn't he? A. He certainly didn't give me that impression. He was -- as I've said, he was professional throughout."* [T9/143:15 – 20]

(3) *"Q. So Mr Bourne told you about the fact that they were going to be going off to get a search warrant, did he? A. He didn't say a search warrant. He said they will be taking the door off its hinges, as he put it. Q. I suggest to you this must have been discussed before, when you met him. A. Not that I recall, no -- as I say. Q. Otherwise you wouldn't know what he was talking about? A. I think anybody would assume that that's what they meant by his comments. As I say, when he took our witness statement and visited us at our guest house there was no mention of warrants and executing them at the time."* [T9/118/13 – 24]

(4) *"A. [Mr Bourne] said that they were -- I think his words were along the lines of: we're meeting a lot of people across the length and breadth of the country. Q. And did he give you his view about the claims or complaints? A. Not at all. As I say, he was professional throughout. Q. What did he say about your complaint? A. Nothing, other than verifying us, what our*

> *situation was, how we'd come to be involved with BES. As I say, he was professional throughout. He didn't try and put any words into our mouths. He didn't try and lead us down any particular path as to what we should include in our evidence."* [T9/119:5 – 17]

(ii) Ms Whitfield

220. In relation to the process by which Mr Bourne facilitated Ms Whitfield's witness statement:

> *"A. He didn't ask me any questions. He basically said, I want you to tell me exactly what happened and I told him exactly what happened. He wrote it down. I read it. I read every single part of it right to the end. Agreed with it, signed it and dated it." [T12/130/9 - 13]*

221. She amplified this in re-examination as follows:

> **"** *A. I actually sat in the office, in my office and obviously we're all sat together and he says, right, I want you to say in your own words exactly what happened. I sat there explained in my own words exactly what happened. He wrote it down. I read through it. Made sure -- yes, yes, that's correct. Signed it, dated it and that was it" [T12/145:4 – 16]*

(iii) Mr McMichael:

222. In relation to the way in which Mr Bourne conducted himself during the statement-taking process:

> *"Q. Can you describe how Mr Bourne behaved during your statement-taking process? A. Courteous, professional, well adjusted chap visiting the office to take a statement. Q. Did anything that he said or did that day cause you any concern? A. No. [T13/69/22-70:3]"*

223. Mr McMichael was asked about updates received from Mr Bourne. He made the point that he understood them as being a courtesy extended to him, but they did not contain detailed information and they did not influence what he told Mr Bourne.

(16) Appraisal of the evidence of the complainants

(i) Mrs Maybury and Mr Maybury

224. In my judgment, the attempts to show that Mr and Mrs Maybury's evidence was unreliable failed. First and foremost, the credibility of Mrs Maybury was demonstrated by the fact of her insistence that there was a preliminary call in which false representations were made and by the denial of the Claimants about the same. The emergence for the first time of the relevant transcript after the search warrant had been executed was highly supportive of Mrs Maybury's evidence.

225. Whilst the documents and the inherent probabilities are more important than views about the demeanour of the evidence, I formed the view that the evidence of Mr and Mrs Maybury stood up well to the extensive cross-examination of them. It is not necessary to go through every point made which would add to the length of the judgment. It suffices to make these findings:

(1) There was a contradiction in that in respect of the front-end call with the broker, Mrs Maybury confirmed in her oral evidence that she had not been told that she was entering into a fixed rate contract [T8/103/6-8] yet her statement of 3 March 2015 taken by Mr Bourne states that Mrs Maybury *"believed I had eventually agreed, as a result of what I was told by him, to enter into a 5 year fixed contract."* This does not lead to a serious credibility problem because she was left with the impression of entering into a 5-year fixed contract, but when she heard the front-end tape which was not in her possession at the time of the statement of 3 March 2015, she ascertained that there was no promise. But for the withholding of the recording, Mrs Maybury would have been able to refresh her memory at the time of her statement.

(2) The fact that proceedings were not brought by Mr and Mrs Maybury was inevitably about the practical difficulties of bringing an action against companies with hugely greater financial strength than they have rather than in any way evidencing a lack of merit in their claims. The point turns out also to be hollow when years later, it emerged that there was a front-end recording which had been withheld and which was supportive of evidence of Mrs Maybury about the first conversation.

(3) I did not find the evidence about Mrs Maybury's mental health difficulties to be inconsistent and incoherent. The fact that she made postings on social media does not mean that she was fit at all times to devote many hours per week to the business. Further, I accept that Mr Maybury took the lead with the correspondence and the letters were then jointly signed.

(4) The fact that Mrs Maybury may have been able to work at points between July and September 2014 does not prove that she was fit for work before or after that time.

(5) The Claimants' suggestion was that given that there had been a climb down by BES at an early stage, it defied reality that Mrs Maybury continued to suffer in the way in which she described. Mrs Maybury came over as genuine: I do not accept the case that her account was made up or exaggerated. Her confidence was damaged by feeling that she

believed that she had been the victim of a fraud and the way in which she had been treated. The fact that it might have affected her more than a person who was more robust is not an answer. Whilst I broadly accept the same, it is with a note of caution in that the Court has no expertise in appraising mental health issues without assistance, but that applies also to the attempt of the Claimants to be dismissive of her mental health difficulties.

(6) There are criticisms which can be made about the way in which the possible claim was calculated. Further, Mr and Mrs Maybury sought in correspondence to connect their claim against BES with a reference to the SRA in respect of Mr Newell's conduct. This linkage does not seem proper, and I have considered whether it undermines the overall credibility of Mr and Mrs Maybury. Despite this, the overall evidence of Mr and Mrs Maybury about the conduct remains intact.

226. The fact that there were contradictions as noted above between the account of Mrs Maybury and the recording which arrived did not affect the fact that overall the recording was supportive. The recording was in large part confirmatory of the position of Mrs Maybury. In the end the challenge of Mrs Maybury's veracity did not make its intended impact because of the Claimants' attempts to marginalize the significance of the recording of the front-end conversation. The recording was telling in confirming substantially the account of Mrs Maybury and no amount of cross-examination was going to undermine the significance of the evidence of Mrs Maybury about the front-end conversations, and the evidence of Mr Maybury to whom she related the same.

227. The Claimants pointed to documents showing some contact between Mr and Mrs Maybury and Mr Scrivener. They point to statements in evidence which may have underestimated the extent of such contact. At para. 126 of the Closing Submissions of the Claimants, there is set out the contact was provided by Mr Scrivener to Mr and Mrs Maybury. Some of this contact was in the context of attempts on the part of the Claimants to silence Mr and Mrs Maybury. I have taken into account the contact which between them and Mr Scrivener. In my judgment, this does not undermine the reliability of the evidence of Mr and Mrs Maybury. This is particularly in circumstances where there had been correspondence from the Claimants' solicitors, Fieldfisher to Mr and Mrs Maybury on a Friday evening at 6.58pm requiring undertakings within 48 hours (that is at a time when solicitors' offices had shut for the weekend).

(ii) Mr McMichael

228. The account of Mr and Mrs Maybury derives further force from the evidence of other complainants. Mr McMichael gave evidence about his business Ramsey McMichael Consulting. Although the evidence of the initial conversations with the broker was second hand in that it was his wife to whom the representations were made, it was he who took over the complaint. The challenge was about a conversation to the effect that the current gas supplier British Gas was unable to supply (which was not the

case) and leading to a contract being entered into with BES. BES responded with a recording, but Mr McMichael said that it was not a recording of the original misrepresentation. He also complained about a charge of in excess of £4,000 more than the agreed tariff, which was resolved in the face of a statutory demand which he caused to be issued.

229. Mr McMichael was cross-examined extensively with a view to demonstrating that his account was at lowest unsatisfactory. He came over with a calm demeanour, unflustered by the detail and persistence of the questioning. His answers were short and to the point. He demonstrated his intelligence and being in total command of the position. The result is that Mr McMichael's oral evidence only added to the picture of misrepresentations being made in the original conversation (as with Mrs Maybury for example) rather than in the subsequent recorded conversation provided.

(iii) Ms Whitfield

230. There was also evidence given by Ms Catherine Whitfield whose evidence was that she received a call from a broker stating that he was from Commercial Power and that he could provide the best existing rates. He provided rates said to be favourable relative to those of E.On. She was informed that she was being charged at fixed rates. She resisted pressure to enter into a 5 year contract but entered into a 2 year contract which turned out not to be a fixed rate. When she cancelled her direct debit the unit price was increased.

231. She came over as a reliable and honest witness who believed that she had been wronged. The questioning of her did not shake her evidence but gave a clearer impression of the extent to which she had been misled.

(17) Evidence of the Claimants and the impact on credibility of the complainants and Mr Bourne

232. There has not been significant evidence to contradict the evidence of Mr and Mrs Maybury. On the contrary, there was some evidence (obtained on the execution of the Search Warrants) suggesting a deliberate attempt on the part of the Claimants to suppress this evidence. I shall identify and say how it supports the finding about the complainants. If the Court did not have this evidence, the conclusions would be the same and the Court would have still come to the same conclusions about the evidence of the complainants and Mr Bourne and on the misfeasance allegations. It should also be added that this evidence has not been taken into account in connection with the allegations relating to the application for the Search Warrant referred to in the next series of issues, which has been considered by reference to the state of knowledge of the Defendant at the time.

233. The evidence referred to in the preceding paragraph comprises an email chain between Joel Chapman, Head of Industry Regulation & Compliance for BES and Graham Aspinall, of Commercial Power Ltd.. On 24 July 2014 at 14:20, in respect of the subject "Re Maybury", Mr. Chapman sent an email to Mr Graham Aspinall,

saying *"Just a quick question - do we have the full recording or only the validation? If so, then do we have anything to hide or is it OK?"* At 15:05, in respect of the same subject Re Maybury, Mr Aspinall replied, saying: *"Hi Joel. Attached are the three calls required. Afraid we can't send these."* These were three calls, the details of which were obtained as a result of the execution of the search warrants and were discussed in the statement of Mrs Maybury of June 2021.

234. Mr Pilley and Mr Newell were cross-examined about their knowledge of the tape recordings. It is not a part of this judgment to make findings that Mr Pilley and/or Mr Newell were or were not involved in any concealment of the recordings. It suffices for this judgment to say that nothing in their evidence undermined the evidence of the complainants. Mr Newell protested a lack of knowledge on his part about such documents in 2014, stating that he believed that the recording was deleted after 48 hours. When it was put to Mr Newell that there were emails showing that the Head of Compliance had access to the front-end call, he reiterated: *"They weren't available to me and I wasn't aware of those at that time."* [T7/20:6-7]

235. Mr Pilley's evidence was vague and not entirely consistent in connection with the retention of the tapes of the front-end calls. He suggested that there was an ability to listen to the front-end calls, that they were probably not recorded and that they were recorded but only retained for 48 hours. Relevant parts of his evidence were as follows:

(1) In response to the question, "*you knew that the initial sales calls with brokers were being recorded, didn't you, right from the time that you got this system?"* [T7/41/9 - 12], Mr Pilley responded*: "Well, hence why I had the compliance team. It would be pointless having a compliance team if they weren't able to listen to any front-end calls*." [T7/41/13 - 15].

(2) In response to the question (which had been put on a number of occasions), *"how did Ofgem come to the understanding that the initial sales calls were not recorded?"* (and in contradiction to the above and below) [T7/125:3 - 5], Mr Pilley stated*: "I have no idea, probably because they were not."* [T7/125/6]

(3) *"BES simply didn't have access to the front-end, it was Commercial Power. [...] it's incorrect to state that BES ever had access to the front-end; it was Commercial Power."* [T7/128/1 - 5].

(4) In relation to the time for which audio recordings were held, Mr Pilley stated: *"I've already explained the reason why they were deleted [after 48 hours]: it was the sheer volume of the recordings and it was not practical or sustainable to retain them, nor was it necessary."* [T7/117/10-19] *and "I can only answer on my belief, and my belief I've made crystal clear, is the calls were there for 48 hours, apart from occasions where they'd been pulled by the monitoring staff or the complaints staff and they'd been placed into a folder or they'd been sent via an email."* [T7/135/8 - 12]

236. It follows that despite the extensive cross-examination on behalf of the Claimants intended to undermine the evidence of the complainants, I find their evidence to the effect that they were misled to be in broad terms reliable. It is not necessary for the

purpose of these proceedings to make findings in that regard other than for the purpose of the instant proceedings. However, the relevance at this stage is that on the basis of the information before the Court including the complainants who have given evidence, I accept that the information was based on their own recollection and was not based on Mr Bourne or anyone else putting words into their mouths or in any influencing the content of their statements. This is fundamentally contrary to the case of Mr Bourne participating in a campaign or distorting the evidence.

237. It also provides a backdrop to the credibility of the evidence of Mr Bourne as to how and why he found convincing the evidence at least of these complainants, and by inference other complainants. It enables the Court to see a context to the complaints and it helps to answer the allegations that Mr Bourne was participating in a campaign and creating distorted or biased evidence. The Court does not need to make final findings as to whether there were misrepresentations, but it is entitled to conclude that the evidence of the complainants substantially affects the view that the Court has about the allegations against Mr Bourne. In the same way, if the evidence had been to contrary effect to show either that the witnesses had been suborned or influenced by Mr Bourne or even Mr Scrivener or Mr Mooney or the UIA or anyone else, then a different and relevant picture might have emerged in respect of the misfeasance claim.

238. The evidence obtained on the execution of the search warrants including the existence of the front-end tapes and the evidence of deliberate suppression of it, was not information known to Mr Bourne at the time. However, the impact of the evidence of the complainants as related to Mr Bourne does affect the appraisal of the allegations relating to Mr Bourne. The subsequently found evidence about the front-end tapes does assist the Court. It reinforces the credibility of at least the complainants who gave evidence in the trial and indirectly of other complainants who gave statements to like effect. This in turn reinforces the evidence that Mr Bourne believed the complainants and that their evidence came from them and not from any campaign or from Mr Bourne. This then is relevant to the Court's view about the credibility of Mr Bourne's evidence and it is a further reason why the Claimants have been unable to establish misfeasance, albeit that misfeasance would not have been established even without this additional evidence.

(18) Allegations against Mr Bourne of failing to check and correct the statements

239. There were criticisms of Mr Bourne for failing to check what the Claimants said were basic matters and obvious inconsistencies in Ms Beckett's account. Mr Bourne said in cross examination that it was not for him to check this information. He said the following:

> *"…As I say, that wasn't our job, to investigate every single thing at the time. Our job was to go down there, obtain witness statements and bring back any documentary exhibits where it would be booked in and then actioned out by a senior officer. It wasn't for me and Ray to go through everything there and then."[T10/139/13-18]*

> *"…that wasn't our role at the time. Our role was to get a statement of complaint, get the exhibits and come back where they would be disseminated, and anything needed would be actioned out to another investigator. Myself and Ray were at the bottom of the food chain, is the best way I can explain it…" [T10/142/1-6]*

240. In detailed submissions, the Claimants drew attention to what they say are obvious questions which could have been asked of the witnesses by Mr Bourne. They are about what are said to be inconsistencies within the witness statements or contradictions between the witness statement and contemporaneous documents. These criticisms do not advance the matter. First, the tort of misfeasance in public office is an intentional tort, so that allegations that there was a failure to exercise reasonable skill and care in the taking of the statements does not advance the Claimants' case. Second, the Claimants have to go further to the effect that the failure to ask questions and point out contradictions was caused by malice, that is to say intentionally providing statements which were misleading or having a reckless disregard to the truth of the statements. This has not been shown to be the case. Third, this line of attack ignores how the witness statements were taken with the investigator leaving it to the witness to tell their story without any inquiry at that stage. Any decision to interview a witness was not taken by Mr Bourne or Mr Noble, but above him whether from Mr Williams or Mr Dinn. In due course, the documents would be compiled by the Defendant and if there were to be an examination of such contradictions, it was not at this stage. Were it otherwise, the modus operandi of the investigators going round Great Britain often getting more than one statement in a day in places very far apart would not have been possible.

241. If in fact more was expected than that, and Mr Bourne did fail to make adequate checks of witnesses or with the underlying documents, this was neither intentional nor with a reckless disregard to the accuracy of the statements which he obtained. At its highest, it would amount to negligence, and not the intentional conduct required for the tort of misfeasance in public office.

242. This is very far as regards the statement taking process from making out a case of misfeasance. Mr Bourne did not act in this process with the intention of harming the Claimants or with the knowledge of the probability of harming the Claimants or with a conscious and reckless indifference to the probability of harming the Claimants. Further and in any event, I find that Mr Bourne had no knowledge that he had done anything wrong in the taking of the statements (if he did act unlawfully) nor did he have a reckless disregard as to whether he acted unlawfully. This is not a case where Mr Bourne has sought to introduce something which he knew to be false into the mouths of the complainants or even to suggest words to them. On the contrary, he permitted the complainant to tell their own accounts of what had occurred, he was keen that they should only sign to an account of which they approved and he provided opportunities for correction. Mr Bourne knew that the complainants had formed an adverse view of BES as a result of their own experience, and it was not caused or contributed to by Mr Bourne.

243. That suffices for this analysis. However, there is also to be taken into account the fact

that the credibility of the complainants as they would have come over to Mr Bourne has been only reinforced by the front-end tapes and by the evidence that there is about the deliberate suppression of the tapes. This was not material before Mr Bourne, but the more that the Court has before it to support the veracity of the complainants' accounts, the more credible it is that Mr Bourne believed the complainants without that information.

(19) Conclusion to the section on misfeasance

244. In the light of the above, I am satisfied that the allegations of targeted malice against the Defendant through Mr Bourne must fail. I am satisfied that Mr Bourne did not have an intention to injure the Claimants. He was at all times attempting to advance the investigation. He believed that he was entitled to provide information to the complainants and to those coordinating the complainants in order to advance the investigation. He did not consider that by doing this he would or might cause injury to the Claimants. He recognised as was the case that the complainants and those coordinating the complainants were already determined to take steps against the Claimants irrespective of his involvement.

245. The actions which he took in the course of his public office did not involve any wrongdoing capable of perverting the investigation or any subsequent court application. He did not attempt to fabricate or embellish evidence. He gave full scope to the complainants to present their accounts and was scrupulous to ensure that they were satisfied with their statements.

246. He did say more than was wise about the intentions of the Defendant as regards search warrants. He did communicate more than was wise with Mr Scrivener. He did join in highly inappropriate remarks about the Claimants, but the people with whom he corresponded were already set in their views and actions against the Claimants. In any event, I am satisfied that the Claimants have failed to show that the Mr Bourne intended to cause injury to the Claimants. His intention at all times was to facilitate the investigation by keeping the complainants on side and cooperative. In my judgment, this is not contradicted by the unprofessional and inappropriate nature of some of the communications of Mr Bourne referred to above.

247. In respect of the alternative form of misfeasance, namely, untargeted malice, the Claimants' claim fails because:

(1) The Claimants have failed to establish that the Defendant through Mr Bourne had knowledge that his actions, in the ordinary course, would cause loss to the Claimants, or that he was aware that there was a risk that they would directly cause loss to the Claimants that Mr Bourne wilfully disregarded.

(2) The Claimants have failed to prove that Mr Bourne had knowledge that his actions were unlawful.

248. In connection with the first limb about knowledge, the matters set out in connection with targeted malice apply. When he carried out the acts in which complaint is made

by the Claimants, he did not know that harm was likely to be occasioned nor was he subjectively reckless to the same. His mind was directed to the investigation and to the cooperation of the complainants and those who were coordinating the complainants. It is not surprising that he did not know that damage was likely to have been occasioned (if indeed that was the case) because the relevant people were already determined to obtain redress, if it was available, against the Claimants.

249. Further, in respect of the alleged unlawful conduct, I am satisfied that Mr Bourne did not know that any aspect of his conduct may have been unlawful. That was because he was focused on the pursuit of the investigation and what was reasonably required in connection with the investigation. If and to the extent that he did more than what was reasonably required, he did not consider at the time that he may have gone outside what was reasonably permitted.

