Neutral Citation Number: [2018] EWHC 804 (Admin)

Case No: CO/3870/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2018

Before :

LORD JUSTICE GROSS
MR JUSTICE NICOL

- -

Between :

Gerard Fitzgerald	**Claimant**
- and -	
(1) Preston Crown Court	**Defendant**
(2) Chief Constable of Lancashire Police	

- -
- -

Rupert Bowers QC (instructed by **Hogan Brown**) for the **Claimant**
Andrew Bird (instructed by **Lancashire Police Force solicitor**) for the **2nd Defendant**

Hearing dates: 20th December 2017

- -

Judgment Approved

Lord Justice Gross :

INTRODUCTION

1. This is the judgment of the Court to which we have each contributed.

2. This is another case about search warrants and covers familiar areas, involving striking a balance between the effective investigation and prosecution of crime and protecting the personal and property rights of citizens against infringement and invasion: *R(A) v Central Criminal Court* [2017] EWHC 70 (Admin); [2017] 1 WLR 3567, at [31] and following, together with the authorities there cited. In a nutshell, the context is an underlying police investigation into corruption in local government; it is that investigation which it is said that the Claimant and others were conspiring to pervert – and the search warrants were sought in connection with that conspiracy to pervert the course of justice. Sensitive and complex though the investigations no doubt are, the essence of the present matter before the Court is as simple as we have just described it. It has, however, been made needlessly complex by the regrettable manner in which the application to the Court below was drafted and presented – drafting and presentation of the kind we very much hope and expect will not be encountered again.

3. On 19th May 2017 HHJ Altham, sitting in Preston Crown Court, was presented with an application by D.C. Fishwick of the Lancashire Police. She applied for a warrant under the Police and Criminal Evidence Act 1984 ("PACE") s.9 and Schedule 1 thereto ("Schedule 1"), para. 12. Judge Altham granted the application and issued four warrants. One of these authorised the police to search the home address of the Claimant who, at the time, was the Chief Executive Officer of Liverpool City Council ("LiCC") and had previously been Chief Executive Officer of Lancashire County Council ("LaCC") from 2008 – 2011.

4. The warrant was executed on 22nd May 2017. At the same time the police executed the other three warrants which HHJ Altham had issued in response to the same application by D.C. Fishwick. They were for the home addresses of:

   i) Mr Geoffrey Driver, then the leader of LaCC;

   ii) Mr Philip Hassall, who had been employed by LiCC between 2002 and 2009, was Deputy Chief Executive Officer of LaCC under the Claimant and who then took over as CEO of LaCC in 2011.

   iii) Mr David McElhinney, who was at various times the Chief Executive Officer of a joint venture called Liverpool Direct Ltd ("LDL") between LiCC and BT, interim CEO of LiCC (from June 2010 – February 2011), and the Chief Executive Officer of another joint venture called One Connect Ltd ("OCL") between LaCC and BT.

5. In each case the warrants authorised officers to search for

   > "any electronic storage devices including but not exclusively mobile phones, computers, lap tops, iPads and any other digital or electronic storage devices"

6. At the same time as the Claimant's home was searched, he was arrested by PC Coates under PACE s.24 on the grounds that he reasonably suspected the Claimant of having committed the offences of conspiracy to pervert the course of public justice and witness intimidation.

7. The Claimant was taken to Skelmersdale Police Station. His continued detention was authorised by Police Sergeant Wainwright pursuant to PACE s.37 on the grounds that this was necessary to secure and preserve evidence and to obtain evidence by questioning.

8. On 3rd August 2017 the Claimant sought a transcript of the hearing which had taken place before HHJ Altham in chambers on 19th May 2017. The Judge ordered that a transcript could be prepared, but at the Claimant's expense. It was to be reviewed for appropriate redactions first by the police and then by the Court. Redactions would be considered either to protect the privacy of other people mentioned in the course of the hearing and where those matters were irrelevant to the application being considered by the Court in relation to the Claimant, or on grounds of public interest immunity. The police voluntarily agreed to provide a copy of the application for the warrant, redacted on the same basis as the transcript.

9. The Claim Form was issued on 22nd August 2017. It challenged the legality of:

   i) the warrant granted by HHJ Altham on 19th May 2017 ("Ground I: The warrant");

ii) the execution of the warrant ("Ground II: The execution of the warrant");

iii) the arrest of the Claimant by PC Coates ("Ground III: The arrest of the Claimant");

iv) PS Wainwright's authorisation of the Claimant's continued detention ("Ground IV: The Claimant's continued detention");

v) HHJ Altham's order of 3rd August 2017 making access to the transcript contingent on the Claimant paying the costs ("Ground V: Payment for the transcript").

10. Transcripts of the hearing on 19th May 2017 and of HHJ Altham's ruling have been prepared. As it happens, the cost of preparing them was met by the police. The transcripts were redacted in accordance with HHJ Altham's order of 3rd August 2017 and the application for the warrant has also been redacted.

11. The Claim Form was issued in Manchester. On 30th October 2017 Dove J. ordered a rolled up hearing. He reminded the parties of the duty of candour which applied to claims for judicial review and that the decisions of the Preston Crown Court regarding public interest immunity would not bind the High Court. On 21st November 2017 Dove J. made a further order. He directed that the case should be heard by a Divisional Court and that that would take place in London. Consequently, he transferred the case to the Royal Courts of Justice.

12. Counsel reviewed the redactions and has confirmed that they include nothing which would assist the Claimant's case or undermine that of the police. The parties agreed that we could decide the case on the basis of the redacted documents. As a result, there was no need for any Public Interest Immunity hearing before this Court.

13. It was this rolled up hearing which we heard on 20th December 2017. As is usual, the Crown Court has taken no part in the proceedings. The Claimant was represented by Mr Rupert Bowers QC; the Chief Constable of Lancashire Police ("the police") by Mr Andrew Bird.

SEARCH WARRANTS: THE STATUTORY BACKGROUND

14. For present purposes, there are two relevant types of search warrants: (i) those issued by a magistrate pursuant to PACE s.8; and (ii) those issued by a Circuit Judge pursuant to PACE s.9 and Schedule 1 paragraph 12.

15. PACE s.8 says,

> " (1) If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing-
>
> (a) that an indictable offence has been committed; and
>
> (b) that there is material on premises mentioned in subsection (1A) below which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and

(c) that the material is likely to be relevant evidence; and

(d) that it does not consist of, or include, items subject to legal privilege, excluded material or special procedure material; and

(e) that any of the conditions mentioned in subsection (3) below applies in relation to each set of premises specified in the application,

he may issue a warrant authorising a constable to enter and search the premises.

….

(3) The conditions mentioned in subsection (1)(e) above are –

….

(d) that the purpose of the search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

(4) In this Act 'relevant evidence' in relation to an offence, means anything that would be admissible in evidence at a trial for the offence."

16. PACE provides a definition of "items subject to legal privilege" ("LPP") in s.10, of the term "excluded material" in s.11 and of the term "special procedure material" ("SPM") in s.14. It is not necessary for the purposes of this claim to dwell on the precise statutory meanings of those expressions.

17. PACE s.9 makes special provision for access to SPM and excluded material. It says,

" (1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule…. "

18. The material parts of Schedule 1 are as follows –

" 1. If on an application made by a constable a judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.

2. The first set of access conditions is fulfilled if –

(a) there are reasonable grounds for believing –

(i) that an indictable offence has been committed;

(ii) that there is material which consists of special procedure material or includes special procedure material and does not also include

excluded material on premises specified in the application or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable to specify);

(iii) that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and

(iv) that the material is likely to be relevant evidence;

(b) other methods of obtaining the material –

(i) have been tried without success; or

(ii) have not been tried because it appeared that they were bound to fail; and

(c) it is in the public interest, having regard –

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

…

4. An order under this paragraph is an order that the person who appears to the circuit judge to be in possession of the material to which the application relates shall –

(a) produce it to the constable for him to take away; or

(b) give a constable access to it.

…

12. If on an application by a constable a circuit judge –

(a) is satisfied –

(i) that either set of access conditions is fulfilled; and

(ii) that any of the further conditions set out in paragraph 14 below is also fulfilled; or

…

> he may issue a warrant authorising a constable to enter and search the premises or (as the case may be) all premises occupied or controlled by the person referred to in paragraph 2(a)(ii)…
>
> 13. A constable may seize and retain anything for which a search has been authorised under paragraph 12.
>
> 14. The further conditions mentioned in paragraph 12(a)(ii) above are –
>
> …
>
> (d) that service of notice of an application for an order under paragraph 4 may seriously prejudice the investigation."

GROUND I: THE WARRANT

The Claimant's grounds of challenge to the warrant

19. The Claimant challenges the legality of the warrant on five grounds:

i) *Ground 1(a):* There were no reasonable grounds to believe that an indictable offence had been committed (para. 2(a)(i) of Schedule 1).

ii) *Ground 1(b):* The police did not seek SPM; accordingly, there was no jurisdiction to issue the warrant (paras. 2(a)(ii), (iii) and (iv) of Schedule 1).

iii) *Ground 1(c):* In any event, there were no reasonable grounds for believing that there was anything on the Claimant's premises that would be of substantial value to the investigation or relevant evidence; accordingly, paras. 2(a)(iii) and (iv) of Schedule 1 were not satisfied, so there was no jurisdiction to issue the warrant.

iv) *Ground 1(d):* There were no reasonable grounds to believe that a warrant was necessary because there was no other method of obtaining the information (paras. 2(b), 12(2) and 14 of Schedule 1).

v) *Ground 1(e):* It was not in the public interest to issue the warrant (para. 2(c) of Schedule 1).

The application for the warrant

20. The application form completed by the police ran to 29 pages with another 27 pages of appendices. D.C. Fishwick was questioned by HHJ Altham for the best part of a day and the transcript of her evidence comprises another 52 pages. It is not easy to summarise this material, presented as it was to the Judge as an impenetrable, discursive mass lacking a discernible sense of order. Understandably, the police are concerned to comply with their duty as to disclosure; but the answer to that obligation

does not lie in simply "throwing" material at the Court in the manner in which it was done in this case. We have, though, considered the application to see whether – despite the failures of presentation – it complied with the statutory requirements or whether any of Mr Bowers' grounds of challenge should succeed.

21. The application identified two offences in connection with which the warrants were sought: conspiracy to pervert the course of public justice contrary to common law ("conspiracy to pervert"); and witness intimidation contrary to the *Criminal Justice and Public Order Act 1994*, s.51. In the event, HHJ Altham was not satisfied that there was evidence that witness intimidation had taken place and Mr Bird on behalf of the police did not seek to support the warrant by reference to that offence.

22. So far as conspiracy to pervert was concerned, the application had to explain the underlying offence whose investigation, it was said, was endangered by the conspiracy. This underlying offence was in essence fraud on and, effectively, corruption in local government – in Mr Bird's phrase what was said to be a case of "jobs for the boys". This underlying police investigation was called "Operation Sheridan". It began in 2013 following an investigation by a firm of solicitors (DAC Beachcroft) of an aborted procurement exercise relating to the potential outsourcing of Lancashire County Council's vehicle fleet to BT. As already mentioned, BT by then had a joint venture with LaCC - OCL. The solicitors' review had been critical of Mr Geoffrey Driver, the Leader of LaCC and Philip Hassall, then Chief Executive of LaCC. The application explained that Operation Sheridan had widened to include alleged criminality within Liverpool City Council and the Merseyside Pension Fund ('MPF'). As we have said, the Claimant was the Chief Executive of LiCC and Mr McElhinney was the Chief Executive Officer of a joint venture, LDL, between BT and LiCC.

23. As already foreshadowed, the underlying offences under investigation in Operation Sheridan were not the indictable offences relied upon to justify the grant of the search warrants; in simple terms, the essence of the conspiracy to pervert went to conduct threatening the underlying investigation. The flavour of the application appears from the paragraphs which follow.