250. In connection with the above it is important to note that the relevant tort of misfeasance in public office is intentional in its nature. It is therefore circumscribed in its nature. As stated above, negligence and even gross negligence in failing to consider a risk, or in deciding there is no risk does not suffice. It is for this reason that most of the reported cases in this jurisdiction in respect of misfeasance in public office have failed, in that the necessary ingredients in the intentional tort have not been proven. That applies in this case. Accordingly the claim in misfeasance in public office and/or the way in which the claim has been framed in reference to Mr Bourne's conduct must fail.

251. In conclusion, I shall state the answers to the issues identified by the Claimants. When in this judgment, I refer to the list of issues and state my conclusions, I do so by way of summary and it is without prejudice to the more detailed analysis which precedes it and to the detail of the judgment as a whole.

252. Issue 1:

"1. Did Mr Bourne:

(1) assist the campaign of Messrs Scrivener and Mooney carried out against BES and CPL?

(2) disclose information obtained as a result of the investigation or concerning the investigation?

(3) delegate investigative functions to Messrs Scrivener and Mooney?

(4) cause the Defendant to place reliance upon evidence gathered and/or influenced by Messrs Scrivener and Mooney without proper scrutiny:

(5) cause the Defendant to instigate the obtaining of the Search Warrants on the strength of such evidence? and/or

(6) incite or assist the harassment of BES and CPL?"

(a) In a sense, any preparatory steps by the Defendant which led to the issue of search warrants and thereafter leading to a decision to prosecute the individuals behind the Claimants assisted what Messrs

Scrivener and Mooney were doing. Insofar as the question is whether Mr Bourne's intent was to assist in any campaign of Messrs Scrivener and Mooney, my judgment is that his intent was to assist the investigation on behalf of the Defendant. In that capacity, he communicated with Mr Scrivener as a source of information for the investigation. In so doing, he made regrettable pejorative remarks concerning the Claimants and engaged in tasteless banter, which were inappropriate and unprofessional.

(b) Any information which the Defendant disclosed as a result of or concerning the investigation was very limited as set out above. Information to the effect that there was an expectation that search warrants be issued was limited.

(c) Mr Bourne did not delegate investigative functions to Messrs Scrivener and Mooney. He had limited functions, namely to take statements (as required by his superiors Mr Dinn and Mr Williams) which he did himself and with Mr Noble. To the extent that he had contact with Mr Scrivener, this did not amount to a delegation of functions.

(d) Mr Bourne did not cause the Defendant to place reliance on evidence gathered and/or influenced by Messrs Scrivener and Mooney. He gathered statements in a professional manner as described above, allowing the witnesses to tell the stories without influence. He took down what the witnesses said and then provided statements to them for their consideration. They were free to amend the statements, and amendments were made. Mr Bourne did not test their evidence against documents or check the likely probabilities because this went beyond his remit and the time available to him. His involvement was limited to the taking of the statements: the compilation of the documents gathered by him and Mr Noble was for officers dealing with documents. The evaluation of the evidence and tying up the evidence with documents as well as the subsequent decision to make use of the statements was by others within the Defendant.

(e) Mr Bourne did not cause the Defendant to instigate the obtaining of the Search Warrants on the strength of such evidence. He took the statements in the manner set out above. The evaluation of the evidence and the decision to apply for search warrants was one taken only after the termination of the employment of Mr Bourne, This consideration was by more senior officers within the Defendant, the advice of Junior and then Leading and Junior Counsel and then the decision of the Lancashire Constabulary to apply for the search warrants.

(f) If and insofar as BES and CPL were harassed by others, Mr Bourne did not incite or assist such harassment. The answer to issue (a) above is repeated.

253. Issue 2

"Targeted malice: If and to the extent that Mr Bourne carried out one or more of the actions described in issues 1 (a)-(f) above, did he do so with the intention of injuring one or more of the Claimants?"

In my judgment, in the actions which he took and, in his communications, Mr Bourne did not have an intention to injure one or more the Claimants. The matters set out above in the section headed "Conclusion to the section on misfeasance" are repeated.

254. Issue 3

"Untargeted malice: If and to the extent that Mr Bourne carried on one or more of the actions described in issues 1(a)-(f) above, did he do so:

(a) unlawfully?

(b) knowing of, or in a manner that was subjectively reckless as to, such unlawfulness? and

(c) knowing or in a manner that was subjectively reckless as to whether such conduct was likely to cause harm to the Claimants?"

If and to the extent that Mr Bourne's actions were unlawful, he did not have knowledge of such unlawfulness nor was he subjectively reckless as to such unlawfulness. He did not know that such conduct was likely to cause harm to the Claimants nor was he subjectively reckless as to whether it would be likely to have that effect. The matters set out in the section above under the heading "Conclusion to the section on misfeasance" are repeated.

VIII Human rights claim in respect of Mr Bourne's actions

255. Before leaving these issues related to Mr Bourne, the Claimants have not included in their List of Issues the claim in respect of the Human Rights Act 1998 ("the HRA") arising out of the conduct of Mr Bourne. It is an issue which has been argued before the court (the Defendant included it in its list of issues). I shall deal with it accordingly.

256. The Claimants' main way of dealing with the allegations in respect of Mr Bourne is through the case of misfeasance in public office. Relatively briefly in its opening, it sought to formulate the case through the HRA claim with the following:

> *"Unlawful disclosure of information*
>
> *141. Quite apart from their claims in misfeasance, it is common ground that if information about the investigation was unlawfully disclosed by Mr Bourne, the Defendant will be vicariously liable to the Claimants for breaches of their rights under Article 8 of the Convention pursuant to ss.6-7 of the HRA 1998 (CG, ¶7)."*

257. The Claimants placed a heavy emphasis on the common ground by reference to the pleadings which included the following:

(1) an admission about vicarious liability of the Defendant as a public authority for the purposes of s.6 of the HRA for the acts and omissions of its servants and agents;

(2) an admission to use information about and acquired in an investigation only to the extent reasonably required in order to enable it properly to carry out its functions and only to disclose such information to persons who had a reasonable and legitimate need for such information.

(3) as a result of the Claimants' rights under Article 8 of the Convention the Defendant was only entitled to disclose information concerning the Claimants obtained in the course of the investigation and/or about the investigation itself for one of the listed policy reasons listed in Article 8(2) to a necessary and proportionate extent.

(4) the Defendant had a duty to act impartially, not to provoke complaints against the Claimants (beyond inviting or encouraging customers to make a complaint) and not to assist in a campaign to injure the Claimants.

258. The Claimants submitted that the actions of Mr Bourne infringed this. Reference is made to the detailed section above in connection with misfeasance of cooperation and communications of Mr Bourne with Messrs Scrivener and Mooney and witnesses including after Mr Bourne was told to lessen his involvement in the investigation and particularly with Mr Scrivener. This includes complaints alleging malice and dishonest conduct during the investigation and in his evidence, all of which have been rejected along with the claim in misfeasance.

259. There has been a debate about the extent to which commercial corporations have rights under the HRA. There is undoubtedly some protection, particularly for premises and correspondence. The Defendant submitted that whilst corporate business premises and correspondence are capable of falling within Article 8, the search and seizure were not caused by the alleged acts of Mr Bourne. The authorities do not speak with one voice about the extent to which corporations, as opposed to natural persons, have Article 8 rights. It is not necessary for the purpose of this judgment to resolve these matters, and an assumption will be made that commercial corporations have relevant Article 8 rights.

260. I am satisfied that the HRA claim does not provide an alternative to the Claimants to the failed allegations of misfeasance. I am not satisfied that each and every contact and communication was unlawful. The rights to privacy were not unqualified. I am satisfied that the need to keep witnesses onside might reasonably have included to inform them about the investigation in very general terms so as to keep them engaged. The heart of the criticism of the Claimants is that the Defendant communicated more than was required such that the reasonable expectation of privacy was infringed.

261. The Defendant submitted (para. 221 of its Closing Submissions) that:

> *"(b) In so far as he made any disclosures about the investigation, such disclosures were consistent with "The Witness Charter" and were not unlawful, do not engage A1P1 or Article 8 ECHR and/or fail to meet the minimum level of seriousness to engage Article 8 ECHR.*
>
> *...*
>
> *(d) If, which is denied, Article 8 is capable of being engaged by reason of the acts of Mr Bourne, it is not engaged on the facts because the threat or assault to the Claimants' privacy arising from the acts complained of, must reach a minimum level of seriousness and the corporate entity must enjoy a reasonable expectation of privacy. Neither condition is satisfied here."*

262. *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123 Laws LJ, who dissented on the application of the law to the facts, said at para. 22:

> *"... it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose, I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain "a certain level of seriousness". Secondly, the touchstone for article 8(1)'s engagement is whether the Claimant enjoys on the facts a "reasonable expectation of privacy" (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2) ..."*

263. The expression "a certain level of seriousness" was derived from *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307 , para 28, per Lord Bingham of Cornhill who said:

> *"It is true that 'private life' has been generously construed to embrace wide rights to personal autonomy. But it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention, which is, after all, concerned with human rights and fundamental freedoms..."*

264. The Claimants recognise the level of seriousness criterion, but say that this only provides an exception in respect of de minimis cases. They submit that the instant cases were above the minimum level of seriousness.

265. The infringement of the HRA would apply to the claims that the Search Warrants were procured unlawfully and/or should not have been obtained. It would apply also to criticisms about the execution of the Search Warrants. It would apply in respect of the most serious allegations concerning Mr Bourne, namely procuring false statements from witnesses intending thereby to mislead the Court or being subjectively reckless. It would have applied if it could have been shown that unlawful actions of Mr Bourne caused the Search Warrants to be issued.

266. These infringements did not occur because the allegations that the Search Warrants being procured or executed unlawfully have been rejected. Likewise, there have been considered and rejected the allegations about Mr Bourne procuring false statements to be made or doing anything unlawful which caused the Search Warrants to be issued.

267. If and to the extent that Mr Bourne's communications with Mr Scrivener and Mr Mooney and complainants went beyond that which was appropriate, in my judgment, they do not cross the line of "a certain level of seriousness". In this regard, the following is to be noted, namely:

(1) The communications were very limited in their ambit. They were a very different case from one in which there is a publication in the media or to members of the public previously ignorant of the information provided. They were communications with persons with whom there was already contact for the purpose of investigation. These were persons already committed to obtaining redress for the complainants: the complainants themselves and the likes of those seeking redress for them such as Mr Scrivener and Mr Mooney. The claim is in effect that some of the communications crossed a line between what was permitted and what was not.

(2) The communications were not particularly specific revelations about the investigation. Indeed, there is no evidence that they had any significant effect. The communications with Mr Scrivener were with a person who on the Claimants' case had an active campaign and he did not depend on Mr Bourne in order to continue it. To the extent that any communications crossed the line, the complainants were going to provide their statements in any event. There is no evidence that Mr Bourne improperly influenced the statements of the complainants, as was demonstrated particularly by the complainants who gave oral testimony. There is no reason to believe that it was any different in respect of other complainants.

(3) There is no identified loss from the communications of which complaint is made to the extent that they may have crossed a

line. The loss pleaded is about the impact of the order for the Search Warrants and the subsequent execution and retention of property seized.

268. In the section about misfeasance, the findings about Mr Bourne's conduct have been far more limited than the case advanced by the Claimants. Having regard to those findings and the matters set out in the previous paragraph, the claim under the Human Rights Act 1998 relating to Mr Bourne's activities fails.

IX The search warrant application

(1) The pleaded case

269. The Claimants' pleaded case in respect of the application for the search warrants is set out at paragraphs 25A – 74 and 79 – 82 of the Re-re- re-amended Particulars of Claim ("RAPOC"). Within this, the Claimants assert:

(a) that "*Lancashire Police made this application on behalf of, and utilising information provided by, the Defendant*" or "*[a]lternatively the Defendant procured the making of this application by Lancashire Police on the basis of such information*", and that the Defendant was therefore subject to a duty: to make full and frank disclosure and/or fairly, properly and accurately present all information that it sought to rely upon to the Court and/or to present to the Court all arguments adverse to its application; to ensure that the actions of Lancashire Police in connection with the application were carried out in compliance with that duty; and/or to ensure that any information it provided to the Lancashire Police to use in connection with the application complied with that duty [RAPOC para. 32]; and

(b) that the Defendant breached the above duties, or is liable for breaches of these duties committed by the Lancashire Police, by presenting or causing Lancashire Police to present, misleading, incomplete, and inaccurate evidence to the Court and failing to ensure that submissions made on its behalf and/or which it procured to be made satisfied the requirements [RAPOC para. 33].

270. In relation to (b), the Claimants' alleged breaches are in relation to and/or arising from:

(1) *"the description of the operation of the SME energy market"*

(2) "*the presentation of the allegations against the Claimants*";

(3) "*the description of Ofgem's historical investigation*";

(4) "*the failure properly to explain the role played by Messrs Scrivener and Mooney, and Ms Brown, in causing the Defendant's investigation, and further failure to mention the improper conduct of Mr Bourne*";

(5) "*the assertion that information and documentation could not be obtained in the absence of the Search Warrants*";

(6) "*false statements concerning the Claimants' business addresses*" [RAPOC paras. 40-46].

271. As a result of these breaches, the Claimants' pleaded case is that "the Defendant obtained, alternatively procured the obtaining of the Search Warrants through the making of misleading and/or false statements, failures to make full and frank disclosure, failures fairly, properly and accurately to present all information relied upon" [RAPOC paras. 47].

(2) The law relating to the duty of full and frank disclosure as regards the search warrants

272. The duties of full and frank disclosure / candour at common law and pursuant to the Criminal Procedure Rules ("Crim.PR"), r.47 and Part 47 of the Criminal Practice Direction ("Crim.PD") can be summarised as follows:

(1) *"When applications are made without notice – particularly those that involve the potentially serious infringement of the liberty and rights of the subject, inherent in the grant and execution of a warrant to search and seize – there is a duty of candour. There must be full and accurate disclosure to the court, including disclosure of anything that might militate against the grant (Energy Financing Team Limited v The Director of the Serious Fraud Office [2005] EWHC 1626 (Admin) ("Energy Financing")"* per Hickinbottom J (as he then was) in *R (Chatwani) v NCA* [2015] EWHC 1283 (Admin) at [106(iv)];

(2) The duty is to make full and frank disclosure of all material facts, with materiality to be decided by the Court, not by those causing the application to be made or their legal advisers: *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 at 1356F-1357B [Auth/1/12]; *R v Crown Court at Lewes* (1991) 93 Cr App R 60 at 68-69. It includes disclosing anything that might reasonably be considered capable of undermining any of the grounds of the application and drawing the Court's attention to any information that is unfavourable to the application: CrimPR, r.47.26(3); CrimPD, ¶47A.3.

(3) The duty has been aptly described as requiring the advocate to *"put on his defence hat and ask himself what, if he was representing the defendant or*

a party with a relevant interest, he would be saying to the judge" R (Rawlinson and Hunter Trustees) [2012] EWHC 2254 (Admin); [2013] 1 WLR 1634 DC;

(4) The duty also involves the need to make proper inquiries, with the scope of the duty dictated by the nature of the case, the effect of the order on the subject of the Search Warrants and the degree of legitimate urgency. The duty is not just on legal advisers but also those behind the application who will often be the only persons aware of everything which is material: see *Fundo Soberano De Angola v Jose Filomeno Dos Santos* [2018] EWHC 2199 (Comm) at [53];

(5) *"The grant and execution of a warrant to search and seize is a serious infringement of the liberty of the subject, which needs to be clearly justified, and before seeking or granting a warrant it is always necessary to consider whether some lesser measure such as a notice under section 2(3) of the 1987 Act, will suffice"*: per Kennedy LJ in *Energy Financing* at [24(i)]. Evidence about previous cooperation or consensual access may be significant: see *R (Dulai) v Chelmsford Magistrate's Court & Anr* [2013] 1 WLR 220 at [15 and 46], where there had been visits to the premises and production of documents, but the Court still refused the application to discharge the order;

(6) For applications seeking special procedure materials, the test is whether using any other measure is *"bound to fail":* PACE, Schedule 1, paragraph 2;

(7) The issuing of a warrant is never a formality, and it is therefore essential that the judge is given and takes sufficient time to consider any application: CrimPD, para.47A.2;

(8) It is not the practice where a warrant is sought in a criminal investigation under s.2(4) of the Criminal Justice Act 1987 for the important underlying documentation to be exhibited to the statement of evidence before the judge. There is a: *"very heavy duty…to ensure that what is put before the judge is clear and comprehensive so that the judge can rely on it and form his judgment on the basis of a presentation in which he has complete trust and confidence as to its accuracy and completeness": R (Rawlinson and Hunter Trustees)* above at [88].

(9) The test whether a failure to make full and frank disclosure is sufficiently material, is whether the information that should have been given to the Judge *"might reasonably have led him to refuse to issue the warrant"*: *R (Mills) v Sussex Police* [2015] 1 WLR 2199 at [55]-[59] per Elias LJ and relying upon *R (Dulai)* above at [45] *(R (Mills)* [2]). If there is bad faith or deliberate non-disclosure the warrant will be quashed whether or not the non-disclosure would have made a difference: *R (Mills)* above at [57].

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273. The Claimants placed special emphasis on the Divisional Court case of *R (Hart) & Ors v The Crown Court at Blackfriars* [2017] EWHC 3091 which they say had "striking parallels" with the instant case. In an investigation about tax evasion and where there were allegations about obstructive behaviour in civil proceedings and the provision of misleading information, the Claimants said that a less draconian order than search warrants such as production orders would have sufficed. The Divisional Court said that the evidence fell well short of providing a basis to believe that the defendant would prejudice the investigation by concealment or destruction of records. In any event, there would have needed to be a fuller account of what had been done so far to justify a search warrant (at [57]).

274. Each case will turn on its own facts. I have not found the case of *R (Hart)* such a striking parallel. First, although a separate matter from proportionality of the order sought, there was a significant misrepresentation in that case. Second, the application was prepared with far less care, experience and attention relative to the instant case. It was prepared by Mr Russell an HMRC officer with a tax investigation consultant, in contrast here to the experienced DC Griffin and Leading and Junior Counsel. In *R (Hart)*, Mr Russell was found to have *"lacked the experience and/or guidance to be appropriately objective"*, which is in distinction to the instant case. Thirdly, it was found that the Claimant failed to "put on his defence hat" not informing the Court of the full history of correspondence between the parties, including that the First Claimant had suggested meeting with HMRC early on, and of what happened at the meeting in April 2016. The Judge was thereby denied the information required in order to decide whether warrants, rather than less intrusive orders, were necessary. I shall consider whether this has any application in the instant case.

275. There is a further factor which was adverted to in the skeleton argument of the Defendant. The Courts have recognised, however, that "*it can be all too easy for an objector… to fall into the belief that almost any failure of disclosure is a passport to setting aside*": *Re Stanford International Bank (in Receivership)* [2010] EWCA Civ 137 at [191] per Hughes LJ referring to *Brink's Mat Ltd v Elcombe* **[**1988] 1 WLR 1350 at 1359 where Slade LJ said as follows:

> *"Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the Rex v. Kensington Income Tax Commissioners [1917] 1 K.B. 486 principle as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case or on the balance of convenience.."*

276. There is a further point of law of some importance in this case about the extent, if at all, that the Court can have regard to material not before the Court on the making of the application. In *R (Dulai) v Chelmsford Magistrates' Court* [2013] 1 WLR 220, at [46]-[48], Stanley Burnton LJ (with whom Treacy J agreed), the Court accepted that the Court is entitled to consider not merely the material of potential benefit to the defendant which had not been disclosed, but also the police response to that material. Thus, the warrant should not be quashed in the event that it was plain that once that this had been taken into account, the warrant would still have been issued. In effect, the court is concluding that taken in the round, and having regard to the police response, non-disclosure did not materially affect the outcome.