24. As the application put it,

> " Turning to the grounds for this application, circumstances essentially revolve around recent activity by Mr Driver, including his sending emails to a principal witness in the wider case, Ian Young which led to Mr Young [LaCC Director of Governance Finance and Public Service and LaCC's senior lawyer] making a complaint to police alleging a deliberate and concerted campaign to intimidate him as a key witness in both criminal and on-going civil proceedings linked to the criminal case.
>
> Following on from this complaint, evidence has now been gathered which shows that between 2013 and 2015, Mr Driver in collusion with Philip Hassall, Mr David McElhinney and Gerard Fitzgerald, was involved in activity directed toward a number of principal witnesses (Ruth Lowry [a former LaCC County Treasurer and auditor], Ian Fisher [another former County Treasurer for LaCC], Gill Kilpatrick [at one time LaCC's County Treasurer and then LaCC's Chief Executive by 2016] and Jennifer Mein [a LaCC councillor]) which was clearly designed to

> intimidate, belittle and undermine them both professionally and, crucially, as witnesses in the investigation."

25. Reliance was placed on email traffic and telephone contact between the four suspects. The emails were summarised in Appendix A to the application. One of these emails in 2014 had an attachment of an email exchange between the Claimant and Mr Driver. The subject matter appears to be a dispute between LaCC and the Claimant concerning a relocation allowance which had been paid to the Claimant when he came to work for LaCC and whether he was required to repay it on his departure after a relatively short time (we return to the issue of the relocation fee dispute below). None of the other emails appear to come from the Claimant so far as it is possible to tell from the unredacted parts.

26. The police alleged that Mr Driver had used his position as Leader of the Conservative party group on LaCC (and, at times, Leader of the Council) "to assist Mr Halsall and Mr McElhinney in the potential construction of their 'defences.'"

27. The application for the warrants then set out a chronology in 167 numbered paragraphs and explained that the underlying investigation was concerned with the propriety of a number of matters which it is not necessary to detail. It added that the Claimant, Mr McElhinney and Mr Hassall were all close personal friends.

28. The application continued with comments on how Mr Driver had acted towards Mr Ian Young, which were said to be attempts to undermine his evidence and to intimidate him. The application noted that the police investigation of Mr Driver had included a previous application for a production order to HHJ Altham on 30th March 2017 for access to Mr Driver's email accounts which had been granted, although only in restricted form. Some of the product of that earlier production order was included or summarised in Appendix A to the application for the present warrant.

29. The application also observed that Mr Halsall had advised Mr Driver to change the properties of any Word document he sent into PDF, in order to disguise its origins. It also observed that some email accounts were held outside the UK jurisdiction (in the USA) and to get access to them would require recourse to a request for mutual legal assistance.

30. The application alleged wilful and deliberate acts by Mr Halsall and Mr McElhinney to use Mr Driver as a source of information. Further details were given, but none involved the Claimant, except for the allegation that Mr Driver's attendance at a meeting on 27th September 2013 (see below) was to glean information concerning LaCC's internal inquiry and the appointment of a Designated Independent Person to conduct it.

31. The application returned to the subject of the dispute over the relocation fee paid to the Claimant on his arrival at LaCC in 2011. It noted that this had been paid as a direct result of approval from Mr Driver. It was said that LaCC had sought part repayment in 2013 due to the Claimant having left his post within 2 years. The application continued,

> " Fitzgerald asked Driver to intervene in the request by LaCC in 2013 and following that request Driver sent an email to the Treasurer at LaCC and suggested that any repayment of removal expenses had been waived by Young (solicitor within LaCC). Young categorically refutes this."

32. The application also said that, as a result of the collusion Mr Driver submitted multiple Freedom of Information requests concerning Operation Sheridan, had made a complaint to the IPCC concerning the Operation and had also put down a Notice of Motion for discussion at LaCC.

33. The application added that private email accounts relating to all four suspects were held off shore and their content could not be retrieved promptly because of the need to invoke mutual legal assistance.

34. The application explained why the s.9 and Schedule 1 procedure was being used rather than an application for a search warrant to a justice of the peace under s.8. It said,

> " 155. The police are conscious that some of the material which may be found on the recovered devices may include special procedure material, which therefore requires the use of a section 9 PACE warrant. The purpose of the search is to recover devices which contain material which evidences the extent of the collusion between the suspects and thereafter evidence any offences connected to their involvement in a conspiracy to pervert the course of justice.
>
> 156. It follows that equipment *may* hold Special Procedure material, however unless it contains evidence of offences, it is not that material which is the focus of today's application.
>
> 157. Although the Special Procedure material may have been of benefit to the principal investigation, the primary purpose is to recover evidence which will demonstrate that Driver and the other suspects are involved in offences of intimidation of witnesses and a conspiracy to pervert the course of justice.
>
> 158. The police are also conscious that the recovered devices may hold items subject to Legal Professional Privilege (LPP). As such, a protocol regarding the access to Special Procedure material is to be attached to this information, together with a protocol about dealing with LPP (see appendix C and D)"

35. It was said that warrants (rather than production orders) were being sought "to prevent the deliberate deletion of data by the suspects." It was said that evidence of their propensity to do this included the following:

> "163. The suppression of formal advice from Alison Foster QC to the effect that appointing McElhinney as Interim Chief Executive of Liverpool City Council would be unlawful. No trace of that document was found within the Legal Department of Liverpool City Council and it had to be obtained from Ms Foster herself.
>
> 164. On 12th February 2014, McElhinney was invited by the police to be formally interviewed under caution. On 17th of that month, seven laptops, including Mr McElhinney's were sent to the internal IT department to be returned to factory settings, thereby irretrievably deleting all the data on them.