277. In *R (Mills) v Sussex Police* [2014] 2 Cr App R 34, Elias LJ (with whom Ouseley J agreed) summarised the ratio of *Dulai* at [60] as follows:

> *"Sometimes the court hearing the judicial review application will be given the information which should have been given to the court below. This may involve not merely the material of potential benefit to the defendant which had not been disclosed, but also the police response to that material. In Dulai the court accepted (at [46]) that this evidence is admissible and that if it is plain that once all the evidence is taken into account the judge below would still have issued the warrant, then it should not be quashed. In effect, the court is concluding that taken in the round, and having regard to the police response, non-disclosure did not materially affect the outcome. On that strict test the court is reviewing the lawfulness of the issue of the warrant but is not undertaking its own assessment."*

278. It is only *material* non-disclosures which will vitiate the grant of a warrant. Where it is the case that if the information had been disclosed with such comment as would have been expected of the applicant and had that been done, the judge could not reasonably have refused the warrant, the non-disclosure would not have been material.

279. In *R (Rawlinson & Hunter Trustees)* at [174-177], Sir John Thomas P. (as he then was) said that it would not be appropriate to allow an applicant that had not made full and frank disclosure to try again when the warrants were challenged and to put its case in a *"coherent, fair and analytical manner"*. This was so, because the Divisional Court considered *"What we would be doing would be permitting the SFO in effect to justify what it had done by adopting a proper and analytical approach in this court and doing what it had manifestly failed to do when it went to Judge Worsley"*.

280. There is a different question which arises where the desire is to consider not only the police answer to non-disclosure based on other information then available to the judge issuing the warrant, but also information obtained as a result of the execution of the warrant not then available to the police: see *R (Mills) v Sussex Police* [2014] 2 Cr App R 34 per Elias LJ (with whom Ouseley J agreed) at paras. 55 and 60-64. At para. 63, Elias LJ said:

> *"I would simply observe that there are in my view considerable problems, as recognised in Rawlinson, in allowing the*

> *Divisional Court to make its own assessment of the evidence. The reviewing court is then standing in the shoes of the judge below and performing a function which by statute belongs to that judge. It is also stepping outside its reviewing function and allowing itself to become a merits court. But as I have said, the issue does not directly arise here."*

281. The law was stated by Chamberlain J in *R (Jordan) v Chief Constable of Merseyside* [2020] EWHC 2408 Admin [35] that the task of the Court in appraising materiality is: *"…to focus on the information that should have been given to the magistrate... What should be before the magistrate is a fair and accurate summary of what is known by the applicant. That includes any points that can properly be made against the grant of the warrant, but also any answers to those points which could properly have been deployed at the time. All this must be considered in the context of the whole of the information before the magistrate so that the salience of the omitted matters can be assessed"* [emphasis added].

282. The Claimants submitted that if materiality is not appraised by reference to the historical position at the time of the application, an open-ended enquiry might take place to resolve the narrow historical issue of whether full and frank disclosure was provided.

283. The submission is an orthodox one as a matter of public law claims for the reasons adverted to in the *Rawlinson* case. Nevertheless, there are curiosities in respect of the instant case. If correct, large parts of the evidence in this case may have been not admissible at least in respect of the non-disclosure issue. This includes the evidence of the complainants and the veracity of their complaints. On the basis of the submissions of the Claimants, the question was not whether the complaints were well made or not, but whether there was non-disclosure on the application. Likewise, the fact that their evidence may have been bolstered by their responses in cross-examination or by the material obtained on the execution of the search warrants may not be admissible. Whilst this evidence may be admissible for other issues e.g. to the misfeasance issue, it is not admissible to the merits of the warrant application/the non-disclosure issue. I shall therefore confine the analysis to the material that was before the Court at the time of the application for the warrants and to the responses of the Defendant to the criticisms of the Claimants (but without allowing the Defendant the opportunity to respond to this by reference to material obtained as a result of the search warrants).

284. Since these decisions, s. 31 of the Senior Courts Act 1981 ("the 1981 Act") has been amended to insert a new provision, s. 31(2A), in these terms:

> *"The High Court—*
>
> *(a) must refuse to grant relief on an application for judicial review…*
>
> *if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the*

conduct complained of had not occurred."

285. Having set out the law, I shall now consider the following allegations, namely:

(1) Failure on the part of the Defendant adequately to prepare and present the application for the search warrants;

(2) Improperly seeking and obtaining documents through search warrants instead of seeking documents through cooperation or production orders;

(3) Non-disclosure in the presentation of the application.

(3) Alleged failure of the Defendant adequately to prepare and present the application for the search warrants

(a) The Claimants' case

286. The Claimants say that there was a failure on the part of the Defendant to prepare the application adequately. The attack is full frontal. It is said that the application should never have been made in that any requests would have been acceded to, and, if any application was required, production orders would have sufficed. The Claimants complain about the fact that the Court was not given the opportunity to consider the matters adequately, and that if a full and fair presentation had been made, the Court would or might not have ordered the search warrants.

287. The Claimants have referred to an email of DC Griffin to HH Judge Brown's clerk informing the Judge that the Warrant Application was the basis of the application and the *"must read document"*. They added that although the supporting materials had been provided, they were for the Judge's reference only and that *"for the purpose of the application, I am happy not to rely on them in the application tomorrow"*. It was submitted that there was a breach of the duty to ensure that the application was presented fully and comprehensively and with sufficient time properly to review the application.

288. The Claimants criticised the fact that whereas it was intended to deliver the papers 3 days prior to the application, the Case Summary was only prepared on 20 July 2016 so that the materials were only lodged 2 days prior to the application. In the event, HH Judge Brown only received the papers on 21 July 2016. As noted above, this was the subject of comment by the Judge about having had "very little time to read".

289. In particular, the Claimants said that none of the exhibits and other documents within the Defendant's possession relating to the 38 customers whose statements were relied upon were made available to either the Lancashire Police or the Court or described in the Search Warrants Application. The discrepancies in their accounts and further problems with their cases, identified in Mr Newell's Appendix and by specific reference to complaints of Mr and Mrs Maybury, Mr Dimmer, Ms Solomon, Mr

McMichael and Ms Whitfield above, were therefore not drawn to the attention of the Court at all.

290. It was to be borne in mind that this was not a case where there was any special urgency bearing in mind that the statements had been prepared over a year before the application. A further consequence of informing the Judge that he only needed to read the Search Warrants Application was that the duty of full and frank disclosure could not be satisfied through a document that was included within the supporting materials, but not mentioned in the Search Warrants Application or Note to the Court. This is addressed further in the context of the discrete heads of non-disclosure below.

(b) The Defendant's case

291. The Defendant submits that there was very detailed preparation of the application, going far beyond anything which was normally done for this kind of application. It points to the following matters, namely:

(1) the experience of DC Griffin, one of the most experienced officers on this issue within the Lancashire Constabulary;

(2) the detailed involvement of Counsel including Leading Counsel and Junior Counsel who helped with the preparation of the application and who presented it;

(3) the detail contained in the application signed by DC Griffin, which included sections as noted above presenting points which may be raised against the application;

(4) the Note of Counsel presenting as noted above the vigilance required in such applications with citation of case law, and detailing each of the matters which had to be satisfied before an application was made.

292. As regards these matters, DC Griffin's evidence was instructive. The application was one of the largest in terms of paperwork of which he was aware. He had never known a QC and a Junior Counsel to attend court to make the application. He referred to the large number of written statements from complainants, saying:

> *"in this case we had a load of witness complaints, which you don't normally get, that's not something -- I don't remember ever putting a case before a -- a search warrant before a judge where we actually have statements of complaint, especially fifty of them. It is just so unusual." [Day 12 / 49:14 – 19] "...I've seen criminal cases go to Crown Court with less paperwork than what we submitted in respect of complaints than we submitted to the Crown Court." [T12/73:2 – 6]*

293. DC Griffin gave evidence about how he liaised with Counsel in connection with aspects of the application, making recommendations and giving advice where appropriate. Before the application went ahead, he had to be happy with it. He signed the application [T12/73:14 – 74:4]. Likewise, Mr Rees emphasised that everything was done in consultation with the barristers involved [T15/142:6 – 10]**.** The Defendant was "*advised by both the police and the barrister in the framing of these warrants*" [T15/152:15 – 17]. The Defendant has waived legal professional privilege.

294. As regards the preparation of Counsel, there were identified in the chronological account above conferences at first with Junior Counsel and then a consultation with Leading Counsel. It was also apparent from the documents prepared that the need for full and frank disclosure was considered and in particular there were mentioned points which the Claimants (the respondents to the search warrants) might make. The Claimants say that this did not go far enough in that (a) the application should never have been made, and (b) there were misrepresentations and omissions in what was presented.

295. DC Griffin was asked why there was not expert evidence in support of the allegations to which he said that none was required. He said the following:

> "*Q. Did you consider that you needed expert evidence to deal with those sorts of allegations? A. No, if a member of the public is telling us that somebody's lied to them, that somebody's misled them and there's allegations that these people who purport to be independent aren't independent, I'm not really sure what expert evidence would necessarily be required. You know, for want of a better expression, people have had -- people have been conned. That's the allegation. And I don't really need an expert. I don't think anyone would need an expert to say, oh, you've not been conned. There are lies there. People have been -- people told you lies. I don't know why -- what an expert would be able to -- how an expert would assist in that".* [T12/75:19 – 76:7]

296. DC Griffin was asked about whether an offer of cooperation would have changed his mind. He said the following:

> *"Q. […] were you aware that there was an offer of cooperation? A. I'm not sure -- no, I'm not, but it wouldn't have changed matters because an offer of cooperation, like I said earlier on and I'm repeating myself, I do apologise to the court, is that it is naive for somebody to expect somebody to hand over material that might send them to jail. Q. And is the nature of the offence being investigated relevant to the issue of considering any offers of cooperation? A. Yes, I think offers of assistance are helpful maybe in a regulatory matter, but not in a criminal case when the stakes are high and people can be easily motivated not to hand over material that*

> *might cause them a problem. Q. And lastly, Mr Griffin, you signed off this warrant application some time ago. Have you seen or heard anything since which changes your view on the applicability and necessity to apply for the search warrants? A. No, there's absolutely nothing. I think it's fair to say that had I seen some of the letters that may have changed a bit. That may have changed some of the thought process but I would still have applied for these warrants in this case." [Day 12/78:25 – 79:24]*

297. To like effect, Mr Rees said the following:

> *"We wouldn't simply request information from companies in a fraud investigation. That wouldn't be an appropriate way of doing it. If you're investigating matters of fraud, it would be ludicrous wanting – to expect to be given all that information and if an investigation has already commenced, we're bound by the rules of PACE and any information which we're requesting asking for should be done in the form of a formal interview. And obviously that does come and there is an option for those under suspicion to provide an explanation and cooperate with the enquiry at the relevant time. That wasn't at that time."* [Day 15 /167/9 – 20]

298. As regards the involvement of Counsel, in this case, the significance is as follows:

(1) it was unusual to have Counsel involved at this stage of the investigation, but it was done so that everything reasonably required should be undertaken before seeking search warrants;

(2) the material was closely considered: hence giving rise to the note of Counsel and the presentation to the Court;

(3) Counsel considered the matter over a period of time, and it was apparent that there was careful consideration of the relevant material.

(4) Observations

299. The criticisms about not giving to the Court sufficient opportunity to read into the case have been addressed by the Defendant, and I accept its answers. The Defendant invited the Court to take such further time as it required. The Judge took further time to read the note. This was in addition to the time that the Judge had spent reading this matter. It was apparent from the judgment that the Judge had availed himself of the opportunity to be fully familiar with the application from his reading of the papers overnight. Mr Thomas QC made it clear to the Court that if more time was required, then the case could be adjourned.

300. There was no time to read the files in support such as the statements themselves. This by itself was not a breach of the duty of candour. In the case of *Rawlinson*, the President of the Queen's Bench Division, Sir John Thomas (as he then was) said as follows:

> *"87. In the present case, the judge was presented with the Information and the evidence of the case manager. None of the underlying documentation was put before him. In an application for a search order in civil proceedings, the important underlying documentation would be exhibited to the statement of evidence before the judge and the judge would have an opportunity of considering them. That is not the practice where a warrant is sought in a criminal investigation under s.2(4) of the CJA 1987.*
>
> *88. Thus, given there is no practice to provide the underlying documentation, it was accepted that there is a very heavy duty placed on the SFO to ensure that what is put before the judge is clear and comprehensive so that the judge can rely on it and form his judgment on the basis of a presentation in which he has complete trust and confidence as to its accuracy and completeness…."*

301. There was no difference in substance between the underlying documentation being before the Judge with no opportunity to consider the same or was not presented at all. Since there is no practice to have the underlying documentation before the Judge in any event, there was no breach of duty in not having sufficient time for the Judge to read the underlying documentation, provided that the very heavy duty was fulfilled of presenting the material to the Judge in a clear and comprehensive manner.

302. Another aspect of the challenge was about summaries of the evidence of the complainants where the Claimants said that there were such widespread inaccuracies that the search warrants were procured by misrepresentations. These were summarised in a lengthy appendix to Mr Newell's witness statement. In my judgment, there has been no material non-disclosure by reference to the criticisms in the Appendix to Mr Newell's witness statement by itself. It was sensible in context to have summaries of the statements. They were bringing together something that had occurred in the context of individual complaints, namely the mis-selling in the front-end conversations. It is not necessary to go through the Appendix paragraph by paragraph which would extend this judgment by many pages. It suffices to make the following observations, namely:

(1) The summaries were no more than that and cannot realistically be expected to be a comprehensive analysis of the position: otherwise, the purpose of having summaries would be defeated.

(2) The fact that there might be answers to the points raised was identified broadly in the counter-arguments identified on the making of the application.

(3) Specific points raised as omissions or providing a different perspective were not by themselves or in the totality of the case sufficiently probative to amount to material non-disclosure or misrepresentation. They did not provide a basis to consider that a judge having this information might decide not to make the order sought.

(4) For example, the omission of references to rejections by the Ombudsman (e.g. by reference to Mr McMichael) is immaterial because the Ombudsman was not told about the pattern of complaints (and especially in respect of front-end calls) in the same way as the Court was informed on the application for search warrants.

(5) Likewise, the fact that complainants were offered some redress (e.g. Mrs Maybury's business) is immaterial because the gravamen of the complaints was a pattern of misrepresentation by numerous complainants and not the way in which they were handled after the event. Indeed, as regards Mrs Maybury, more significant than any redress was the attempt to stifle her complaints by a letter sent to her one Friday evening at 6.58pm requiring a response within 48 hours (that is still within the weekend), failing which injunctions were threatened.

(6) The limited numbers of inaccuracies in the summaries highlighted by the Claimants do not give rise to matters which could amount to a material misrepresentation. Examples are Complaint 8 (The Beauty Rooms/Diane Commons), Complaint 12 (Brew Cavern/Matthew Hinton) and Complaint 16 (Sleepy Inns/Tina Laird). There was a particular complaint in respect of a summary of an aspect of Mrs Maybury's evidence, whereas her evidence as a whole very clearly demonstrated reasonable grounds for believing that she was a victim of misrepresentations.

(7) There is a long account on the part of the Claimants taking issue with the contentions made by complaint 10 (Elstree Effects/Mr Dimmer). Mr Dimmer succeeded only in part before the Ombudsman and his contention that he would be paying more under the contract with BES than under the prior Npower contract may have been mistaken. It is not every error which gives rise to a material misrepresentation. The errors complained of did not provide a different potential characterisation of the conduct of the Claimants, and so they were not capable of affecting the overall decision of a judge considering whether or not to order a search warrant.

(8) In the context of the application as a whole, I am satisfied that there was no material misrepresentation in the sense used in the case law, namely that the alleged material which was not accurate (if and to the extent that this was so) might not have reasonably led to the decision of the judge to refuse the search warrants.

303. The Claimants' closing submissions also included some minor points of criticism of Ms Sakly's evidence, relied upon by the Defendant as evidence of what she said to the Defendant. There has been discussed above the fact that the original recording of the

interview that led to her statement had been deleted by Mr Dinn, and I have concluded that this does not invalidate the information which she provided. The criticisms include contradictions within the statement itself about the identity of her employer and the percentage of contracts placed with BES (98% in one place and 90% in another, both very high). None of this amounts to criticisms which even begin to undermine the importance attributed, and reasonably so, to the evidence of Ms Sakly.

304. I accept the submissions that the application was prepared appropriately, and in more detail than that customarily applied in respect of such applications. It reflected an appreciation of the possible impact of the application. I accept entirely the evidence of DC Griffin as quoted above regarding the preparation.

305. In my judgment, this was an application which was prepared with care and attention. It was treated with appropriate seriousness, cognisant about the possible effects on the business. In addition to the skill which DC Griffin applied based on his experience, it is apparent that there was preparation over a period of time with Counsel and latterly with Leading Counsel. I accept the submissions made by the Defendant as regards the nature and extent of the preparation of the application, and the significance of the preparation and advice given by Counsel in confirming the reasonable belief required on the part of the Defendant about the existence of the alleged frauds.

306. I also accept the evidence of DC Griffin and Mr Rees that the Defendant was entitled reasonably to decide not to ask questions of the Claimants in circumstances where they had reason to believe that there had been systemic fraud.

(4) Allegation of improperly seeking and obtaining documents through search warrants instead of seeking documents through cooperation or production orders.

(a) The Claimants' case

307. The Claimants' case is that there was no need for search warrants. There had been cooperation of the Claimants in connection with the Ofgem inquiry, as was recognised in the final report. Mr Rees in cross-examination was taken to passages within the Ofgem final report which indicated that there had been cooperation and how BES had made improvements in specific areas: see paras. 5.34 and 5.36 of the Ofgem report. There was cooperation offered in numerous letters sent on behalf of the Claimants to the Defendant before the search warrants were sought. The Claimants had offered to meet with the Defendant to assist with the enquiry. Most of those letters were not adverted to, and the cooperation offered was not disclosed adequately or at all.

308. The Claimants also presented a case to the effect that they had been at all times honest and there was no basis to the investigation which had been provoked by a campaign being waged against them by Mr Scrivener and Mr Mooney and others. They say that BES had gone beyond what was expected of them by creating its own code of conduct, placing obligations on brokers to be clear and transparent. Commercial Power audited the code of practice. The campaign had infected the investigation itself, particularly through the Defendant's investigator Mr Bourne, and therefore had

contaminated the statements which he took. None of this had been presented fully and fairly to the Court on the application for the search warrants.

309. The Claimants deny the existence of fraud, at least insofar as it involves them. They say that the critical conversations were not the initial conversations, but the subsequent calls, referred to as comfort calls, in which the contractual terms were set out, and there was nothing fraudulent in these calls. Their case among other things is that the number of alleged victims were the product of a baseless campaign which poisoned their minds. Either the alleged victims had no belief in their case and were acting as they did to make money at the expense of the Claimants by unreasonable demands which had no basis. Alternatively, if they did believe what they were saying, it was because they had become influenced by a campaign of defamation waged against them with a view to gain of people like Mr Scrivener and Mr Mooney. The brokers were not controlled by the Claimants: not all of the business which they introduced went to BES. There were connections as there are with many such business associations, but there was nothing untoward or corrupt. Mr Pilley had worked very hard over many years in building up the business of the Claimants and other businesses of benefit to the Fylde coast, and he was not going to ruin it all by an involvement in dishonest practices of the nature alleged.

310. On the contrary, the Claimants said that they had cooperated with the investigation of Ofgem such as led to a nominal fine of £2. They had taken steps through lawyers to cooperate with the Defendant in connection with its investigation, but their repeated approaches to assist were evidently ignored. They had, as they were entitled to do, written, through lawyers, letters seeking undertakings against those who were making defamatory allegations against them. They had brought court actions against ringleaders and fought the actions until such time as they had procured the provision of undertakings. In particular, an action against Mr Scrivener and Mr Mooney went to trial. The action commenced on 19 January 2018, and it settled by an order on the fourth day of the trial in which Mr Scrivener and Mr Mooney withdrew in writing all allegations of fraud against the Claimants.