> 165. Similarly on 18th February 2014, six iPads and iPhones including ones used by McElhinney were also 'wiped'.
>
> 166. On 11th March 2014 McElhinney's Lenovo desktop computer was ordered to be 'destroyed' even though it was only six months old"

36. During the hearing and arising from our concerns as to the manner in which the application had been drafted, we asked Mr Bird to identify the high points (from the evidence before HHJ Altham) of the police case that the Claimant was involved in the conspiracy to pervert ("the high points"). Mr Bird's summary, reduced to a helpful Note, was as follows:

> "1. The Hellard letters. Sept 2013 to Sept 2014. Application Form paras. 35 to 44. Lancashire believed that McElhinney's salary at OCL was £40,000 pa (paras 14, 18). In fact he was being paid considerably more. Gill Kilpatrick (Lancashire) enquired of Rebecca Hellard (Liverpool) concerning his salary and highlighted concerns about his bonuses. In reply to those enquiries Hellard deferred to Fitzgerald (her boss) and in turn he referred her to McElhinney to give the substance of the replies. Fitzgerald reviewed the draft replies before they were sent. As a result Hellard was misled into providing answers which were 'uncooperative, vague and dishonest' (para 42)
>
> 2. Encouraging Driver to attend meeting on 27.9.13 re Halsall's suspension as CEO of Lancashire (paras 56-7 and 109-113). Driver (Lancashire) had been told by Turton (Interim CEO following suspension of Halsall) that he (Driver) had a conflict and that he should not attend. Fitzgerald (now at Liverpool) liaises with Halsall and they advise Driver to attend nevertheless (para 110). The purpose appears to be to glean information (para 112). Driver does attend and tries to remove documents but is prevented by a vote (para 113). As Fitzgerald was CEO of Liverpool (and had not been employed by Lancashire since 2011) he had no legitimate professional purpose in urging Driver to ignore the advice of his officials.
>
> 3. February 2014. McElhinney computers wiped immediately following McElhinney interview under caution (paras 164-166). Fitzgerald (Liverpool) had management responsibility for McElhinney at LDL.
>
> 4. November 2016. Coincidence of timing between Driver's complaint to IPCC and FOI request immediately before Fitzgerald's interview on 21.11.16 (paras 119 to 123).
>
> 5. November 2016. Communication with and between Driver, McElhinney and Halsall immediately after Fitzgerald's interview on 21.11.16, followed by Driver seeking 6 year old material re Halsall's appointment (para 124 to 129 + Appendix B bundle p67).

> 6. February 2017. Second interview of Fitzgerald (7.2.17) coincides with communication activity between Halsall and River (para 130) and Notice of Motion filed by Driver at hearing of which he calls for removal of Chief Constable and Deputy (paras 131 to 133)."

37. The template of the application form asked the applicant to specify the material being sought. D.C. Fishwick specified the electronic items which were then repeated in the warrant itself. The form continued (at box 2(a)),

> "The devices are sought in order to:
>
> (1) Access further material which is believed held on the devices and which is relevant to this enquiry and has not thus far been produced or is available by any other method to investigators.
>
> (2) Obtain evidence of collusion and/or interfering with witnesses and/or attempts to pervert the course of justice., and
>
> (3) Obtain any other relevant evidence relating to the investigation as a whole"

38. The form next asked why it was believed that the material was likely to be of substantial value to the investigation and was likely to be relevant evidence.

39. Mr Bowers is entitled to say that some of the answers given in this section at the form appear to justify the warrant as a means of preventing future offences by the suspects. Of course, a successful criminal investigation may have a deterrent effect, but the powers given in Schedule 1 are to support a criminal investigation of offences which are believed to have already taken place. Filtering out those directed at preventing future offences, the application referred to the following:

i) Mr McElhinney appeared to have a new email account and Mr Halsall and Mr McElhinney had new telephone numbers.

ii) Contact (presumably between the suspects) could reasonably be assumed to have been maintained by other methods and on other devices (again presumably than those already known to the police).

iii) Because of the investigative measures taken in 2014, the suspects are likely to have purchased new devices

iv) Handsets and SIM cards could provide additional evidence of substantial value to the investigation, as would the content of text messages and identification of email accounts.

v) The police made clear that they would also be interested in any evidence relevant to the underlying offences being investigated (presumably through Operation Sheridan).

vi) Warrants rather than production orders were sought for fear, as previously noted, that potential evidence would be deleted, altered or disposed of.

40. The template of the form then asked whether the police had tried to obtain the material in any other way. The form said they had and referred to the previous application made to HHJ Altham on 30th March 2017 for a production order. In addition, all four suspects had been interviewed. The Judge was told that the police intended to arrest the suspects.

41. In response to the question as to the public interest in obtaining access to the material, the application repeated that it was believed to be in the public interest and proportionate for the warrants to be granted.

42. The form acknowledged that the material sought might be mixed with LPP material which was why the procedure set out in Appendix C to the form was to be used and to preserve the confidentiality of any material which was properly LPP. A related procedure was set out in Appendix D for setting aside SPM which was not relevant to the investigation.

43. Finally, the form confirmed that there was no further material to be disclosed in accordance with the applicant's duty of disclosure.

44. As mentioned above, D.C. Fishwick gave oral evidence before HHJ Altham and was questioned closely about the application.

HHJ Altham's ruling on 19th May 2017

45. The Judge reminded himself of the conditions which had to be satisfied for a production order and then the additional requirements for a warrant to be issued. He set out the ingredients of the offence of perverting the course of justice. He mentioned aspects of the underlying investigation (which it was alleged was threatened by the conspiracy to pervert). He referred to the Hellard letters ("the Hellard incident"). He mentioned the meeting which Mr Driver had been advised not to attend on grounds of conflict of interest and the consultation which the Claimant had had with Mr Driver on that matter.

46. The Judge considered whether what had occurred was no more than interference with a private inquiry by LaCC rather than a conspiracy to pervert *public justice*. He decided, though that it was inconceivable that the police would not be brought in and that this was not therefore a purely private matter.

47. He considered the emails that had been recovered as a result of his previous production order (attached to the application form as Appendix A). He observed that Mr Driver had been sending the Claimant an email exchange between him and Ms Kilpatrick. He found it difficult to see what legitimate business Mr Driver could have in doing so and he thought it significant that the email was sent from a private email account to another private email account. There were other emails in which Mr Halsall said that he was providing material "as promised" which the Judge took as evidence of a prior agreement. He concluded from this that it indicated that "Mr Driver is in cahoots with the others, providing not only information but also providing challenge to people who can cause difficulties in the course of this investigation."