311. The Claimants point to the letters complaining about defamation to which reference has been above and to the offers of cooperation in those letters. They say that the offers in those letters made it unnecessary to seek search warrants because if and to the extent that there were bad practices of the independent brokers, the Claimants were as determined as anyone else to root out such practices. There were matters which ought to have been disclosed to the Court on the application for the search warrants. They would have shown that less intrusive means of obtaining information and documentation ought to have been sought instead of search warrants.

312. The Claimants said that the fact that they were aware for many months prior to the search warrants being applied for that there was an investigation taking place meant that if there was a risk of concealment and destruction of information, this would have occurred in the time prior to the application. In short, there was no reason to make an application for search warrants by the time that it was made.

(b) The Defendant's case

313. The Defendant submits that the point about cooperation to Ofgem is not well made out. As regards cooperation offered to Ofgem, this was not a case of the Claimants taking the initiative and reporting complaints, but their being reactive to information provided by Ofgem. In the words of Mr Rees "*…I was aware that they commented that they had had cooperation, but they also commented that no proactive steps had been taken by the company to address the matters until their involvement".* [T15/155:10–13]. Mr Rees said that "*Ofgem urged us to continue with our investigation".* [T15/155:3]. This was in re-examination and referring to an email sent on 9 May 2016 from Andrea Gregory head of enforcement casework of Ofgem to Mr Dinn of the Defendant to the effect that Ofgem's report was limited in its scope. The Defendant's investigation, which lay outside and beyond the report, was about misrepresentations made by brokers selling energy contracts who were associated with BES. Ms Gregory wrote in the following terms:

> *"As you know, Ofgem completed its investigation into BES for various breaches of licence conditions and Complaints Handling Regulations in December 2015 and this resulted in a significant penalty. However, this dealt with only half the problem, at best, and all the issues we sought to deal with stem from the alleged misrepresentations made by brokers selling energy contracts on behalf of BES to induce consumers to agree energy contract with BES.*
>
> *Those concerns and allegations surrounding BES and associated brokers have been around since 2009 and were highlighted by BBC Radio 5 in 2010. At that time Ofgem did not have the necessary powers to enforce against the brokers allegedly involved. Back in 2013/14 we started to investigate this aspect using our newly acquired powers under the BPMMR (November 2013), but subsequently stepped aside due to interest from Trading Standards and your greater powers in this area.*
>
> *We continue to receive a high volume of complaints and correspondence about BES and associated brokers and face quite strong criticism from consumers for apparently failing to deal with a significant area of concern. Until your case is within the public domain, it is much harder for us to rebut criticisms effectively.*
>
> *We look forward to hearing from you in relation to developments and progress in your case, and remain very willing to cooperate and assist you as appropriate."*

314. In short, the scope of the investigation of Ofgem did not concern allegations of fraud and dishonesty. The core of the application for the search warrants was about mis-selling by brokers who were alleged to be controlled by the Claimants, despite being held out as being independent. At the heart of the application was the allegation that lies had been told in front-end conversations which the Claimants had said had not

been recorded. This invalidated the evidence regarding the comfort calls. The contract had been entered into by then. Further, having listened to comfort calls, it appeared to be pre-prepared and formulaic as the broker spoke to a script at a very rapid pace. To the extent that the key conversations were the front-end ones in different terms and containing misrepresentations (with the recordings being concealed from customers), the Defendant's case is that the comfort calls were just a cover up. The result of the failure and/or refusal to provide transcripts of the front-end calls was that the complainants depended on recollection without contemporaneous documentary evidence to substantiate these allegations. According to the Defendant, to the extent that there was cooperation in connection with its report, that was reactive only, and the report was limited in its scope and did not cover the issue of fraud.

315. The points made by BES that it did not participate in fraud and that it was independent of the brokers are matters which in broad terms were identified as potential defences on the application for the search warrants. The Defendant relies on the evidence of the numerous statements and the pattern alleged of misrepresentation. It also relies on the evidence suggesting that the brokers were not independent but were ultimately controlled by BES and/or Mr Pilley in particular.

316. The Defendant's case is that the Claimants had repeatedly and/or systemically made representations orally to prospective customers so as to sign up customers to 4–5-year contracts with BES at higher prices than were available elsewhere. The prices were not fixed for the duration of the contracts. There were very high termination fees. The brokers were not independent of BES and in particular of Mr Pilley. BES and/or Mr Pilley controlled everything.

317. On this basis, the Defendant submitted that it had reasonable grounds to believe that criminal offences in the nature of fraudulent conduct were being carried out on a systemic basis. Whether or not the fraud is established is for another day, but it was submitted that this was enough on which to justify the making of the application.

318. The Defendant adduced evidence as to why it was believed that it was justified to seek the information by way of search warrants rather than by way of request or production orders. Mr Rees gave evidence in the following terms:

(1) *"Well, I have some knowledge as to the necessity of the warrants, and yes, I'm aware that warrants were necessary because a lot of the investigation involved phone calls and it would have been -- would be crucial evidence to criminal investigation if those phone calls were available. So yes, absolutely, I was aware. It was also important that we had training records and business records which showed any links between the companies. So yes, absolutely, I was aware of those considerations taking place."* [T15/44:4 – 13]

(2) *"Yes, it's not seizing data willy-nilly, is it? It's making sure we capture the evidence which was detailed in the warrant applications."* [T15/148:20 – 22]

(3) *"Q. So this is not an area where there was any concern at all about things disappearing, is there? A. Well, absolutely it is…And remember, this is a*

> *fraud investigation we're looking at. So, you know, our suspicions are alert as to the activities of the company. So, you know, we want to capture the records ourselves to be sure that they exist and are kept. So, yes, entirely appropriate to look for those records*." [T15/154:11 – 20]

319. As regards the letters containing offers of cooperation, the Defendant was entitled to treat these offers in the way in which they did. They were not treated as genuine offers because of the evidence of fraud. DC Griffin dealt with this in evidence, as set out above.

(c) Observations

320. I accept each of the above points made by the Defendant insofar as they provide answers to the case about the application for the Search Warrants being inappropriate. Without affecting the generality of the foregoing, the scope of the Ofgem report was different from the investigation about fraud, and Ofgem was supportive of the Defendant's investigation. Even without the material subsequently obtained, the investigation of the Defendant (and that undertaken previously by Lancashire Trading Standards) had revealed patterns of conduct giving rise to reasonable grounds to believe that there had been fraudulent conduct. There was ample material in order to support the existence of reasonable grounds for the belief that search warrants were required. The application had been subjected to detailed preparation and scrutiny by Leading and Junior Counsel, which itself was infrequent in these applications.

321. There is a further point about the settlement with Ofgem. There was nothing nominal about the settlement. The fact that instead of receiving a fine of £980,000 BES was allowed to pay almost all of it to charity did not mean that this was a voluntary charitable donation. This was a penalty in which BES was allowed to make the payments to charity. The submission of BES that there was only £2 payable by way of a fine due to cooperation is not a correct characterisation of a compulsory payment totalling almost a million pounds to reflect the gravity of the matters. The fact that there was in the end agreement as to the destination of the moneys does not affect the fact that the regulator required £980,000 to be paid.

322. The Defendant might have set out more about the correspondence of Fieldfisher than it did and highlighted the offers of cooperation and why they were disregarded. However, I do not regard the failure to do so as evidence of material misrepresentation or non-disclosure. Given that there was evidence from which the Defendant had reasonable grounds to believe the existence of systemic fraud, they were entitled reasonably to believe that the letters were part of a strategy to conceal the fraud or misconduct. They appeared in solicitors' letters which, they believed, were intended to stifle criticism rather than to uncover the truth. Insofar as the suggestion was that the brokers might be independent of BES, there was emerging evidence to indicate that the contrary was the case. I accept DC Griffin's evidence in this regard. I have considered whether this ought to have been provided to the Court to make this assessment. I am satisfied in the context of the application as a whole (including the view taken by the Defendant about the letters) that this was not

information which might reasonably have led a judge to refuse the Search Warrants. In the circumstances, I accept the Defendant's case that there was no material non-disclosure in that the disclosure of these documents neither would, nor might it have made any difference to the Court's determination of the application for the search warrants.

323. I am also satisfied that there was no material non-disclosure as regards allegations of contamination and association with what the Claimants described as a campaign. This is especially as to the extent to which the statements were in fact the handiwork of Mr Bourne and driven on by a campaign of Mr Scrivener and/or Mr Mooney and/or others. I am satisfied that Mr Bourne allowed witnesses to make the statements themselves without influence over the content of the statements. The application was put together with a limited and subordinate role of Mr Bourne, whose participation was over a limited period of time and ended long before the making of the application for the search warrants. The Defendant was entitled to disregard for the purpose of the application the allegation that Mr Bourne had behaved unprofessionally because of a view reasonably taken that it did not contaminate the application. Likewise, to the extent that there was contact with Mr Scrivener and/or Mr Mooney or others, the Defendant was entitled reasonably to come to the same conclusion, namely that this did not have any significant impact on the investigation.

324. In this regard, it was suggested that there was no disclosure of contact with Ms Kelly Bailey, a whistleblower. The Claimants threatened proceedings against her and obtained undertakings on 30 March 2015. They say that she still continued to assist Messrs Scrivener and Mooney and ultimately proceedings were brought against her, culminating in interim and ultimately final relief. The Claimants say that there was a failure to identify her influence on the investigation leading to the Search Warrants application. The Defendant did not rely on her in the preparation for the Search Warrants application, and her statement of 25 July 2017 post-dated the Search Warrants application. The attempts to silence Ms Bailey by the Claimants was in the knowledge that she had stated in a conversation recorded by a private detective engaged by Mr Pilley that the front-end calls were recorded; it was known that they were recorded; they could be listened to; they were withheld from the customer. This was consistent with the complaint of complainants and in particular Mr and Mrs Maybury. She had accurate information about the business of the Claimants, but attempts were taken on behalf of the Claimants to silence her.

325. As regards the merits of the dispute, the Claimants' denial of being fraudulent is accompanied by a statement that the Court should not decide that the Claimants have committed a fraud. The question is not whether the Claimants committed a fraud, but whether there is sufficient evidence for the Defendant to have made an application for search warrants. In my judgment, the Defendant had reasonable grounds on which to believe that there had been systemic fraud. It also had a reasonable basis to believe that there was a serious risk that it would not receive all relevant documents without the search warrants.

326. This might have applied to the front-end tapes: if they were to exist, it seemed unlikely that they would be produced absent a search pursuant to a warrant. BES did nothing to correct the impression of Ofgem that no recordings were made or retained. The same point might be said to apply to evidence about the nature and extent of connections between BES and the allegedly independent brokers. Without the search

warrant, there was a reasonable basis to apprehend that the Defendant might not have been able to obtain these documents. This point is made without reference to the documents obtained on the search warrants.

327. I am satisfied on the basis of the totality of the evidence before HH Judge Brown that, despite the case of the Claimants, there was sufficient to raise reasonable grounds to believe that there was systemic fraud being practised on potential customers. In particular, the evidence about the front-end calls and the misrepresentations by a number of witnesses are so substantial that they raise reasonable grounds for the Defendant to believe that there was a systemic fraud. Further, there was substantial evidence giving rise to reasonable grounds to believe that the brokers were not independent but were acting under the control and at the behest of the Claimants.

328. There was a reasonable basis for the Defendant to believe that a production order or steps taken in liaison with the Claimants would not have sufficed, such that search warrants were necessary. The history of the matter (Radio Five Live Investigates and the Ofgem report), the evidence of the whistle-blower and the numerous statements in this matter were such that the Claimants could not be trusted to provide effective assistance. It was necessary and justified in these circumstances for all the reasons submitted on the application to apply for and execute search warrants. All of this is without taking into account matters which emerged from the exercise of the search warrant and the apparent concealment of recordings of the front-end calls from those investigating the Defendant.

329. It was obvious from the nature of the investigation that it had taken a long time to prepare and that the Claimants would have had an opportunity to destroy or conceal documents. That did not make the application pointless because it was still reasonable to expect that documents might be found on the search warrants required to consider a criminal prosecution. Delay in this kind is a factor and no more: its weight depends on each case. The Court cannot decide this point by reference to what has transpired on the execution of the Search Warrants because the question is the material on which the Defendant acted at the time. However, nothing that has happened subsequently whether in the execution of the Search Warrants and in the detailed oral evidence and examination of evidence in this case has undermined the conclusion that the Defendant had reasonable grounds for the belief about the alleged fraud.

330. I should add that the test which has been applied in this regard is about whether there was reasonable grounds to believe that the particular offences had been committed and the other matters which had to be satisfied under the legislation under which the Search Warrants were obtained. The Claimants have not demonstrated that the Defendant did not have reasonable grounds to believe the same. Likewise, I am satisfied, if and to the extent that it was necessary, that the Defendant had reasonable grounds for such belief on the basis of the information which it had at the time of the application for the Search Warrants. Further the last sentence of the paragraph immediately above is repeated. As the Claimants emphasise, this is not the same thing as saying that the frauds have been proven. That is a matter for a criminal trial.

(5) Other allegations of non-disclosure in the presentation of the application for the Search Warrants

331. In the discussion about the allegations of inadequate preparation and presentation of the application and of improperly seeking documents through search warrants, there have been considered specific allegations of non-disclosure. Without repeating all of the above sections, the following has been considered above and do not give rise to sustainable allegations of non-disclosure, including:

(1) the cooperation with Ofgem;

(2) the offers of cooperation in the correspondence with Fieldfisher and other solicitors;

(3) the alleged influence of Messrs Scrivener and Mooney;

(4) the allegations made about Mr Bourne.

332. It is convenient at this stage to set out Issue 4 because it contains a detailed summary of some of the allegations of non-disclosure, each of which can be summarised here to the extent that they have not already been considered.

333. Issue 4

"Did the Defendant instigate the application for the Search Warrants in a manner which caused the Court to be misled and/or where there were material failures to comply with duties of full and frank disclosure for which the Defendant was responsible in respect of:

(a) The description of the operation of the SME energy market and industry practice concerning cold calling, verbal contracts, the absence of a cooling off period, the recording of calls and/or customers being told that they were on emergency rates?

(b) The relationship between BES, CPL and brokers, the nature of their respective businesses, the role played by rival brokers and Messrs Scrivener and Mooney in generating complaints, the proportion of complainants to total customers, the historical nature of complaints relied upon and/or the role played by a comfort call procedure in detecting and addressing shortcomings in the dealings between brokers and customers?

(c) The description of the Ofgem investigation including the nature of the matters investigated, the fact that they were historical and/or BES's cooperation and correction of the matters of concern prior to the conclusion of the investigation?

(d) The failure to disclose the impact of the Scrivener and Mooney campaign, Ms Kelly Brown (Bailey) and/or Mr Bourne's misconduct on the investigation?

(e) The failure to disclose the offers of cooperation from the Claimants, the Defendant's failure to engage with the same, the Defendant's failure to attempt to obtain information and documentation by less intrusive steps and/or the Claimants' historical cooperation with the Ofgem investigation and other investigations?

(f) The statements that BES used Darwin Court as a correspondence address and/or that CPL used Mr Pilley's home address as a correspondence address?"

334. As regards Issue 4(a) about expert evidence, reference is made to the section above headed "Expert evidence". I accept the submission of the Defendant that it was reasonable not to adduce expert evidence for the purpose of the application for search warrants. I accept the evidence of DC Griffin to the effect that the case was about whether people had been conned. The expert evidence has provided very limited assistance in this case. For the reasons above set out, the failure to adduce expert evidence does not amount to a non-disclosure.

335. As regards the many matters set out in Issue 4(b) above, there was not a failure to provide full and frank disclosure as regards the relationship between BES, CPL and brokers. There was a reasonable basis for a belief that the brokers were not independent and were controlled by BES and in particular Mr Pilley. This came from the whistleblower, from the Radio 5 Live Investigates programme and from the relationships between Mr Pilley and the persons who were said to independent from BES. The case of the Claimants that they had strategic partners is not an answer: there is a reasonable basis for the belief that these were not strategic partners, but persons controlled by or agents of or otherwise not independent from BES.

336. The evidence given by Mr Pilley in this regard did not undermine the reasonable grounds for the belief of the Defendant that this was the case. His attempt to distance Commercial Power and BES was unrealistic. Commercial Power was set up by Mr Pilley in the first place, and then its director was Mr Pilley's best friend Mr Qualter aka Mr Goulding. Further, responsively to Mr Pilley's evidence in this regard, there was evidence obtained as a result of the Search Warrants that Mr Qualter was "fronting" the brokers CRS (Commercial Reduction Services Limited) and ES ("Energy Supplies Limited"). In an email of 31 May 2016 from Mr Qualter to Mr Pilley, Mr Qualter wrote:

> *"I have no idea if CRS & ERS are losing money as they are not really my Companies as we both know and I have never been privy to the ins and outs. I front them for everyone's benefit, probably mine included, and will continue to do so because as you say we are best mates. I can't afford to leave and set-up on my own as you well know..."*

The explanation of Mr Pilley was that Mr Qualter was suffering from stress. It is apparent from the email that Mr Qualter was under pressure, but this does not explain

why he would have made this assertion if it was not true. It was consistent with the allegations in the 5 Live Investigates programme. This document cannot be relied upon in connection with the making of the application which depends on the knowledge of the Defendant at the time of the application, but it is relevant to Mr Pilley's evidence maintaining the independence of the strategic partners.

337. Likewise, the communications between Mr Chapman of BES and Mr Aspinall of Commercial Power to the effect that the tapes of the front-end conversations should not be produced is indicative of the collusion between Commercial Power and BES. The attempt to rely on Mr Pilley's evidence about strategic partnerships may be developed in the criminal proceedings, but it does not in any way negate the reasonable belief of the close connections (not explained by a strategic partnership) between Commercial Power and BES.

338. The fact that the Comfort Call procedure was not addressed is also not a matter giving rise to material non-disclosure. The complaint was that the misrepresentations occurred at the outset in the front-end calls. There was a basis for a reasonable belief that the "comfort call procedure" was not to detect shortcomings, but something after the event of the contract and formulaic so as to pretend that there had not been misrepresentations in the front-end conversations which were the contractual calls. The Court appraises the allegation of misrepresentation without the evidence emerging from the execution of the search warrants. There was sufficient information to form the basis of a reasonable belief about the systemic fraud. The identification of the counter-arguments sufficed. The Defendant could not reasonably be expected to have identified each and every way in which the Claimants would put their case. As regards the central nature of the front-end calls, this is without considering the evidence subsequently obtained of tapes of front-end calls and evidence of deliberate suppression of the same.

339. The belief of the Defendant is by reference to the point of applying for the search warrants, but nothing which has subsequently emerged has shaken that: the Court heard the evidence of complainants which only emphasised this. At the heart of their evidence was that the comfort calls did not contain everything which was said in the key front-end calls. On the basis of the evidence given to the Court, the complainants gave evidence because they were entirely convinced about systemic fraud and not because of rival brokers or Messrs Scrivener and Mooney. The non-disclosure allegation by reference to Messrs Scrivener and Mooney and rival brokers is also addressed above.

340. As regards Issue 4(c) above, the criticism that the description of the Ofgem investigation should have been mentioned in greater detail is ill placed. The Ofgem investigation was not about the same subject matter as the instant allegations of fraud, and, as noted above, Ofgem encouraged the Defendant to carry out the instant investigation in the knowledge that the ambit of its investigation did not extend to fraud, and there were matters for the Defendant to investigate in that regard. The fact therefore that some statements pre-dated the Ofgem findings did not make those statements historic following the Ofgem findings.

341. As regards Issue 4(d) above, this is predicated upon a substantial impact of the actions of Scrivener and Mooney on the investigation and/or of Ms Kelly Brown (Bailey) and/or of the inappropriate communications of Mr Bourne. As set out above, these

matters did not have or were reasonably believed not to have had a substantial impact on the investigation of the Defendant. There was no non-disclosure or misrepresentation for failing to refer to these matters and then to respond saying that these matters had no substantial impact.

342. I accept broadly the submission of the Defendant at para. 83 of its closing submissions that there was no evidence that the complaints submitted to the Defendant were fabricated or generated by Messrs Scrivener and Mooney. The evidence is that the complainants' statements relied upon for the purposes of the application for the search warrants were obtained by investigators from Lancashire Trading Standards or by the Defendant's investigators, and not by Messrs Scrivener and Mooney. Much of the evidence pre-dates the alleged campaign of Messrs Scrivener and Mooney. As stated in the evidence of Andrew Rees at paragraph 9 of his witness statement between 1 April 2013 and 31 July 2014, 186 complaints relating to the provision of misleading information and aggressive sales practices were recorded on the Citizen's Advice Partner Portal and the Trading standards intelligence systems, MEMEX and IDB.

343. As set out elsewhere in this judgment, despite cross-examination over a period of 3 days, nothing in the oral evidence of the complainants who gave live testimony at trial supported the case about their evidence being influenced by Mr Scrivener or Mr Mooney or other third parties.

344. As regards Issue 4(e) above, such offers of cooperation as there were formed part of letters complaining about the investigation that was taking place. The Defendant had reasonable grounds to believe that any offers were part of a strategy to divert attention from the investigation of a systemic fraud on the part of the Claimants. As more information was revealed up to the time of the application, this became more apparent to the Defendant. Although not relevant to the question of disclosure which is by reference to the time of the making of the application, it became more apparent still at a later stage as a result of the information revealed on the execution of the Search Warrants. The disclosure which was provided to the Court was sufficient. Had there been disclosure of the offers of cooperation together with the answer set out in this paragraph, it might not reasonably have led a judge to refuse to issue the Search Warrants.

345. As regards Issue 4(f) above, it was asserted in the application for Search Warrants that BES Utilities corresponded with customers from Darwin Court, whereas the Claimants say that this had not been the case since June 2011. It was further asserted that Mr Pilley's home address was the correspondence address for the Second Claimant and Commercial Power, whereas the Claimants say that this was not the correspondence address for Commercial Power, and the registered office at the time of the application was 3 Darwin Court. The answer of the Defendant was that the investigation included events prior to June 2011 when the Claimants admit that Darwin Court was a correspondence address for BES Utilities. Further, Mr Pilley's home address was shown in a Companies House document dated 2 March 2016 as a correspondence address for Commercial Power. This shows an overlap between Mr Pilley's home address and Commercial Power. Even if it was not current, it had been, which is relevant as a basis of an inference of common ownership and control of BES Utilities and Commercial Power. In any event, any failure to mention the current position or an implication that this was the current position was in all the

circumstances not something which could reasonably have led to a judge to refuse to issue the Search Warrants.

346. It is said that if there was a failure properly to address the fact that the complaints which were relied upon were a small proportion of the total number of customers of BES and/or pre-dated the Ofgem investigation. They also complain about the failure to disclose that the various brokers were each separate companies as were Commercial Power rather than asserting that Commercial Power and the brokers were simply part of a group working to secure contracts for the benefit of BES.

347. The Claimants also submit that there was non-disclosure in failing to say that the complaints were "likely to have arisen" as a result of brokers working for other utility suppliers and/or that they were commonplace in the industry which were unfounded to get people out of valid contracts. The disclosure which was given was adequate: it could not reasonably be expected to deal with each and every way in which the non-disclosure matters would be formulated.

348. There is a lengthy section of the closing submissions in respect of the UIA comprising pages 38-45. The Claimants say that the UIA comprised a small association of 30 brokers in co competition with BES. They refer to their animosity towards the Claimants. They submit that the UIA had an influence on the investigation in that they had had contact with the Lancashire Trading Standards investigation including making unsubstantiated allegations. It was said that the UIA had a direct influence on some of the 38 complainants on which the Defendant relied in the application for the Search Warrants, and in particular on Mr Dimmer of Elstree Effects and Ms Solomon of Complete Aquariums. The complaint of Mr Dimmer was largely rejected by the Ombudsman and the complaint of Ms Solomon was rejected by the Ombudsman, albeit that there was a compromise of Ms Solomon's claim. In the case of Mr and Mrs Maybury, there was comment that the UIA had a strong influence on their case by reference to minor contact including a reference on a forum posting, a letter from Mr Maybury to the UIA enclosing the statement of Mr Maybury and oral evidence of contact of Mr Maybury with a rival utility supplier.

349. In my judgment, none of this has given rise to material non-disclosure. The following is to be noted:

(1) Without treating this as a pleading point, there is a point about prominence: the pleadings did not mention the UIA (referring simply to rival brokers). There is a qualitative difference between the actions of rival brokers and concerted action of a trade association comprising other brokers in the industry.

(2) The evidence given by Mr and Mrs Maybury showed that their evidence was the product of their own independent thought and whatever contact they may have had with the UIA (or Messrs Scrivener and Mooney) did not cause or influence the substance of the complaints. Likewise, in the other evidence given orally, the complaints were not so caused or influenced.

(3) The other instances of contact in the context of the application were not of such a nature and extent as called for disclosure.

(4) It is necessary to distinguish between the failure to identify the points of detail taken by a respondent to a search warrant application after formulating their own case and the points reasonably expected of an applicant putting on the respondent's hat. None of these points are points which if identified to the court might reasonably have led to a judge refusing the application.

(5) If the point was as weighty as is indicated by the submissions of the Claimants, it is surprising that the UIA was not mentioned as such in the pleadings.

350. In my judgment, this does not amount to a failure to provide full and frank disclosure. This is presented on the basis not only that there are potential answers to the allegations of systemic frauds, but that it is highly likely that they are false. These points do not answer the allegations of systemic fraud and the quality of the evidence deployed in support. In terms of wearing the hat of the respondent to the application, this duty was discharged especially under the heading of counter-arguments referred to above. That highlighted among other things the answers that it would be said that there was no systemic fraud and that the sins of individual sales staff did not mean that there was systemic conduct. The Radio Five Live Investigates programme was put into a context of possibly being historic and the Ofgem investigation of not containing findings of dishonest conduct. The whistleblower might be exercising a grudge.

351. In my judgment, none of the matters alleged to amount to non-disclosure by themselves or in association with other matters might reasonably have caused a judge to refuse the Search Warrants. They are to be seen in the context of all the allegations and the identification of counter-arguments.

(6) The Human Rights Act 1998 ("HRA") claim

352. I preface my findings by saying that there was a considerable amount of European and domestic decisions placed before the Court on the question as to whether rights under the ECHR could be used not only by individuals but also by corporate claimants. The authorities did not go all one way, but I propose to assume for the purpose of this judgment that a corporate claimant can make a claim under the HRA.

353. In addition to the matters discussed thus far, the alleged failure to make full and frank disclosure is alleged also to be a breach of the duty to act compatibly with Article 8 and/or Article 1, Protocol 1 of the ECHR. It follows from the rejection of the case about a failure to make full and frank disclosure that this allegation is rejected. It is therefore unnecessary to make findings about the alternative legal matters which were relied upon.

354. There was a considerable amount of law addressed to the Court as to whether there could be liability for failure to make full and frank disclosure without malice being established, as would be a pre-requisite of proving the tort of malicious procurement

of a search warrant. The tort of malicious procurement of a search warrant has not been pleaded. It is not simply a pleading point because the relevant tort involves malice as an essential ingredient. That has not been alleged, and on the information before the Court, rightly so. There is in my judgment no evidence that any officer of the Defendant acted maliciously in respect of the application for the Search Warrants.

355. The Defendant contends that there are numerous additional reasons in law why the claim is not viable. It claims the following. First, there is no case where there has been, without more, a civil Queen's Bench claim to the effect that the consequence of a failure to make full and frank disclosure gives rise to a claim for damages. In any event, the Defendant submits that there is a defence of immunity because this is an attempt to litigate the way in which a case was presented to the case. The Claimants say that this is not an answer to a claim under the HRA and/or under the ECHR. These issues do not arise for consideration because irrespective of these points, there was no failure to make full and frank disclosure.

356. In addition, and under the heading of the HRA claim, the Claimants assert that the application for the Search Warrants "*was unnecessary and/or disproportionate*" RRRaPoC at para. 82, including because:

(1) "*[t]here was 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 investigations*";

(2) "*[t]he Defendant failed to make any attempt to obtain access to, inspect or take copies of the Claimants' property by consent before seeking and obtaining the search warrants*"; and

(3) "*[t]he Defendant did not seek to obtain, or to procure the obtaining of, a production order pursuant to paragraph 1, Schedule 1 PACE before applying for the Search Warrants*".

357. In addition, and under the heading of the HRA claim, the Claimants assert:

(1) that the Defendant seized or procured the seizure of "property belonging to the Claimants in breach of statutory duties to return it and as such contrary to the conditions provided for by law and/or not in enforcement of any such law". [RRRAPoC at paragraph 79.2];

(2) that the Defendant "unlawfully retained, alternatively caused the unlawful retention of, property belonging to the Claimants in breach of statutory duties to return it and as such contrary to the conditions provided for by law and/or not in enforcement of any such law" [RRRAPoC at paragraph 79.3]; and

(3) that "[t]here have been, and remain, failures to comply with obligations under ss. 50, 52, 53 and 54 of the 2001 Act for which the Defendant is responsible and/or liable" [RRRAPoC at paragraph 82.7].

358. It follows from the matters set out above, particularly in the section about "the allegation of improperly seeking and obtaining documents through search warrants instead of seeking documents through cooperation or production orders" that:

(1) there were reasonable grounds to believe that the Claimants had been involved in criminal activity and/or that their premises would contain information relevant to the Defendant's investigations;

(2) the Defendant was entitled to take the view that in the light of the history to date and the particular nature of the fraud believed to exist, there was a risk of destruction or concealment such that proceeding with the consent of the Claimants was not a realistic option;

(3) the same considerations militated against merely seeking a production order.

359. Issue 5

"Did the Defendant instigate the application for the Search Warrants in a manner which caused the Search Warrants to be obtained in excessively broad terms?"

In my judgment, the terms of the Search Warrants were not in excessively broad terms. This was a large-scale investigation into systemic and endemic fraud. It was not one fraud. Every time that new business was obtained by fraudulent misrepresentation was a separate fraud, even if it was pursuant to a similar modus operandi each time. It was recognised that it would be an enormous task to prove such frauds, and that the probability was that there would be sustained resistance on a grand scale (as indeed has transpired). The Defendant considered that it required to have a wide-ranging seizure of documents so as to uncover as much as reasonably possible and to prove the fraud. It will be borne in mind that the scope of the Search Warrants was in consultation with Leading and Junior Counsel, showing an unusual attention to detail for such an application. Although not relevant to the adequacy of the disclosure at the time and other matters under consideration about the nature and scope of the application, the scope of the searches has been vindicated by uncovering pursuant to the Search Warrants documents such as front-end recordings and internal emails indicating an intent to cover up the same.

360. Issue 6

"Should the Defendant have sought the information and documentation by consent or the use of less intrusive means?"

It does not follow from the fact that this was an investigation into fraud that it necessarily follows that a less intrusive means such as a production order would not suffice. It is a question of judgment in each case. In the instant case, there developed a picture from the investigation that the Claimants had an elaborate system of setting

up sham companies in the pretence that they were brokers at arm's length. There was evidence of similar fact evidence of the kind of representations that were made in the front-end conversations to sign up new customers. Faced with systemic fraud, the Defendant was entitled to form the view that an informal request for documents or a production order, depending upon the integrity of the Claimants to produce documents was unreliable way of getting documents. There was a reasonable basis to believe that there was an endemic fraud and that there would be dishonest conduct in concealing documents in the event that Search Warrants had not been sought. The answer to this issue is therefore in the negative. This conclusion has been reached on the basis of the information known about at the time of the application and without the information learned from the documents obtained through the Search Warrants.

361. Issue 7

"If the answer to any of the issues and sub-issues at Issue 4 to 6 above is yes, did this mean that the interference with the Claimants' rights under Article 8 and/or Article 1 Protocol 1 by virtue of the obtaining and execution of the Search Warrants was:

(a) Unlawful;

(b) Unnecessary for the purposes for which the interference with such rights is permitted;

(c) Disproportionate?"

The answers to the issues and sub-issues at Issues 4 to 6 are in the negative, and accordingly, this does not arise for consideration.

362. Issue 8

"Does the immunity principle:

(a) Apply to the Defendant having regard to its role as an instigator?

(b) Apply to the Claimants' HRA 1998 claims?"

It was submitted that the Defendant had an immunity in connection with the application. This was challenged by the Claimants. This otherwise controversial issue does not arise for necessary consideration in view of the findings in respect of Issues 1-6 where no liability has been found. Hence, it is not necessary to consider if immunity arose. Given the fact that no liability has been found, and also the extent to which this would have prolonged this already long judgment, it is not necessary to consider what decision the Court might have reached.

363. Issue 9

"Are the Claimants only able to advance claims based under the HRA 1998 in respect of the obtaining and execution of the Search Warrants:

(a) Within judicial review proceedings; and/or

(b) After first setting aside the Search Warrants?"

364. The Defendant submitted that even if the warrants had been applied for irregularly or the warrants were ordered without a reasonable basis for them, the Defendant submitted that the ensuing search was valid until and unless the warrants were set aside by judicial review. The Defendant submitted that a private law action could not lie until the warrants were set aside in judicial review. The Defendant submitted that claims for damages had not arisen in a free-standing claim in tort but had been in the context of judicial review proceedings and/or the setting aside of search warrants. The Claimants submitted that the existence of a private law action was sufficient on which to obtain a finding that the warrants were unlawfully made, and for damages to be obtained on the back of them. It is unnecessary to rehearse and decide the submissions of the parties on the basis that the warrants were obtained properly and the application for the Search Warrants was well made out. Since the claims have been resolved in favour of the Defendant, these questions do not arise for necessary consideration.

365. Issue 10

"Having regard to the answers to Issues 4 to 9 above:

(a) Is the Defendant liable to the Claimants pursuant to ss.6-7 of the HRA 1998 by virtue of breaches of their rights under Article 8 and/or Article 1 of Protocol 1 of the Convention?

(b) Are the Claimants entitled to a declaration that the Search Warrants were obtained by way of material failures to comply with the duty of full and frank disclosure and/or by the Court being misled and/or that their rights under Article 8 and Article 1 of Protocol 1 of the Convention have been breached?"

The effect of the answers given above is that the answer is 'no' to both questions.

(7) Subsequent evidence relating to the action against Mr Scrivener and Mr Mooney

366. There are matters which have occurred subsequent to the search warrants which appear to be relied upon by the Claimants whilst at the same time saying that the Defendant is confined to the material adduced on the application before HH Judge Brown. This includes the abandonment of the defence by Mr Scrivener and Mr Mooney ("the Abandonment") and then provision of undertakings by them not to repeat their allegations against the Claimants. Assuming that it can be relied upon whilst the Defendant cannot adduce any subsequent evidence, I do not find that the Abandonment is probative. The Abandonment does not affect my judgment that there were reasonable grounds to believe that there was a systemic fraud of the Claimants in acquiring business from originally unsuspecting clients. It is not possible to reach a

definitive conclusion as to why the Abandonment took place, but it is possible that Mr Scrivener and Mr Mooney went beyond legitimate criticism or simply that they overreached themselves in defending an action for which they were not equipped in terms of know-how and financial resources.

(8) Conclusion

367. It follows from the above that, in my judgment, the application for Search Warrants was properly made. Each of the challenges that there was no full and frank disclosure and/or that no warrants were required and/or that a production order would have sufficed are rejected.

368. The conclusion which I have reached without taking into account the evidence either not available to the Defendant at the time of the application for the search warrants or not deployed on the application is that there was sufficient evidence to justify the application for the search warrants and there was no breach of the duty of full and frank disclosure. For the reasons above set out, I am satisfied that at the time of the making of the application, there were reasonable grounds for the Defendant's belief that:

(i) there was a fraud being practised by the Claimants;

(ii) the Claimants' desire to help was cosmetic and could not be relied upon; and

(iii) Search Warrants were required in order to seek documents which might provide evidence of such fraud;

(iv) Search Warrants in the terms sought were appropriate and proportionate

If it had been the case that the Claimants had shown that the warrants were improperly obtained and/or that there were no reasonable grounds on which to seek the same, then the Defendant has advanced a number of defences which would have arisen for consideration. In view of the findings which I have made, defences such as immunity are not necessary to determine.

(9) Conclusion

369. It is important to emphasise that these findings are made by reference to the question of whether the duty of disclosure was observed or whether the scope of the Search Warrants was too wide. They are not findings of whether the fraud was established or whether there has been criminal conduct. That is for another court at another time. This is a point which has been made elsewhere in this judgment. It will not always be reiterated in this judgment, but the same point applies that a finding in this judgment is very different from a determination of a court which is examining the question as to whether there was a fraud.

X Execution of the warrants

370. In view of my ruling that the warrants were properly obtained, it is not necessary to decide whose submissions are right either as regards the method of challenge or which party was responsible for an unlawful search. On the basis that the warrants had been obtained lawfully and properly, there does not arise for consideration the possibility that all items seized were ipso facto obtained unlawfully such as to give rise to private law remedies such as damages for trespass and/or conversion.

371. Despite the foregoing, there still remains for consideration any liabilities arising out of the way in which the warrants were executed. The question is then whether the warrants were executed improperly or unlawfully, and, if so, whether the Defendant is liable for the same. The Claimants claim against the Defendant damages alleging the following, namely

(1) : seizure of materials beyond the scope of the Search Warrants and/or the failure to provide inventories;

(2) seizure of LPP;

(3) failure to carry out the process of imaging the servers and making them available for return within a reasonable time;

(4) failure to return the hard copy documents within a reasonable time.

372. Before considering the foregoing, it is necessary to note the following. The execution of the warrants is said by the Defendant to have been undertaken by the police and not the Defendant with the effect that the original seizure was the responsibility of the police and not the Defendant. It is common ground thereafter that there is a potential liability of the Defendant once materials were received and then held by the Defendant. In other words, the defence of the Defendant that it was the responsibility of the police does not absolve the Defendant in respect of items received and held by the Defendant subsequent to the execution of the warrants.

373. Accordingly, there will now be discussed the following, namely:

(1) The accounts of how the Search Warrants were executed;

(2) Was the liability for any unlawful acts in the execution of the Search Warrants that of the Defendant or the police;

(3) If the liability was that of the Defendant:

(a) Whether items were taken which went beyond the scope of what was permitted;

(b) Whether LPP material was seized in an unlawful manner;

(c) Whether the removal of the servers from the premises was unlawful.

(1) The accounts of how the warrants were executed

374. The warrants were obtained under PACE and were addressed to police officers of the Lancashire Constabulary. There were about 70 police officers involved in the execution of the warrants. The Defendant was not authorised to, and did not, execute the warrants. They were authorised to accompany the police on the search, as were officers from Trading Standards National E-Crime, from Lancashire Trading Standards, Blackpool, National Crime Agency and independent counsel.

375. There was a computer and IT strategy plan in connection with the operation drawn up by Mr Childs of the National Trading Standards E-Crime Team ("NTSeCT") Digital Forensic Laboratory ("the Lab"). He was employed at the time by the North Yorkshire County Council. The Lab provided digital forensic analysis for national, regional and local investigations being carried out by Trading Standards. It was envisaged that upon the execution of the warrants, there would be attendance by NTSeCT officers to undertake a fact-finding exercise when they arrived on site, to identify the server locations and key workstations and sources of stored data, as well as to undertake an assessment of the extent of the content that needed to be captured.