48. As indicated earlier, the Judge was not persuaded that there was sufficient evidence of witness intimidation of either Ms Kilpatrick or Mr Young although the nature and the persistence of the criticism of Mr Young by Mr Driver did show reasonable grounds for believing that Mr Driver had been putting pressure on an inconvenient witness - so that could be fed into the grounds for believing that the offence of conspiracy to

pervert had been shown. He was persuaded that there was ample evidence of this offence having been committed.

49. He then considered whether there were reasonable grounds for believing that the warrants sought would yield material of substantial value to the investigation and of evidential value. He thought there was. Those concerned tended to communicate with each other via private emails. They were likely to have continued to do so, at least in the case of Mr Driver. The application in relation to the other men was also justified because not all the traffic would necessarily be contained on the devices of Mr Driver. The Judge said, "If there is email traffic to others, say between, for instance, Mr Halsall and Mr Fitzgerald, not including Mr Driver, and there is every reason to believe that there would be such communication, it would not be on Mr Driver's devices." The communications between the four men were necessary for the investigation.

50. The Judge then considered whether alternative means of obtaining the material could be used. He rejected the possibility. There had been previous examples of attempts to cover tracks. The format of some documents had been altered to disguise them (this appears to be a reference to converting some Word documents to PDF format), the reversion of some computers to factory settings and the destruction of a 6 months' old computer. That led the Judge to fear that potentially important evidence might be deleted if any means other than a warrant was utilised.

51. The Judge considered the public interest. Perverting the course of justice was a grave offence, particularly where the object was to hide significant fraud. He was satisfied that it was in the public interest "to allow police officers to enter four domestic properties".

52. We turn to the Grounds advanced by the Claimant for challenging the legality of the warrant.

Ground 1(a): There were no reasonable grounds to believe that an indictable offence had been committed (para. 2(a)(i) of Schedule 1)

53. *(1) The relevant tests:* We take as our starting point the threshold requirement for satisfying para. 2(a)(i) of Schedule 1. It is whether "there are reasonable grounds for believing" that an indictable offence has been committed. These words mean what they say, as helpfully explained in *R (Newcastle United Football Club Ltd) v Revenue and Customs* [2017] EWHC 2402 (Admin); [2017] 4 WLR 187, at [84]:

> " ….It is self-evident that 'reasonable grounds' for belief are just that. They do not mean that any criminal offence has in fact been committed. There may, at the end of the investigation, turn out to be innocent explanations for what happened."

Moreover, as is clear from the wording, the Judge need only be satisfied that there are reasonable grounds for believing that an indictable offence has been committed by *someone*; it is not a requirement of this paragraph that an indictable offence has been committed by all the suspects or indeed by the owner of the premises to be searched.

54. As to the approach to be adopted by this Court, it is one of review: *R (Faisaltex) v Crown Court at Preston* [2008] EWHC 2832 (Admin); [2009] 1 WLR 1687, at [31]. Thus, this Court will not intervene if "it was properly open to the judge below to be satisfied as to the various requirements….".

55. *(2) The rival cases:* In his skeleton argument, Mr Bowers, for the Claimant, submitted that there were no reasonable grounds for the Judge believing either that there had been a conspiracy to pervert or that the Claimant had been party to any such offence. Furthermore, the application had been made on the basis that the Claimant had acted in concert with the other suspects in committing the offence in question. In his oral submissions, Mr Bowers accepted, "as a generality", that it was not necessary for the Judge to have reasonable grounds for belief that the Claimant had himself committed an indictable offence; however, here, there was no point searching his house unless he had had been complicit. The "high points" did not form the basis upon which the warrant had been sought. In any event, the Judge's decision did not follow from the material before him; he had been put in "an almost impossible position by the way in which the application was conducted". The Judge was wrong to conclude that there was a course of public justice (as opposed to an internal investigation) that was capable of perversion. Additionally, there had been non-disclosure by the police in respect of the circumstances relating to the compromise of a dispute as to the relocation allowance paid to the Claimant when he left LaCC in 2011 – and which (Mr Bowers submitted) had been at the centre of the application as brought.

56. For the police, Mr Bird submitted that the Judge had given careful consideration to the case and the evidence. The starting point was the personal friendship between the individual suspects; what happened, however, had gone beyond any lawful remit. The Judge was entitled to reach the conclusion to which he came as to the conspiracy to pervert: in all the circumstances before him; the high points (all going to the Claimant's involvement); the apparent suppression of Ms Foster QC's Advice (set out at para. 163 of the application); and the recognition that it was unnecessary to hold a reasonable belief that the Claimant had himself committed the offence. The dispute as to the relocation fee and the compromise reached comprised a red herring and the Judge had paid no attention to it whatsoever; there had been no non-disclosure, alternatively any non-disclosure had been immaterial.

57. *(3) Discussion:* The context emerges well from Mr Bird's skeleton argument:

> " D2 was conducting a sensitive and difficult investigation into whether former (Halsall and McElhinney) and serving (the Claimant) public officials were conspiring with an elected councillor (Driver) to pervert the course of justice in a wider criminal investigation whose primary focus was whether Halsall and McElhinney had improperly received very large sums of public money. The immediate investigation was sensitive because it involved an elected councillor and difficult because the suspects appeared to be close friends (in addition to their professional connections) and because their communications, even in relation to Council matters, had been conducted on private email addresses and by other private (i.e., non-Council monitored methods."

58. There can be no sensible dispute that the Judge anxiously and carefully considered the material before him – demonstrated, *inter alia*, by his differentiating between the two offences (conspiracy to pervert and witness intimidation) in connection with which the warrant was sought. The Judge had well in mind the friendship links between the suspects, together with the need to distinguish between robust but legitimate political activity and even (merely) reprehensible conduct, on the one hand and criminal conduct on the other.

59. The question for us is whether the Judge, notwithstanding his diligence, reached a conclusion to which he was not entitled to come in respect of the conspiracy to pervert. We are not persuaded that he did. Indeed, once the manner in which the application was drafted and presented is put to one side, we have no real hesitation in holding that there was ample material upon which the Judge was entitled to conclude that para. 2(a)(i) of Schedule 1 was satisfied.

60. The short answer is that the efforts of Messrs Driver, Halsall and McElhinney set out above, gave reasonable grounds for belief that there had been a conspiracy to pervert, even assuming that the Claimant played no part in it. By way of examples only, the Judge referred to "providing challenge to people who can cause difficulties in the course of this investigation" (at [26]) and "secretive dialogue" between the suspects both before and after they were aware of an actual police investigation (at [28]). Those were observations the Judge was entitled to make and to weigh accordingly. The conclusion that there were reasonable grounds for belief that there had been a conspiracy to pervert, regardless of whether the Claimant participated, was open to the Judge and is sufficient to decide Ground 1(a) adversely to the Claimant.

61. In this regard, we entertain no doubt that the Judge was right or, at the least, entitled to conclude, for the reasons he gave at [21] – [23] of his judgment (and which need not be elaborated upon here), that a "course of public justice had been embarked upon" in the sense that "proceedings of some kind are in being or imminent or investigations which could or might bring proceedings about are in progress": *Archbold*, at para. 28-22.

62. Matters do not end there. The high points tell strongly in favour of a sufficient basis for the Judge forming reasonable grounds of belief that the Claimant was himself party to the conspiracy to pervert. Reduced to its essentials, the allegation is that the Claimant and the other suspects were conspiring to undermine the police investigation of the underlying corruption offences. Taken cumulatively, the high points could readily lead to a reasonable belief in such a conspiracy including the Claimant as a participant and persuasively support such a conclusion. That individual aspects might admit of an innocent explanation is neither here nor there. So too that, at the conclusion of the investigation, the belief might not turn out to be well-founded. Moreover, although the high points were articulated by Mr Bird with a clarity conspicuously lacking from the application, *all the high points were based on material contained within the application*. In this last regard, we are not persuaded that the case before the Judge was in some way materially different. Accordingly, on this footing too, the Judge was entitled to conclude that para. 2(a)(i) of Schedule 1 was satisfied.

63. For completeness, we agree with Mr Bird as to the relocation fee and the compromise reached as to repayment. This was a red herring. Even applying the most favourable test from the Claimant's point of view (that the non-disclosure *might* reasonably have led the Judge to refuse to issue the warrant: *R (Hart) v Crown Court at Blackfriars* [2017] EWHC 3091 (Admin), at [19]), we are unable to agree that any non-disclosure was material. We cannot detect that this issue played any role in the Judge's conclusion. In addition, we are bound to say that it is anything but apparent that a more intense focus on this issue would or even might have assisted the Claimant.

64. For all these reasons, we reject Ground 1(a) of the Claimant's challenge.

Ground 1(b): The police did not seek SPM; accordingly, there was no jurisdiction to issue the warrant (paras. 2(a)(ii), (iii) and (iv) of Schedule 1).

65. *(1) Argument:* Though Mr Bowers' submissions were wide-ranging, their essence was that the target material was not and did not include SPM; it was iniquitous material over which there could be neither confidentiality nor privilege; the police had therefore erred in proceeding under s.9 of PACE and Schedule 1 – rather than s.8. S.9 and Schedule 1 were only to be used when SPM was targeted rather than when it may arise incidentally. In any event, "material" in paras. 2(a)(iii) and (iv) of Schedule 1 meant SPM – and given that the police were not targeting SPM these paragraphs could not be satisfied here. The upshot was that the Claimant was deprived of the protection of the rigour that would have been required had the police proceeded under s.8, specifying the target material on the devices in the application and then seizing the devices pursuant to their powers under ss. 50 and following of the *Criminal Justice and Police Act 2001* ("the CJPA").

66. *(2) Discussion:* There is, with respect, nothing in this Ground. The police were, on balance, correct to apply under s.9 and Schedule 1. As the Judge held (at [4] of his judgment) it was extremely likely that SPM would be found on the articles identified in the warrant; he had noted "…in particular the habit of the four men who are the subject of this application of sending work related emails and documentation by Driver's email and it seems unlikely there will not be special procedure….". While we cannot entirely exclude the possibility that a way *might* have been found to reformulate the application in accordance with the requirements of s.8, we cannot avoid thinking that had the police done so they would have been criticised by the Claimant for <u>not</u> using s.9, with the additional protections offered.

67. In the light of the decision of this Court in *R (A) v Central Criminal Court (supra)*, at [36] and following, there can be no complaint as to the identification of the articles in the warrant (set out above). As to the contents of those articles, in particular emails and text messages, those appear from the application (despite the difficulties with its drafting, already adumbrated).

68. This conclusion is sufficient to reject the Claimant's challenge under Ground 1(b).

69. We are additionally fortified by the consideration that Ground 1(b) goes nowhere. Thus, even complete success for the Claimant (for instance, assuming without deciding that "material" in paragraphs 2(c)(iii) and (iv) of Schedule 1 means SPM) could result at best in a formal and empty declaration that the police ought to have proceeded under s.8 of PACE, rather than s.9 and Schedule 1. But, with respect to Mr Bowers' submissions, that would yield no practical benefits to the Claimant. To the contrary, the fact that the police proceeded under s.9 and Schedule 1 *increased* the *safeguards* for the Claimant. The s.9 procedure involves scrutiny by a Circuit Judge rather than a Justice of the Peace and the Judge was required to address the public interest as a separate and additional statutory criterion (para. 2(c) of Schedule 1). The argument is thus wholly arid. We venture to add that in seeking to reconcile the important public interests furnishing the context for disputes as to search warrants, the Court is not engaged in a game of snakes and ladders; the rigour which the law requires in this area is designed to protect individual rights – but it should not be carried to the extreme of setting traps for those engaged (in the public interest) in the investigation and prosecution of crime.

Ground 1(c): In any event, there were no reasonable grounds for believing that there was anything on the Claimant's premises that would be of substantial value to the investigation or relevant evidence; accordingly, paras. 2(a)(iii) and (iv) of Schedule 1 were not satisfied, so there was no jurisdiction to issue the warrant.