376. The Claimants are critical of the execution and in particular contend that the first day, 28 July 2016 was squandered by Mr Hunter allowing Mr Matthew Walker a member of BES's IT staff to commence a process of copying using MS DOS. They submit that there was a failure on the part of the Defendant to give prompt guidance to the police as to what to do. They submit that there would have been ample time for the server to be imaged whether using Backtrack or by acquiring forensic images and reconstructing the RAID array. The copying process using MS DOS was abandoned at 19:00 and a decision was made that either everything would need copying or the server seized.

377. In the event, it was necessary to return on the next day, which was the day of a pre-season friendly of Fleetwood FC. At that point, there were removed the servers from the premises. The Claimants say that that embarrassment of a police operation visible to many people would have been avoided if the items had been removed on 28 July 2016, and further with the necessary skill, the server could have been imaged. If the servers were seized, the Claimants submit that they could have been imaged and available for return within two to three working days.

378. Mr Pierce, an officer of the Defendant gave evidence in paragraph 63 of his witness statement: "*I was present at the execution of the search warrants. I recall that it was not possible to conclude the search on 28 July 2016. An officer or officers of Lancashire Constabulary remained on the premises at Highbury Stadium overnight and the search continued the following day. There was therefore no re-entry to the premises. A copy of the warrant was handed to the responsible person and I have seen photographs of the warrant ripped up in a bin*."

379. At paragraph 64, he said:

> "*It was never the defendant's intention to cause embarrassment to the claimants. As indicated above, it was intended that the searches would be completed in one day, but this proved impossible due to the officers' inability to extract the information contained on the server. There was no re-entry*"

380. Mr Pierce was not challenged on this evidence. The evidence of the Claimants' witnesses was limited. Mr Newell was on annual leave (and thus not present at the premises) on the date of the execution of the search warrants. Mr Pilley was in Southport (and thus not present at the premises) on the date of the execution of the search warrants. Rather, Mr Pilley was watching on CCTV and spoke to Wally Dinn over the telephone.

381. There are contemporaneous notes which the Defendant say indicate that Mr Chapman was presenting difficulties to the Lancashire Constabulary in their search and was being obstructive. It is not necessary to characterise whether this was so or whether in fact he was ensuring that nothing happened beyond what was provided in the warrants. This was not explored in any detail in the trial. Mr Chapman, who was present in court at the trial, did not give evidence. I do not for the purpose of this judgment make findings as to the conduct of Mr Chapman or anyone else on behalf of the Claimants at the time of the execution of the warrants, and I shall assume for this purpose that the Claimants were doing what they were entitled to do without being obstructive. This made the exercise time consuming, ensuring strict compliance with the terms of the warrant. That is a relevant factor to the inability to complete the search on 28 July 2016.

382. I accept the evidence of Mr Pierce. I accept that the search was properly executed. I accept that it was not possible in the circumstances to complete the search on 28 July 2016. It was unfortunate that it therefore went into a pre-season friendly match day, but this was necessary and proportionate in order to complete the execution at the premises. It was understandable that there was an attempt to do copying at the premises with a view to avoiding the removal of servers, but in the event, this proved fruitless and the process before removal was postponed.

383. The Claimants' case is that the copying should have been done in situ and that if it was going to be done externally, the servers should have been removed immediately. There is an unreality about these submissions. With hindsight, it might have been better if the decision had been made to remove the servers immediately. However, there was resistance to that, and it was not unreasonable to take steps to see if this was possible. Mr Childs would not have taken that course, but it does not make it unreasonable that in the face of concern of the Claimants the Defendant did see whether the Claimants' wishes could be accommodated. It was still on 28 July 2016 that the decision was made to abandon copying at site.

384. Such was the task that in the event the search and execution at the football stadium premises could not be completed until the next day. I reject the submission that the search was unlawful. In any event, for reasons which I will set out below, the search was the responsibility of the Lancashire Constabulary, and the Defendant is not liable for any shortcoming of the Lancashire Constabulary.

385. The evidence is that all but one of the servers were seized by 29 July 2016. Imaging commenced on one server at 14:50 on 29 July 2016 with the others not commencing until after the weekend on 1 August 2016. In a table at para. 439 of the Claimants' final closing submissions, it is set out how over the first fortnight at the rate of 1-2 per working day, the imaging took place on a total of 14 servers. In the final written submissions, numerous criticisms are made about the performance of the NTSeCT in respect of the imaging of the servers. It was submitted that on the basis of one disk being imaged on each of the 12 ports per day, the processes could have been completed within 5½ days. On this basis, the submission was made that the process could have been completed within one week with proper prioritisation and coordination. It was submitted that the Defendant was aware by 3 August of delays with NTSeCT. By that time, it should have insisted that NTSeCT properly prioritise the imaging process or arrange for a third party like CY4OR to render assistance.

386. Mr Mike Rainford, a partner of JMW Solicitors LLP, communicated with the Defendant in writing and orally with those who were undertaking the imaging of the servers with a view to having the servers returned at the earliest opportunity. Mr Rainford gave evidence about this. He did so in a down to earth manner with nothing to hide. He was cooperative with the process of the questions and gave evidence about his attempts to procure an acceleration of the time for the return of the servers and how he made many communications from the day of the commencement of the search, namely 28 July 2016. In consultation with Mr Walker of IT at BES, a priority list of servers was established. From then onwards, Mr Rainford was *"in constant communication"* [T6/13/25-14/1] with, and *"getting constantly updated by",* Mr Walter Dinn [T6/14/4-6]. During the 3-week period during which servers were returned, Mr Rainford and Mr Dinn were in daily communication by phone and email [T6/20/23-21/1]. Mr Rainford accepted that there was *"an enormous amount […] of communication over the period from the search itself and through the examination of electronic material."* [T6/31/2-6]

387. The information that Mr Rainford was receiving directly from those who were dealing with the computers on 29 July 2021 was that there would be a phased release. On 3 August 2016, Mr Rainford stated in an email to Mr Dinn: *"But as we discussed on the phone if it is going to take until next week then any constant complaining will not make any difference. I just need a date for return not an estimate."* Mr Rainford said that the real problem was not knowing when the property would be returned. He confirmed that the servers were returned as follows: six on 5 August 2016, three on 10 August 2016, one on 12 August 2016, three on 16 August 2016, and two on 18 August [T6/23/6–15]. Mr Rainford confirmed that all of the priority servers had been returned by 18 August. At that time, Mr Rainford identified a further list of priority items. He noted that at that time, there certainly was a high degree of cooperation between Mr Dinn and himself in attempts to return the material as quickly as possible. [T6 /22/1 – 23/2]

388. In my judgment, the intervention of Mr Rainford was very helpful: the impression is that without it, it may have been that the process would have taken longer than it did for the return of the servers. Mr Rainford had made it known that being without servers would have a "massive impact" on his clients. He wanted to have a definite timetable to know when they would be returned.

(2) Was the liability for any unlawful acts in the execution that of the Defendant or the police?

389. The Search Warrants were addressed to the police. The argument of the Claimants is that the Search Warrants were executed by the police at the instigation of the Defendant. Even if there is an argument to that effect about the making of the application, in my judgment it does not follow that the Search Warrants were executed by or at the instigation of the Defendant.

390. The Claimants' pleaded case (para. 55 of RRRaPoC) is as follows:

> *"Lancashire Police, at the instigation of and/or on behalf of the Defendant, and pursuant to the Defendant's instructions of and in the presence of representatives of the Defendant, executed the search warrants and seized a large volume of items…."*

391. The above contains an acknowledgment that the search warrants were executed by the Lancashire Police. The contention is that the search warrants were instigated by the Defendant and pursuant to the instructions of the Defendant. It is necessary to unpack this, first to consider the law and then the facts.

(a) The law

392. The concept of agency and vicarious liability has no application to police officers: see *Fisher v Oldham Corporation* [1930] 2 KB 36. It was only due to statutory intervention that Chief Constables became vicariously liable for the acts of their officers: see s.48(1) of the Police Ac 1964 (now s.88 of the Police Act 1996).

393. Hence, the Claimants' case that the Defendant procured or instigated the searches. However, that requires more than that the police acted at the request of the Defendant. It is necessary to show that they acted as "*the instigator, promoter and active inciter of the action"* rather than simply providing information to a properly constituted authority on which they could act per Lord Bingham MR in *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597 ("Davidson").

394. An essential element of the test of instigating or procuring is whether the officer is in a position to exercise his or her own discretion on the evidence which is available. In *Ali v Heart of England NHS Foundation Trust and Anor* [2018] EWHC 591 (Ch) ("Ali"), there were allegations of false imprisonment arising from procurement of an arrest. A distinction was drawn by Birss J (as he then was) between laying information leading to an arrest decided upon by the police and putting an allegation to the police which they cannot check such that the police officer's discretion is effectively removed. In the latter situation, the person providing the information procures the claimant's arrest. Birss J said:

> *"a person who merely gives information in good faith albeit mistakenly does not commit the tort. To be liable they have to*

> *go beyond that by directing, requesting or directly encouraging the officers to arrest the claimant, as a result of which the prosecuting authority could be said to be acting as their agent or whom the defendant procured to act as they did."*

395. Thus, an element of the test of instigating or procuring is whether the officer is in a practical rather than a theoretical sense in a position to exercise their own discretion on the evidence which is available. In a malicious prosecution case of *Martin v Watson [1996] AC 74 ("Martin")*, the House of Lords stated per Lord Keith that "*the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge*" (at p.80B-C). In relation to the complainant, Lord Keith stated (at p.86B) that:

> *"[t]he circumstance that a defendant in an action of malicious prosecution was not technically the prosecutor should not enable him to escape liability where he was in substance the person responsible for the prosecution having been brought."*

He continued (at pp.86H-87A)*:*

> *"Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if the prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant."*

396. The case law is sometimes applied to a case where an arrest is procured as a result of a complaint about a single matter to the police where there is no opportunity for checking as opposed to a case where the police gather information from various sources and has to make some evaluation. The cases are also mainly where the complaint is malicious, which may not affect the test to be applied, but it provides a context in which the police is not able to exercise an independent discretion.

(b) Applying the law to the facts

397. It has been a part of the Claimants' case in connection with the obtaining of the search warrants to seek to apply these cases to show that although the application was made by the Lancashire Police, it was at the instigation of the Defendant. The suggestion was made that since the application had been prepared by the Defendant following an extensive investigation, the Lancashire Police did not have the opportunity to exercise a discretion of their own, and that in substance the Defendant was responsible for the application having been made. I shall assume without deciding the point that this was

the case. It is not necessary to reach a conclusion about the respective arguments on whether any liability would have attached to the Lancashire Police and not the Defendant because I am satisfied that the application was properly made and that there is no liability attaching in respect of the making of the application.

398. I shall nonetheless consider the application of these principles in relation to the execution of the search warrants. The case for the Claimants operates on the basis that if the Defendant were held to have instigated the application for the search warrants, it must have instigated the execution of the search warrants. There was in effect one transaction to procure the obtaining of the documents which were being sought.

399. In my judgment, for this purpose it is not one single transaction. However dependent the police may (or may not) have been on the Defendant for getting information in order to make the application, that was not the case in connection with the execution of the warrants. It was not only the case that the execution was that of the Lancashire Police, but there were the following features, namely:

(1) the Search Warrants were obtained under the PACE and were addressed to police officers. The Premises Searched Records (PACE 8 Forms) were completed by the police. The Defendant was not authorised to, and did not, execute the warrants. The Defendant was authorised to accompany the police on the search, as were officers from Trading Standards National E-Crime, from Lancashire Trading Standards, Blackpool, National Crime Agency and independent counsel;

(2) the search took place pursuant to the Lancashire Constabulary Search Strategy;

(3) the Lancashire Constabulary had their own expertise and experience in conducting such searches, and were doing it themselves rather than at the direction of others;

(4) there was no Operational Order drafted by the Defendant.

(5) the Premises Searched Records were Lancashire Constabulary documents completed by the police. They each named the police officer in charge of the search and a list of police officers underneath as being the people who were executing the warrants. There may also appear in such documents the name of a trading standards officer present;

(6) the search teams were provided by Lancashire Constabulary (it had 70 of its officers carrying out the search) supplemented by officers of the National Crime Agency.

(7) the contemporaneous notes of Matthew Hunter show that the Defendant's representatives sought authority from the police and were given authority before unplugging and removing the server;

(8) powers under sections 50 and 51 of the Criminal Justice and Police Act 2001 (additional powers of seizure of property in an authorised search) are

exercisable only by the police. There are notices under sections 50 and 51 in the documents before the Court which were completed by the Lancashire Constabulary on their forms (and not by the Defendant) describing the location of seizure, the grounds for seizure and the description of the property searched;

(9) neither were the warrants executed nor were section 50 and 51 powers exercised by the Defendant.

400. The result of this is that the execution of the warrants was by the Lancashire Police and was not instigated or directed or procured by the Defendant. Accordingly, in my judgment, at the execution stage, the Defendant is not liable for the execution of the search warrants by the Lancashire Police.

(3) If the liability was that of the Defendant, was the execution of the Search Warrants unlawful?

401. Issues 11-13

(11) Were items seized which were beyond the scope of the Search Warrants, taking into account the additional powers of seizure under s.50. CJPA?

(12) If so, to what extent was such excessive seizure undertaken by the Defendant?

(13) If and to the extent that such excessive seizure was undertaken by officers of the Lancashire Constabulary rather than by officers of the Defendant, is the Defendant liable for their actions, whether by virtue of such officers acting as the Defendant's agent, at its instigation or otherwise?

402. If there had been items seized beyond the scope of the Search Warrants, taking into account additional powers of seizure under s.50 CJPA, is the Defendant liable for such allegedly excessive seizure? In the light of the discussion above, the seizure was undertaken by officers of the Lancashire Constabulary and not by officers of the Defendant. Thus, the seizure was not undertaken by the Defendant. It has been shown that this is what occurred, and that it is not based on some legal fiction. Accordingly the answer to Issue 12 is that the seizure was entirely undertaken by the Lancashire Constabulary. As for Issue 13, for the reasons above set out, the Defendant is not liable for the actions of the Lancashire Constabulary in that the Lancashire Constabulary did not act as its agent or at its instigation or otherwise.

403. It has not been proven that there were seizures which went beyond the scope of the Search Warrants in the sense that either:

(a) The items came within the terms of the Search Warrants; or

(b) The items were seized pursuant to powers under s.50 CJPA 2001; or

(c) The material comprised electronic data within common drives and were seized by reason of the fact that it was inextricably linked to material which was within the Search Warrants or a section 50 power of seizure.

404. The Lancashire Constabulary made its application to HH Judge Brown in the Preston Crown Court pursuant to section 59 CJPA 2001. The Claimants applied by way of judicial review in respect of the same, claiming that the powers were too wide, and the Divisional Court dismissed the application.

405. Issues 14 – 18

(14) Were the notices required under PACE and the CJPA served on the Claimants after the execution of the Search Warrants?

(15) If the answer to Issue 14 above is no, did this render the seizure of any property unlawful?

(16) Did the Defendant damage items of IT equipment belonging to any of the Claimants?

(17) Was the manner in which the Search Warrants were executed disproportionate?

(18) Having regard to the answers to issues 11 to 17 above:

(a) Is the Defendant liable to the Claimants in respect of the torts of trespass and/or conversion in respect of seized property?

(b) Is the Defendant liable under ss.6-7 of the HRA 1998 for breaching the rights of the Claimants pursuant to Article 8 and Article 1 of Protocol 1 of the Convention in respect of any items of seized property?

406. As regards Issue 14, the obligations to provide details of retained data was that of the Lancashire Constabulary and not the Defendant, as the body executing the Search Warrants. The Search Warrants were executed by the Lancashire Constabulary, and therefore the matters set out in the above issues do not give rise to liability on the part of the Defendant. In any event, the criticisms about the notices provided after seizure identified in Schedule 2 to RRRaPoC are points of detail (e.g. Mr Pilley paras. 114-115 and Mr Newell paras. 32-34). In the context of the exercise as a whole, it has not been proven that there was a failure reasonably and proportionately to identify the items seized. It follows that in answer to Issue 14, this was an issue for the Lancashire Constabulary and not for the Defendant. In any event, it has not been shown that the notices served were inadequate. Issue 15 does not therefore arise for consideration.

407. As regards Issue 16, it has not been shown that the Defendant caused damage to IT equipment.

408. As regards Issue 17, the execution of the Search Warrants was not by the Defendant, but by the Lancashire Constabulary. In any event, it has not been shown that the manner in which the Search Warrants were executed was disproportionate. The warrants were executed on a non-match day: the execution continued until the next day due to proper attempts to comply with requests to do copying at the scene and to the Claimants insisting that the Lancashire Constabulary did not go beyond the powers conferred upon them by the Court orders. The unparticularised allegation of alleged damage to electronic equipment has not been proven. This judgment shall return in due course to the issues relating to LPP material.

409. Having regard to the above, in respect of Issue 18, I find that the alleged liabilities in respect of tort and under the HRA 1998 are not established against the Defendant.

XI The Claimants' submissions regarding the removal of the servers and their retention

(a) The pleaded case

410. The Claimants assert a claim of trespass and conversion in respect of the seized items. Their case is that:

(1) the Defendant retained the property seized without lawful justification and that thereby the Defendant committed, alternatively is liable for, acts of trespass, alternatively conversion;

(2) The Defendant failed to comply with s.53 of the CJPA 2001 including by failing to adhere to its timetable and the Defendant returned the servers in a piecemeal fashion;

(3) The Defendant was in breach of s.54 of the 2001 Act in respect of LPP material.

411. In addition, and under the Claimants make a claim under the HRA 1998, alleging that:

(1) The Defendant unlawfully retained property belonging to the Claimants in breach of statutory duties to return it and as such contrary to the conditions provided for by law and/or not in enforcement of any such law

(2) The Defendant failed to comply with ss.53 and 54 of the CJPA 2001.

(b) The legal framework

412. The legal framework arises from powers generally addressed to police officers, as a power of seizure vests in police officers. The Defendant was in possession of the

seized property in consequence of the execution of the warrants and/or by reason of the exercise of the power pursuant to s.50 CJPA 2001. I accept the submission that the powers of retention applicable to the police are therefore applicable to the retention by the Defendant.

413. On this basis, the legal framework is as follows:

(1) Pursuant to s.53 CJPA 2001, there is an obligation upon the person for the time being having possession of the seized property to take certain steps as soon as reasonably practicable to ascertain the status of the property seized pursuant to s.50 and the grounds for ongoing retention.

(2) The obligation to return property subject to LPP pursuant to s.54 CJPA 2001 will be discussed below.

(3) Following removal from the premises, property seized by the police was transferred into the possession of the Defendant for examination for the purposes of the investigation. The Defendant admits that from that point it is potentially liable in trespass or conversion or pursuant to the HRA.

(4) The starting point is the common law power of retention of seized articles: see *Ghani v Jones* [1970] 1 QB 693 at 708: the police "*must not keep [it]…nor prevent its removal for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned*".

(5) The police have an overriding duty to retain property which may be used as evidence see *R v Lushington Ex p.Otto* [1894] 1 QB 420 at 423-424. The police are entitled to retain property if it is likely to be a 'reasonably necessary' part of the evidence see *Malone v Commissioner of Police* [1980] QB 49 at 60A per Stephenson LJ and 70C per Roskill LJ.

(6) The common law is supplemented (but not superseded) by the provisions of the Police and Criminal Evidence Act 1984 and the Codes of Practice thereto, in particular ***s.22*** **[A/V6/93]** and ***Code B*** **[A/V6/97].**

(7) Section 22 provides as follows:

> "(1) Subject to subsection (4) below anything which has been seized by a constable or taken away by a constable …may be retained so long as is necessary in all the circumstances;
> (2) Without prejudice to the generality of subsection (1) above –
> (a) anything seized for the purposes of a criminal investigation may be retained, except as provided by subsection (4) below –
> (i) for use as evidence at a trial for an offence; or for (ii) forensic examination or for investigation in connection with an offence….
> …
>
> (4) Nothing may be retained for either of the purposes mentioned in subsection (2)(a) above if a photograph or copy would be sufficient

for that purpose."