70. *(1) Argument:* Under this heading, Mr Bowers advanced a number of complaints: if the Claimant was not involved in the conspiracy to pervert, then the relevant criteria could not be satisfied; the police were engaged in a fishing expedition; in part at least, the police were seeking material they already had; moreover and with particular reference to box 2(a) of the application (set out above), its terms involved impermissible delegation.

71. *(2) Discussion:* We do not agree. First, as the Judge, rightly, observed (at [33]), the emails between the four men were "likely to be of substantial importance to the case", indeed "necessary for the case". As it seems to us, there were reasonable grounds for believing that the "devices" sought by the warrant on the Claimant's premises would be of substantial value to the investigation – and that they or their contents would comprise relevant evidence, even if communications essentially concerning the other three were simply forwarded or copied to the Claimant.

72. Secondly, on the footing that there were reasonable grounds for believing that the Claimant might himself be party to the conspiracy to pervert given the high points identified by Mr Bird, there were reasonable grounds for believing that evidence of the contents of the devices, together with an analysis of the Claimant's treatment of the email and text traffic (including forwarding, replying and deleting) would be of substantial value to the investigation or comprise relevant evidence.

73. Thirdly, against this background, we see no force in the complaint of fishing or the suggestion that the police were seeking material they already had.

74. Fourthly, box 2(a) of the application does not introduce any question of impermissible delegation here, as encountered in the eminently distinguishable case of *R (Superior Import/Export Ltd.) v HMRC* [2017] EWHC 3172 (Admin), esp., at [72] – [78]. In the present case, the articles sought were clearly and properly specified on the warrant. In the course of searching and sifting – within the parameters of the warrant defined by the specification of the articles sought – an exercise of judgment on the part of officers as to relevance is both necessary and inevitable. That is not a vice, still less the mischief addressed by the judgment in *Superior Import/Export Ltd.* Questions of searching and sifting are dealt with by other provisions of PACE and the well-known provisions of the CJPA: see, *R(A) (supra), passim*. Equally, provision needs to be made for dealing with LPP material if encountered. Here, if anything, the police were over-cautious in including the Protocol for SPM and LPP on the face of the warrant, when the better course would have been to include it in the application; but, plainly, the course followed by the police in this regard caused the Claimant no prejudice and, in any event, it does not appear that any claim to LPP material has been made.

Ground 1(d): There were no reasonable grounds to believe that a warrant was necessary because there was no other method of obtaining the information (paras. 2(b), 12(2) and 14 of Schedule 1).

75. *(1) Argument:* In advancing this Ground, Mr Bowers underlined the Claimant's previous cooperation with the police and submitted that whatever concerns may have applied to the other suspects, they could not apply to the Claimant. Under this

heading, as elsewhere, Mr Bowers criticises the police for using "one generic application form" when separate consideration needed to be given to each suspect. The Judge too had failed to give specific consideration to the Claimant; had he done so, he could not have been satisfied that these criteria were met. Finally, Mr Bowers criticised the manner in which the relevant box on the application had been completed.

76. *(2) Discussion:* The hypothesis on which this Ground is reached is that Ground 1(a) has been rejected; accordingly, there are reasonable grounds to believe that an indictable offence – conspiracy to pervert – has been committed. The relevant factual background includes the matters contained in the application at paras. 163 – 166 (set out above). Those matters involve (alleged) suppression of legal advice and the "wiping" and destruction of computers. So far as the Claimant himself is concerned, there are the high points and, in particular, for present purposes, the consideration that, at the very least, the Judge was entitled to come to the conclusion that, at the time of the computer "wiping" and destruction, the Claimant had management responsibility for McElhinney)

77. It is against this background that the Judge came to consider paras. 2(b), 12(2) and 14 of Schedule 1. He said this, at [34] – [35] of the judgment:

> "34. I have to consider whether other means of obtaining this evidence have been considered or ought to be considered and I note, in the application, I am told that careful consideration has been given specifically asking them to hand over the devices. I agree that would not be practicable. There have been in this case…careful steps taken to cover their tracks. The authorship of documentation has been carefully disguised by altering the format in which those documents are saved by agreement between Mr Halsall and Mr Driver. I note that Mr McElhinney was invited to be interviewed by the police on 4th and 12th February 2014 and shortly thereafter the laptop appears to have been returned to factory settings, thereby wiping it……
>
> 35. I do not believe that these men will comply with a request to hand this material over and, if they fail to comply, in the intervening period they will be in the position to delete potentially important evidence."

78. In addressing this Ground, we have paid particular attention to the Claimant's prior cooperation with the investigation (albeit to an extent that is in dispute) and the feature that the principal concern as to deletion or destruction of evidence relates to the other suspects rather than the Claimant himself.

79. The application at boxes 2(b) and 2(c) deals carefully with this issue. It records that there had been "Considerable deliberation…regarding simply making a request for the devices from each of the suspects…". It observed, with specific reference to McElhinney, that there had been deletion of files from the email accounts, before going on to express the concern that "…investigating officers cannot make a request for the devices without there being a real risk of disposal, alteration, loss of or interference with the evidence connecting the suspects to the offences under consideration". Flowing from the earlier interviews and disclosure of police tactics there given, there was a very real probability that "each suspect has acquired new email accounts, new telephone and data handling devices and new methods of

communication….". Intelligible as these concerns plainly are, they were significantly magnified by the consideration that the police wished to make simultaneous seizures from four different addresses and, if possible, simultaneous arrests. Warrants were effectively the only way of doing so, without giving the suspects the opportunity to alter or destroy evidence and thus risk prejudicing the investigation.

80. Having regard to the material and evidence as to the investigation available to the Judge and to us, we return to the Judge's conclusion, set out above. Under para. 14 of Schedule 1, the Judge was required to address the future risk to the investigation (see, *Newcastle United Football Club, supra,* at [92] – [93].) Notwithstanding the submissions made on behalf of the Claimant, we find ourselves quite unable to say that the Judge's carefully formed conclusion was one to which he was not entitled to come. That the Judge did not in terms refer to the Claimant in the observations at [34] – [35] of the Judgment does not dissuade us. Ground 1(d) accordingly fails.