(8) Code B applies to the search, seizure and retention of property, and it provides amounts amongst other things:

(i) **Para 7.14** -Subject to paragraph 7.15, anything seized in accordance with the above provisions may be retained only for as long as is necessary. It may be retained, among other purposes: (i) for use as evidence at a trial for an offence; (ii) to facilitate the use in any investigation or proceedings of anything to which it is inextricably linked (see Note 7H); (iii) for forensic examination or other investigation in connection with an offence; (iv) in order to establish its lawful owner when there are reasonable grounds for believing it has been stolen or obtained by the commission of an offence.

(ii) **Para 7.15** Property shall not be retained under paragraph 7.14(i), (ii) or (iii) if a copy or image would be sufficient. The issue for the court in relation to the retention of seized items is whether and to what extent any individual item of property was retained by the Defendant for longer than was reasonably necessary.

(iii) **Explanatory Note 7H**- Paragraph 7.14 (ii) applies if inextricably linked material is seized under the Criminal Justice and Police Act 2001, sections 50 or 51. Inextricably linked material is material it is not reasonably practicable to separate from other linked material without prejudicing the use of that other material in any investigation or proceedings. For example, it may not be possible to separate items of data held on computer disk without damaging their evidential integrity. Inextricably linked material must not be examined, imaged, copied or used for any purpose other than for proving the source and/or integrity of the linked material.

(iv) S.67 PACE provides that a failure to comply with any provision of any of the codes shall not of itself render a person liable to criminal or civil proceedings.

(c) Were the servers seized retained for longer than necessary?

414. The core question is whether the Claimants can prove that the items were retained for longer than was "necessary in all the circumstances". There is no reported case in which a breach of s.53 or s.54 of CJPA has given rise to a private law cause of action for damages and paragraph 75.2 of the RRRAPoC, alleging breach of statutory duty, has been deleted.

415. The Claimants' case as regards the servers was that:

(1) The imaging should have been done in situ so that the servers did not need to have been removed.

(2) Even if removed, the imaging should have been done in 2-3 days as per the Operation Best Computer and IT strategy ("the IT Strategy").

(3) Even if the IT Strategy was not realistic, the imaging process could have been done in 5½ days on the basis that one disk was imaged per day on the 12 imaging ports across the four workstations.

(4) BackTrack should have been used instead of the RAID system. This would have led to faster turnround time before the return of the servers. Examples of this were that (a) in respect of server 20, instead of attempting to reconstruct RAID, it took 2 weeks before Back-Track was eventually used, (b) in respect of server 10 from 12/13 August to 15 August, and (c) in respect of server 11 from 10 August to 13 August, and this was necessary to allow front-end applications to work: see Claimants' Closing Submissions at paras. 442-443.

(5) There was not a determination to progress this time critical exercise so as to achieve the fastest turnround time. The constraints included the fact that the NTSeCT facility was limited to four imaging stations. There was competition for this facility between imaging of the Claimants' material and material in other cases.

(6) Absent access to the four imaging stations, NTSeCT could have set up laptops with blockers and FTK Imager to increase their imaging capabilities.

(7) If there were difficulties which were perceived, then a third party should have been engaged such as CY4OR to assist with the process.

(8) There was an absence of a coherent strategy on the first day, namely 28 July 2016 as a result of which imaging took place at the premises, and it was not until about 19:00 that the decision to remove servers took place. As a result of that delay, the operation continued at site into a match day on 29 July 2016 and the operation only got going in earnest after the weekend on 1 August 2016.

(d) Mr Childs' evidence

416. The submission of the Claimants was that the Defendant was guilty of trespass and/or conversion of the servers by failing to return them within a reasonable time and therefore was in breach of a common law tort and/or in breach of obligations under the HRA. The Court heard evidence from Mr Childs for almost the whole of Day 14. Mr Childs faced extensive and very well-prepared cross-examination from Mr Marshall QC in which it was sought to make good many points including the above. The thrust was that seizure was unnecessary and the execution on site and imaging off

site was incompetent. The effect was to cause a delay of many days before the servers had each been returned.

417. Mr Childs' evidence was first about his experience and expertise. He said that he had "30 years' experience in law enforcement, 12 years' experience of digital forensics and a Master's degree in digital forensics. I had been running a lab for 10-years, received training from the National Policing Improvement Agency, specialist training from the software manufacturers, Guidance Software and AccessData [T15/35/20–36/7]. He demonstrated in his evidence that he was very knowledgeable about his field. He gave clear answers to the questions asked of him, which were easily intelligible. In my judgment, he was a reliable witness. He dealt well with the questions asked of him. I accept the general tenor of his evidence. I shall now refer to that evidence.

418. Mr Childs gave evidence to the effect that unexpectedly, there were a much larger number of servers than would have been expected, particularly in the IT Strategy prepared in advance of entering the premises. This affected everything. As Mr Childs said:

(1) The IT Strategy is a document based on the limited knowledge available prior to entering premises. It is at best a suggestion of what is likely to be the approach. It cannot be a set of instructions of how things are going to be done on site. That is why only trained officers are used on the search and seizure, able to respond to the different circumstances that might arise [T14/157/17 – 158/4]**.**

(2) It was very rare for there to be more than two or three servers on the site. In the instant case, there was a vast number "*It is unusual to go into a business and come out with 20-odd servers and a load of other computers."* [T14/167/6 – 167/10]

(3) "The likelihood of being on site and imaging terabytes of data is very low. We don't expect to be staying on site if there are volumes of data of that size, because of the time taken to do forensic imaging. So in circumstances where there are large volumes of terabytes of data the anticipated action is to seize servers, take them back to the lab, image them and get them back, which actually is a more effective and efficient way of dealing with them." [T15/15/4-12].

(4) *"There is no doubt in my mind that I would not have considered on site imaging being a valid option, in view of the quantity and in some cases complexity of the servers that were present, along with all the other ancillary items that were seized. It would not have been a consideration. I would have done the same thing in seizing and taking away all of the servers and the additional workstations that were taken from the scene. I have no doubt that on-site imaging would not have been considered as even the slightest option."* [T15/74/1-20]

419. Mr Childs' assessment of the overall speed and efficacy of the operation was as follows.

(1) *"At the time that following this search and seizure the bulk of the imaging within the lab was dedicated to this job. So I would say that the imaging was completed as quickly as we were able to do so."* [T15 /47/13 – 17] *"I know what was going on at the time in the lab, and as far as I am concerned the imaging that was being done was almost solely to do with these particular exhibits. So I am satisfied that they were being imaged as quickly as they could be, and as far as I'm aware in the order that was being requested from the on-site search and seizure."* [T15/48/10– 16]

(2) As regards the time take for imaging, this was *"completely dependent on the volume of storage and in some cases the type of data present on that storage. Within very small limits of changes that can be made within the forensic software, the time taken is purely down to how long the software takes. We have got no other control over it."* [T15/69/18 – 70/4]

(3) He also said that it is most effective and efficient to work in a controlled environment, meaning in the lab. He said:

".*"Q. In terms of your experience of searches, what is the most efficient and effective method of getting servers back up and running as quickly as possible? A. I consider that, particularly where you are dealing with multiple servers, the most effective and efficient way of dealing with them, getting them back up and running quickly is to seize them, take them to the lab where there is a controlled environment, deal with them as quickly as possible, but always with that proviso that ultimately the evidence is what needs to be dealt with correctly and that you know that you've got access to it, but as soon as you have got verified forensic images with data you can understand, that you have backed-up copies of those forensic images, at that point you can return the exhibit, and in the case of business servers obviously get them back running as soon as you can. Q. You say deal with them as quickly as possible. Can you think now, Mr Childs, of anything that you might have been able to do in relation to these servers and computers seized that would have returned them any more quickly? A. I don't consider that the alternative methods that have been suggested would give me what I consider to be the best evidence that is available. And so I'm still very, very satisfied that the action that we took in physically imaging the drives, attempting then to reconstruct the RAID systems within software, in the few instances where that failed then resorting to what I would consider the second option of using the BackTrack DVD, I would still consider that to be in my experience the best possible option."* [T15/82/20-83/25]

(4) There was some amount of weekend and overnight working, but this had to be by way of choice [T15/78/8-13]. Requests for such working were accommodated, but it is not the preferred way of working. He

recalled working late for a number of weeks at this time and working weekends [T15/77/2-5].

420. Mr Childs rejected the notion that imaging at site would be better in that:

(1) *"The expectation would always be that if there is a large volume of data then on-site imaging is not a valid option, and you would usually seize and remove items for physical imaging back at the lab. So the storage that you take for the potential of imaging on site would not be huge amounts, because the expectation is if there are huge amounts of data you are not likely to be doing it on site."* [T14/64/18 – 65/2]

(2) Forensic imaging to a USB connection is a slower method of transferring data than using the forensic imaging workstations off site.

(3) The servers were in multiple locations which creates a burden in ensuring that imaging is secure at all locations.

(4) It was important to have designated areas for imaging hard drives rather than being scattered around a room.

(5) "*...the big issue with imaging on site is the fact that you are always going to be working on the premise that if the forensic image fails to verify correctly you have to begin the process from the start, and particularly when you're dealing with large capacity hard drives it can be 24-48 hours before you know that you're going to have to repeat that same process and it will take another 24-48 hours, and you are still not guaranteed that after that you're going to get a verified image."* [T15/79/13-80/13]

421. Mr Childs also rejected the notion that the alternative method would have produced the best method available. In particular, as regards the suggestion that BackTrack should have been used instead of the RAID system:

(1) *"I don't consider that the alternative methods that have been suggested would give me what I consider to be the best evidence that is available. And so I'm still very, very satisfied that the action that we took in physically imaging the drives, attempting then to reconstruct the RAID systems within software, in the few instances where that failed then resorting to what I would consider the second option of using the BackTrack DVD, I would still consider that to be in my experience the best possible option."* [T15/82/20-83/25]

(2) BackTrack was a secondary option because where it was not possible to recreate the RAID in software, BackTrack was a viable option to use [T14/45/4-46/12].

422. Mr Childs, in response to the limitations of the NTSeCT laboratory and the suggestions that it was not solely dedicated to the instant case, said as follows:

(1) The laboratory was a national resource having to deal with other cases (some of which have restricted time schedules attached to them) and not dedicated solely to the instant case.

(2) This said, the bulk of the imaging was dedicated to the instant case during the period when the servers were removed to the laboratory [T15/51/18-52/10 and T15/53/24-54/17].

(3) There was a limitation on the speed of the work in the lab in that there were four dedicated workstations each capable of imaging three hard drives at a time [T14/168/5-24].

423. In respect of any initial delay in the process, Mr Childs said the following:

(1) Normally there would be no consideration to copying on site. However, it appeared that what was being done was accommodate to a request not to take away a server that was being used partly for the football club [T15/47/13-17].

(2) There are processes which need to be completed before actual imaging starts, namely cataloguing and indexing and setting up an exhibit location process. This involves setting up barcoding on each individual exhibit to ensure that it is known within the store where the exhibit is [T15/20/21-21/13]. This must have affected the ability to do much imaging before the weekend.

424. As regards the possibility of work being done by laptops with write blockers and FTK Imager assisting and by third parties assisting such as CY4OR, Mr Childs expressed concerns about the following:

(1) The ability to manage the lab would be compromised if there were random laptops lying around with very sensitive information.
"You don't particularly want laptops just sitting around with evidential hard drives attached on a work bench somewhere. You want to keep your evidential hard drives in a manner where you are certain and sure that they are being dealt with properly. To have evidence just sitting on desks somewhere in a lab imaging I would not consider to be a sound process."
[T14/36/1-8]

(2) There were some documents indicating that CY4OR might have been prepared to do the job for a sum of £12,000. Despite being challenged extensively in cross-examination, Mr Childs was very confident that CY4OR would not have been prepared to recommend imaging on site if they had known the size of the job and in particular the number of servers.

(3) There were security issues about contracting out the imaging to third parties. The sensitivity of the information was such that it was important to have the operation carried out under the control of Trading Standards and not farmed out to a third-party contractor.

425. There were also concerns regarding the timing of the return of laptops. By 25 August 2016, seven laptops had been imaged. There were problems about suspected encryption of laptops and obtaining the login passwords. The Claimants pushed for the return of the laptops, saying that there were concerns about the impact of not returning the same. In the event, by 28 September 2016, the priority items had been returned.

(e) Observations

426. As noted above, I broadly accept the evidence given by Mr Childs. In addition to the answers which have been given which suffice without more, it is right to reflect also upon the nature of the criticisms. They are as follows:

(1) Any criticism of the operation must not be one with the advantage of hindsight. In assessing what were the reasonable steps to take, it is necessary to look at what could reasonably have been expected with foresight.

(2) It does not follow that if the work could have been done faster, then there was culpable delay. That is because the standard expected was not absolute, but of reasonable diligence. It is also because some of the work is trial and error. Some of the work depends upon making professional judgments. For example, the decisions as to what software to use involves to an extent matters of judgment. So too does the decision not to contract out, taking into account the dangers of losing or compromising sensitive evidence vital for considering a prosecution. Working within those constraints, the benchmark was only of reasonable progress. The submissions about timing on the part of the Claimants do not take adequate account of these concepts.

(3) Insofar as it was contended that the matter has to be considered without reference to the limited resources of the NTSeCT, I reject the suggestion that this does not have to be considered. It is relevant to take into account that there were other cases demanding on the resources of the lab, albeit that this case had the bulk of the attention at the time of the execution and the imaging. It is therefore legitimate to take into account that there were four workstations only. If that had been manifestly inadequate, then that might have needed some attention. However, that was not the way in which the case was put.

(4) I accept entirely the notion that parting with any of the servers or the laptops to a third party outside the control of Trading Standards was treated as too dangerous a step to be taken. The sensitivity of the operation and concerns about having random laptops in use are relevant in assessing the timing of the operation.

(5) Any challenge does not depend on *Wednesbury* unreasonableness (which derives its name from the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223). However, there must be some leeway considering the pressures which the Defendant must have in the operation before finding that the Defendant acted unreasonably. It is to be borne in mind how complex the operation was bearing in mind the number of servers and laptops involved and the vastness of the information.

(6) The detailed criticisms looking at every server separately showed an impressive attention to detail, but it also gave rise to a minute examination which missed the big picture. The attempt to use those notes or to extrapolate times that an operation could have taken if done in a different way miss the issues of the complexity of the operation and the judgments which had to be made at the time. It was in any event impressive how Mr Childs was able to answer at the micro as well as the macro level. Some of the criticisms against Mr Childs evidence smacked as being of a scattergun nature e.g. that his working practices were inflexible in not having laptops with write blockers: see [T14/35/4-39/9]. In fact, as noted above, it was entirely rational not to adopt the suggested approach, based on keeping control of sensitive material. This did not make good the allegation of inflexibility of Mr Childs.

427. The urgency and priority of this work were promoted by the conversations of Mr Mike Rainford with Mr Dinn. It may have had the desired outcome in emphasising urgency to Mr Dinn and in the Defendant taking it into account. I am satisfied that the Defendant has answered effectively the criticism of the progress of the work at each stage in the execution of the warrants, the removal of the servers and the imaging and the return of the servers. I am satisfied that looking at the big picture as well as the more specific criticism, the case that there was a failure to exercise reasonable expedition in any of these steps must fail. Bearing in mind the complexity of the operation, I am satisfied that the return of the 15 servers with the multiple hard drives within about 3 weeks was reasonable.

428. As regards the other priority items including the laptops, the fact that it might have been possible to return the priority items at an earlier stage does not mean that they were not returned within a reasonable time. Account has to be taken of the vast amount of work which had to be undertaken at that time, the encryption difficulties and the fact that it was all sorted out by late September 2016 as regards the priority items. It is possible that the communications on behalf of the Claimants warning of serious consequences without the priority items contributed to the early return of the

items. Given all the circumstances, I do not accept the case of the Claimants that the Defendant returned these items beyond a reasonable time for the return of the same.

(f) Retention of property following the return of the servers

429. In addition to the complaint about the late return of the servers, the Claimants claim that the Defendant held on for an unreasonable time to hard copy documents both originals and copies. By so doing, the Claimants assert that the Defendant is liable for acts of trespass, alternatively conversion. In addition and under the heading of the HRA claim, the Claimants say that the Defendant unlawfully retained property belonging to the Claimants. In addition to the servers which have been considered above, the Claimants claim that the Defendant held on to the hard copy and soft copy documents for longer than a reasonable time.

430. It is not in dispute that a huge volume of hard copy and digital material was seized. The electronic material has been described above. In terms of hard copy documents, there were at least 50,000 documents, and Mr Pierce regarded that as an under-estimate.

431. This part of the application may be less fundamental than the application that the search warrants were themselves unlawful or that the servers were held on to for an unreasonable period. The retention by an authority of computer equipment is liable to cause business disruption. However, the retention of copied data is likely to cause much less harm in view of the fact that the business can, upon the return of its equipment, access whatever it requires. The equipment can be interrogated so that the data can be accessed and used.

432. The timing is also significant in that in the event that there had been a continuing problem arising out of the failure to return earlier hard copies or soft copies, then it would be expected that action would have been commenced long before July 2017. The warrants were executed on 28 July 2016. The servers were removed on 29 July 2016. The servers were returned over a period of time up to 25 August 2016. There was no application for judicial review or under section 59 the CJPA 2001 for the return of the items taken on the execution of the warrants or for the return of items copied thereafter. Nor was there an application to the Preston Crown Court to set aside the warrants on the basis that they had been obtained by material non-disclosure or were in some way unlawful. It was only on 19 July 2017 that this civil claim for damages was brought. A few days later on 28 July 2017, an application pursuant to section 59 of the CJPA 2001 was brought in the Divisional Court for an order that the Defendant segregate the data, list it, describe it and return it. These actions were brought, that is to say about a year after the execution of the warrants. If the order sought had been granted by the Divisional Court, which it was not, it would have caused the Defendant to be diverted from its investigation.

433. Mr Pierce was challenged as follows:

(1) The original documents could simply have been photocopied and the originals returned;

(2) The process could have been accelerated by sending out the documents to a photocopying company;

(3) The documents could have been returned in batches instead of all or most at once at or towards the end of the process.

434. The answers of Mr Pierce included the following:

(1) The material could not have been returned within a matter of weeks. The first part was a photocopying process which lasted a long time because, in Mr Pierce's oral evidence, *"we had to go through a copying process which took a significant amount of time to do"* [T16/110/23-T16/111/5] and was not completed until January 2017 [T16/112/12-15]. The copies were provided in May 2017, but not the original copies [T16/111/20-25]. In May/June 2017, the Claimants called for a list of documents which were being retained, and the Defendant created a USB of copies of hard copy documents which were being retained for the purpose of the investigation. As Mr Pierce said in para. 71 of his statement dated 21 October 2021, a USB device containing a copy of all scanned documentary exhibits which were reasonably practicable to copy was delivered on 21 July 2017 to the Claimants' legal representatives.

(2) He said that instead of doing it in tranches, *"we decided to keep all of the material, photocopy all of the material, undertake that review of the material, identify material that had evidential value and then we went through the returns process which took place after September 2017."* [T16 /114/10 – 23]

(3) Hard copy materials were not returned because *"we needed to understand the nature of the material that had been seized. We didn't know whether it was sufficient for us to maintain a copy or whether we needed to retain the originals, and from my experience of dealing with other cases we've always followed that process of copying the material, reviewing the material and then making decisions upon return as quickly as we can. The issue we had in this case was the volume, which was significant."* [T 16/120/16 – 121/1];

(4) He said that the final decision cannot be made until the end. *"You have to wait until that process has been completely finalised. So the process to follow would be to review all material that is held before you can actually make that decision."* [T16/121/5 – 12] There was also the problem about returning copies that they in turn may contain original writing or other marks which might make it necessary to treat them as if they were originals.

435. The Claimants submitted that:

(1) If the facilities of the Defendant were limited, there was no good reason why the photocopying of documents could not have been sub-contracted. In that event, the photocopies could have been obtained within a relatively short time.