81. For completeness:

i) Our dissatisfaction with the drafting of the application (already emphasised) does not lead us to embrace Mr Bowers' solution of individual applications for each suspect. It would have been perfectly feasible to draft a much improved single application form dealing with all four suspects. We would not in any event wish to be prescriptive as to single or multiple application forms; all must turn on the facts of the individual case.

ii) With respect, Mr Bowers' focus on whether the correct box had been ticked in section 2(c) of the application is misplaced – and, in any event, goes nowhere. In answer to the question "Have you tried to obtain the material in any other way?", the "No" box was left blank and a cross was inserted in the "Yes" box. The correct answer was that given by Mr Bird: namely, both "Yes" and "No". There had been an application for a somewhat limited production order previously, thus justifying a "yes" answer. That did not exhaust the police's justifiable interest in obtaining the material sought under the warrants. For the reasons already discussed, any further *inter partes* applications were not tried because they were "bound to fail", within the meaning given to those words in *Newcastle United Football Club (supra)*, at [93]: "…the investigator believes on the basis of the evidence that there is no lesser measure available which is likely to be effective in securing the relevant documents…" Accordingly, a "no" answer was also justified. Whether the form ought to be amended to more readily permit both a "yes" and a "no" answer – to cater for situations which may not infrequently arise - is a matter for others and for another day; it has no bearing on the outcome of these proceedings.

Ground 1(e): It was not in the public interest to issue the warrant (para. 2(c) of Schedule 1).

82. We take this Ground summarily. Conspiracy to pervert the course of justice is always a serious offence. In the present case, there is, if anything, heightened concern given the corrosive nature of corruption in local government. Questions of privacy and the like were amply catered for in the Protocol dealing with SPM (in any event not the target of the application) and LPP material. Contrary to the assertion in the Claimant's skeleton argument, this issue was addressed in the application (under box 2(d)). In any event, the Judge addressed the public interest succinctly and in terms:

> "38. …Is it in the public interest to allow police officers to enter four domestic properties? I am perfectly satisfied that it is. Perverting the course of justice is a grave offence, particularly where the objective is to hide significant fraud….."

Suffice to say, we entirely agree.

83. It follows that all the Claimant's challenges to the legality of the warrant fail.

GROUND II: THE EXECUTION OF THE WARRANT

84. Mr Bowers accepted that this Ground should be considered together with Ground 1(b). He contended that the warrant was not executed in accordance with the power conferred under it. Alternatively, the warrant conferred a limited power of seizure which the Court had no power to make. We have already rejected Ground 1(b), observing in the course of doing so that it was wholly arid. With great respect, we think the same of the present Ground. It seeks to conjure up difficulties where none exist. There is no conflict between the terms of the warrant, para. 13 of Schedule 1 and the additional powers of seizure under s.50, CJPA. We repeat that the protocol covering SPM and LPP material should not have been on the warrant and should instead have appeared in the application. That, however, occasioned no conceivable prejudice to the Claimant. On any view Ground II fails.

GROUND III: THE ARREST OF THE CLAIMANT

85. This Ground too can be dealt with summarily. In the course of the hearing, the Court pressed Mr Bowers as to whether by advancing this Ground, he was electing not to pursue a civil action. As we understood his answer, he did not agree that there had been any such election; nonetheless, he wanted to keep the present Ground alive, subject to the limitations of Judicial Review proceedings, which these are. For immediate purposes, the key limitation of Judicial Review proceedings is that the police evidence must be accepted as true.

86. On the footing that the police evidence must be accepted as true, this Ground is hopeless. The police evidence amply supports the subjective belief by the arresting officer that the Claimant had committed the offences of conspiracy to pervert and witness intimidation. Furthermore, by reason of the high points, that belief – as least so far as concerned the conspiracy to pervert – was objectively reasonable. Still further, on the basis of the police evidence, the arresting officer subjectively believed it was necessary to arrest the Claimant to allow the prompt and effective investigation of the offences and this belief was objectively reasonable, given the concerns as to collusion between the four suspects. Arrest and detention were the only means of depriving the suspects of the opportunity of collusion; voluntary attendance would not do.

87. It is unnecessary to express any conclusion as to the objective justification for the arrest in connection with the intimidation of witnesses; it is irrelevant to the present issue, given the conclusion which we have reached with regard to the arrest for conspiracy to pervert.

88. Ground III thus fails.

GROUND IV: THE CLAIMANT'S CONTINUED DETENTION

89. This complaint is succinctly advanced by Mr Bowers: it was not necessary to detain the Claimant to interview him, or for any other purpose "necessary to secure or preserve evidence". Accordingly, the decision to detain the Claimant was unlawful irrespective of the lawfulness of the decision to detain him.

90. The answer to this Ground is, however, equally short. This was a police operation against four suspects. After being made aware of the circumstances of the arrest and the other suspects, the Custody Sergeant authorised the Claimant's detention "in order to secure and preserve evidence and to obtain evidence by questioning", thus within PACE s.37(3). As it seems to us and given the need to avoid collaboration or collusion between the suspects prior to interview, we cannot say that the detention of the Claimant was unlawful. Ground IV accordingly fails.

GROUND V: PAYMENT FOR THE TRANSCRIPT

91. Though a good deal was sought to be made of this point in the written submissions on behalf of the Claimant, we declined to entertain oral argument at the hearing. It is, with respect, a "non-point". Well before the hearing, the relevant transcripts had been provided to the Claimant with the police, in the event, bearing the expense of their preparation. Ground V was accordingly wholly academic and, on any view, not a matter for this rolled up hearing. We therefore dismiss Ground V but, if need be, the question can be revisited at some future point when costs are in issue.

OUTCOME:

92. In deference to the arguments addressed to us, we have considered this application for permission to apply for Judicial Review fully and at some length. Ultimately, however, once we had overcome our own initial reservations as to the drafting of the application for the warrants, we have come to the clear view that there is insufficient merit in the claim to warrant granting permission to apply for Judicial Review. Accordingly, we refuse permission and dismiss the claim. We add only this: our conclusion is strictly confined to the application for permission to apply for Judicial Review; we have and express no view as to the ultimate outcome of the investigation or as to any prosecution which might result.