(2) It was not an answer to take cost into account if the exercise could have been carried out faster. Competing demands for finite resources should not be an answer. If there were not sufficient facilities in the laboratory, better facilities should have been obtained. If there were not enough technicians able to expedite the process, they should have been hired.

(3) There was no good reason why photocopies could not have been made on a rolling basis even if the Defendant was not prepared to hand back originals until all the material had been reviewed [T16/114:10-T16/115/9]. No review had to be undertaken before a document was photocopied.

(g) Observations

436. As regards the hard copy material and the copies which were taken, the relevant circumstances to take into account are the following, namely:

(1) the nature of the investigation;

(2) the volume of material seized;

(3) the technological challenges;

(4) the availability of a dedicated laboratory facility, staffed by appropriately qualified personnel.

437. As regards the nature of the investigation, the Defendant has established a case where there were reasonable grounds to believe that there had been a systemic fraud on customers and potential customers of the Claimants. This justified the making of the application, and the allegations that the application was made improperly or that the scope of the warrants were too widely have been rejected. It was to be a very large investigation in which although there was an umbrella fraud, a separate fraud had to be proven against each or a substantial number of customers. As has been apparent in the course of this case, this has a complexity. No aspect of the fraud is admitted, and everything has been challenged 'lock, stock and barrel.'

438. None of this was unexpected. A very determined and sustained opposition had been forecast at the time of the application for the search warrants and explained preparation far beyond what would be normal for such application for search warrants e.g. the consultations with Counsel and the presentation of the application by Counsel.

439. The vigorous nature of any opposition is such as to heighten the need for very detailed preparation of any intended application. It made vital attention to detail so as to

isolate documents which might be vital to the application. This had the following practical applications including:

(1) Wishing as far as possible to prove points with the benefit of original documents. In a criminal case of this complexity, it is often important to retain originals. It is frequently the case that a defendant requires an original document to be proven, and so letting go of a potentially important original document could harm a case. The notice to prove about 300 matters was a sign, not unexpected, that this might be expected of the Defendant by the Claimants. In order for this to be possible, it would entail being on the safe side and keeping hold of original documents. This consideration is to be seen in the context of the unusually large number of documents which have been the subject of the search.

(2) The Court was referred by the Defendant to a very different kind of case on the facts, namely *Holding v Chief Constable of Essex Police* [2005] EWHC 3091 (Admin). This concerned the holding on to documents for 112 days, where there were relatively few documents. One of the reasons why the Court found (HH Judge McCahill QC at [64-65]) against the claimant in that case was that the prosecution *"...was entitled to protect its position by retaining, in original form, all that was necessary to prove its case to the fullest extent required, and thereby avoid any problems which might present themselves by not having the original item at court."*

(3) Wishing to complete the assessment of the gathering of evidence, not simply physically, but also in terms of the appraisal of the evidence. Before dismissing as irrelevant any documents, and especially original or best copy documents, the Defendant wished to assess their relevance in the context of the whole rather than in a piecemeal way. A document which in isolation may not appear relevant may assume a different character in the context of the documents as a whole or may set off a train of inquiry when appraised at a later stage.

(4) Although the analysis of the electronic documents would continue for a long time beyond the selection of the hard documents to be returned and to be copied only, it was necessary for the Defendant to appraise something of the electronic documents too in order to make the decision as to how to make selections in respect of the hard copy documents.

(5) The documents require very detailed attention in order to appraise the extent to which they assist in proving that front-end representations were made. That by itself would not suffice because it is necessary to prove the precise terms of such representations, how they were systemic and the extent to which they support the case that the system was at the instigation or with the connivance of the suppliers and the brokers such as to prove that the brokers were not independent.

(6) An example of the complexity has become apparent in the course of the trial in respect of Mr and Mrs Maybury who gave evidence. Despite

documents being revealed containing front-end conversations (hitherto denied and documents showing at lowest a reluctance to disclose recordings)[3], this correspondence has not deterred the vigour of the cross-examination of Mr and Mrs Maybury designed to show that they were making up or exaggerating their case about fraudulent misrepresentation. This included a challenge that Ms Maybury was not being truthful in seeking to attribute her mental health problems to the Claimants' behaviour. It is not at this stage necessary to form a judgment as to whether the case of fraud will prevail, but this is a useful example of how important it is to be able to prove each point. Any complacency for a potential prosecutor to base the case on finding isolated examples would be dangerous in the face of such determined resistance.

440. The volume of the documents which were the subject of the Search Warrants has been described above comprising 53 terabytes of data. The sheer size of the documentation in the instant case is a telling indicator. This has been only in the context of limited issues, including regarding whether there was a reasonable basis for believing fraud and for requiring a wide-ranging search. In order to prove fraud in a criminal fraud trial, the documents will be subjected to far more scrutiny in order to assess whether fraud could be proven and then to pursue a criminal prosecution. The Court was informed that the trial was due to last about 3 months. A critical stage for the purpose of enabling the prosecutor whether or not to charge potential defendants was to gather this material, to copy and then manage it.

441. The fact that the Claimant did not issue an application for the return of the documents at an earlier stage than July 2017 has several layers. On one layer, it indicates that the CJP Claimants were able to manage without the documents, at least after the return of the servers. It may also be that the Claimants recognised that a long period of time was required to search through such a large quantity of documents.

442. The Defendant's approach to the application was in one important respect consistent with the size of the task. It did not say that they required just a short further period. It is to be inferred that the Defendant would have said this in the event that it was possible. By its application, the Claimants sought that within 21 days, there be returned all documents which had been seized, save for such specific documents as were identified by the Defendant as falling within the scope of the warrants. In the course of the application, the Defendant agreed to provide an itemised list of the "hard copy" documents which had been seized. That was a more limited exercise than that which had been sought of an itemised list of the electronic documents. Reflecting even the size of a list in respect of hard copy documents, the parties agreed that this should be done as soon as reasonably practicable and in any event within 3 months.

443. It is accepted that in theory there could have been attempts to return copied documents in batches. However, I consider that absent a demonstration that this was required at the time it does not amount to an unreasonable retention of documents for

[3] These documents have been discussed above in the context of the section about misfeasance and in particular referring to email correspondence between Mr Chapman and Mr Aspinall of 24 July 2014.

this not to have been done. In my judgment, the points which support this conclusion that incremental return of documents was not required are as follows:

(1) The fact that it was not specifically sought by the Claimants until at earliest May 2017, and when it was sought, the Defendant responded in a sufficiently timeous manner;
(2) The retention of copy documents was much less significant than the retention of hardware required in order to search the data;

(3) The need to exercise vigilance not to return even copy documents which contained markings or which might contain markings on them which themselves were originals;

(4) The extent of other work in the process of greater importance, and the need to devote the resources to other tasks.

444. Flowing from this description of the size of the task were the technological challenges and demands on the resources of the Defendant in respect of its own dedicated laboratory facility. The Claimants submitted that copying could be done outside the facility by third parties with bigger and better facilities. Further, they submitted that it was no answer that the Defendant did not have such facilities. If they were to have an order to search documents of this magnitude, it behoved them to acquire such facilities. The competition for such facility between the instant and other searches was no answer for the same reason.

445. Regarding the suggestion that hard copy documents could have been sent out to a commercial copying company, Mr Pierce's answer was as follows: *"A. Well, the real concerns with sending seized evidence out to a commercial company, I'm sure that there are firms available that could offer that process, but you know, the concern would be releasing material that's of potential evidential value out to a third party and potentially losing control of that material. That is a risk."* [T16/122/7–13]

446. In the instant case, I accept that this was a reasonable response on the part of the Defendant. The risk of leakage was real, and it was much less within the Defendant's laboratory than outside. If the confidentiality had been compromised, it is not difficult to imagine the nature and the extent of the complaint. In my judgment, the Claimants would have been able to say that there was no need to expedite the process by jeopardising confidentiality. That is to say that once the servers and laptops had been returned, there was access to all of the documents, and the retention of copied data thereafter was of much lesser significance than having access to the hardware.

447. I now consider the submission that in the event that the resources of the Defendant were limited, this was not an excuse. The Claimants have referred to cases where statutory duties could not be limited due to constraints of resources. They referred to *R v East Sussex County Council, Ex p Tandy / In re T (A Minor)* [1998] 2 WLR 884. However, that case turned on the absolute nature of the duty in section 19 of the Education Act 1996, whereas in the instant case the legislation is expressly not in absolute terms. Likewise, in the case of *Regina (Noorkoiv) v Secretary of State for*

the Home Department and Another [2002] EWCA Civ 770, the court considered the application of rights under Article 5 of the ECHR to the consideration of parole for prisoners and found that the right to such consideration was absolute.

448. This has no application to the instant case having regard to the wording of section 53 of the CJPA 2001, which is not an absolute statutory duty, but contains language about what is reasonably practicable "in all the circumstances". It is not confined to what is possible, but it is broader than that because it uses the word "practicable" rather than possible, and the word "practicable" is extended by the word "reasonably", considering the matter in all the circumstances. The interpretation of these words is that there ought to be taken into account factors such as cost, time and resources. Insofar as it is submitted that the resources of the Defendant were irrelevant and that it was incumbent on the Defendant to have the biggest and fastest facilities, this is rejected. The evidence, which I accept, is that the Defendant had the use of a very substantial facility and that although there were demands as regards other searches, the predominant use of the facilities at the relevant time were for the instant case. This is consistent with the judgment of the Divisional Court in *R (on the application of Business Energy Solutions Ltd) v Preston Crown Court* above at paras. 93-98, especially at para. 96.

449. The conclusion is that this was indeed a long period of time required for the task in hand. However, I find that the Defendant has not exceeded more than a reasonable time, bearing in mind all of the matters set out above. The Court rejects the claims for trespass and conversion and under the HRA.

450. Issues 19 - 23

(19) Did the Defendant retain for any period originals of hard copy documents where a photograph or copy would have sufficed contrary to PACE, s.22(4)?

In view of the analysis, I find that the Defendant did not retain originals of hard copy documents where a photograph or copy would have sufficed. The Defendant was entitled to hold on to originals until all the material had been reviewed, bearing in mind that nothing other than originals might suffice in order to prove the case in a criminal case.

(20) Did the Defendant put in place arrangements to ensure that:

(a) Property (including IT equipment) seized pursuant to s.50 CJPA was the subject of an initial examination as soon as was reasonably practicable after the seizure; and/or

(b) That property that the Defendant was not entitled to retain was returned as soon as was reasonably practicable, as required by s.53 CJPA?

(21) Was property that the Defendant was not entitled to seize or retain and IT equipment returned as soon as was reasonably practicable?

As regards Issues 20 and 21, a huge quantity of material was lawfully seized by the police and was thereafter passed to the Defendant for the purposes of the investigation. It was obvious that examination of the

same would necessarily take a substantial period of time. To minimise disruption to the Claimants, the Defendant liaised with the Claimants' representatives and agreed the priority order in which items would be examined and returned. The servers and IT equipment were the subject of initial examination and were returned as soon as reasonably practicable. This was in liaison between the Defendant and the Claimants' representatives who recognised that the items of most importance to the Claimants' business activities were the servers which had been removed from the premises. These were examined and returned on a rolling basis from 1 August 2016 to 18 August 2016.

The enormity of the remaining documents is such that they had to be copied and then considered in the manner set out above. These items took much longer to return, but they were returned as soon as was reasonably practicable in all the circumstances. The Defendant was entitled to retain the original of hard copy documents as it did instead of obtaining copies and returning the original. Further, it has not been proven that items were seized which went beyond the scope of the Search Warrants.

(22) Is it an abuse of process for the Claimants to bring claims concerning delays in the return of property and/or are the Claimants estopped as a result of the s.59 application made to the Preston Crown Court in September 2017?

In view of the answer to Issues 19 to 21 above, the question of abuse of process does not require to be determined.

(23) Having regard to the answers to Issues 19 to 22 above:

(a) is the Defendant liable to the Claimants in respect of the torts of trespass and or conversion in respect of the retention and handling of any item of property beyond the time at which it should have been returned.

(b) is the Defendant liable under section 6 -7 of the HRA 1998 for breaching the rights of the Claimant pursuant to Article 8 and Article 1 of Protocol 1 of the Convention in respect of the retention and handling of any item of property beyond the time at which it should have been returned?

In view of the answer to issues 19-21, there was no liability.

(h) Treatment of LPP material obtained on execution

451. The Claimants submit that the protections provided at common law, by the Attorney General's Guidelines on Disclosure and the CJPA 2001 have not been followed. In summary, the requirements are as follows:

(1) any material suspected of containing LPP material was required to be isolated and reviewed by a lawyer independent of any of the authorities involved in the execution of the Search Warrants;

(2) no member of the investigative or prosecution team should have had sight of, or access to LPP material;

(3) proper records should have been maintained to show the way in which the LPP material was handled, who had accessed it, and how decisions had been taken in relation to it.

452. Mr Rainford, the Claimants' external solicitor (at paras. 15-31 of his witness statement), has identified correspondence in his evidence where it was believed that there had been infringements. Mr Newell (at paras. 12-16 and 32-37 of his statement), the head of the legal department of the Claimant companies, points out that there was taken material likely to contain privileged material without a serious attempt to segregate privileged material. One complaint was that officers of the Lancashire Police and the Defendant looked at such material first and then passed anything which they thought might contain LPP material to independent counsel. That meant that LPP material was seen by the investigating officers.

(i) Legal framework

453. There is an obligation to return property subject to legal professional privilege ("LPP") pursuant to s. 54 CJPA 2001. This arises at the stage where *"it appears to the person for the time being having possession of the seized property in consequence of the seizure"* that the property is an item subject to legal privilege or has such an item comprised in it.

454. Pursuant to s.53 CJPA 2001, there is an obligation upon the person for the time being having possession of the seized property to take certain steps as soon as reasonably practicable to ascertain the status of the property seized pursuant to section 50 and the grounds for ongoing retention. Thus, the obligation arises only when the inspection of the property (under the appropriate safeguards) has given rise to the required state of mind.

455. Property seized by a constable may be retained as long as necessary in all the circumstances - see s.22 PACE**.** Code B of PACE is applicable to the retention of property seized.

456. The Attorney General's Supplementary Guidelines on Digitally Stored Material (2011) under the sub-heading "*Legal professional privilege (LPP)*" provided:

> *A29. The CJPA 2001 enables an investigator to seize relevant items which contain LPP material where it is not reasonably practicable on the search premises to separate LPP material from non-LPP material.*

A30. Where LPP material or material suspected of containing LPP is seized, it must be isolated from the other material which has been seized in the investigation. The mechanics of securing property vary according to the circumstances; "bagging up", i.e. placing materials in sealed bags or containers, and strict subsequent control of access, is the appropriate procedure in many cases.

(j) The evidence and discussion

457. Whilst the responsibility on execution is with the police executing the search warrants, following removal from the premises, property seized by the police was transferred into the possession of the Defendant for examination for the purposes of the investigation. The Defendant admits that from that point, it was potentially liable in trespass or conversion or pursuant to the HRA.

458. The evidence of Mr Pierce, a senior officer responsible for the operation in question, was that detailed procedures were put in place to deal with LPP material. Independent counsel was retained and instructed pursuant to the Attorney General's guidelines on the seizure of material potentially covered by LPP. The Claimants were provided with copies of the instructions and copied into emails with independent counsel. Independent counsel were present when the search warrants were executed, and the Lancashire police informed the Claimants to raise any matters of concern with that counsel. It was not reasonably practicable to separate the LPP material from non-LPP material. Items were passed to the Defendant and were bagged and reviewed by independent counsel. Material which contained or might contain LPP material was double bagged in accordance with the LPP handling procedures. I accept the evidence of Mr Pierce.

459. The Defendant's evidence with regard to the handling of LPP material was not challenged in cross examination. The steps taken by the Defendant to deal with LPP material were set out in paragraphs 77-81 of the witness statement of Mr Pierce: see also page 4 of the witness statement of Mr Pierce dated 16 November 2017 and the witness statement of Mr Pierce dated 24 November 2017. Those last two statements were made in the section 59 proceedings which were heard in the Divisional Court. The Judge was entitled in the light of that evidence to hold that it was impracticable for the authority to separate the information which was properly retained from that which might arguably not be.

460. In these circumstances, I am satisfied that even if the Defendant was responsible for taking away material potentially covered by LPP, there was no liability because it was impracticable to separate the information at site, and a proper procedure of having the material reviewed by external counsel was undertaken.

461. My conclusions in respect of the LPP material are as follows:

(i) The execution was by the Lancashire Constabulary and not the Defendant and there is no responsibility of the Defendant for the acts of the police in this regard.

(ii) In any event, the Lancashire Constabulary had proper procedures in place for dealing with LPP material.

(iii) Even if the Defendant was responsible for taking away material potentially covered by LPP, there was no liability because it was impracticable to separate the information at site. A proper procedure of having the material reviewed by external counsel was undertaken.

(iv) I reject any complaint to the effect that the proper procedures were not followed.

(v) The Defendant does have responsibility from the point that the material was taken away. It discharged its responsibilities at all times.

(vi) There is therefore no liability on the Defendant in respect of the LPP material.

462. Issues 24-28

The issues relating to LPP material are set out in the list of issues 24 onwards. They now follow.

(24) Did the Defendant act beyond the powers conferred by the Search Warrants and s.50 in reviewing and/or seizing material covered by LPP?

(25) Did the Defendant breach the Attorney General's Guidelines in respect of the handling of material subject to LPP?

(26) Did the Defendant return LPP material which was seized as soon as was reasonably practicable after the execution of the Search Warrants?

(27) Is it an abuse of process for the Claimants to bring claims in respect of the seizure, retention and handling of LPP material other than via the s.59 applications made to Preston Crown Court in September 2017?

(28) Having regard to the answers to Issues 24 to 27 above:

a) Is the Defendant liable to the Claimants in respect of the torts of trespass and/or conversion in respect of the seizure, retention and handling of LPP material?

b) Is the Defendant liable under ss.6-7 of the HRA 1998 for breaching the rights of the Claimants pursuant to Article 8 and Article 1 of Protocol 1 of the Convention in respect of the seizure, retention and handling of LPP material?

463. It follows from the above that the answers to issues 24 and 25 are in the negative, and that the answer to issue 26 is in the positive. Issue 27 does not arise for necessary consideration. The answer to issues 28(a) and 28 (b) is in the negative: this is the mirror of issue the Defendant did not act beyond the powers conferred by the Search Warrants.

XII The judgment of HH Judge Knowles QC in Preston Crown Court

469. On 15 July 2022, when the judgment was virtually ready to go in draft to the parties, and when the issues raised from April 2022 in respect of disclosure had been addressed, the Defendant wrote to the Court through their solicitors suggesting that the Court may wish to postpone the hand-down in order to see a judgment in another matter. That other matter was an application to stay the Crown Court proceedings on the ground of misconduct on the part of the investigating and prosecuting authority. By this time, HH Judge Knowles QC had decided to refuse the stay, but it was expected that the reasons of the Court would soon be available. The response of the Claimants was that there was no need to delay the hand-down. The parties and issues were different, and the findings were irrelevant and/or inadmissible.

470 The Court decided that in view of the small additional time-frame, it would postpone the hand-down so that the issues about awaiting the judgment of HH Judge Knowles QC could be appraised in the light of the judgment, but provided that the judgment would be available by the end of July 2022. In fact, the judgment of HH Judge Knowles QC was provided to the Court on 29 July 2022.

471. Having now seen the judgment, it did not appear to be irrelevant, but in fact there are many overlapping issues with the instant case. Nevertheless, I have decided to issue the instant judgment without making any changes consequential upon the judgment of HH Judge Knowles QC.

XIII Conclusion

472. For all these reasons, the claims of the Claimants are dismissed.

473. Finally, I wish to thank Counsel in this case and all the legal advisers for the enormous preparation on both sides and for the assistance which they have provided to the Court throughout the case.