



Neutral Citation Number: [2017] EWCA Crim 534

Case No: 2017/00347/B5, 2017/00842/B5, 2017/00346/B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
HIS HONOUR JUDGE GRIEVE QC
T2016 7397/8/9

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2017

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MRS JUSTICE CARR DBE
and
THE HONOURABLE MR JUSTICE GILBART

Between :

Regina

Respondent

- and -

(1) AB

(2) CD

(3) EF

Appellants

Mr Andrew Campbell-Tiech QC and Mr Richard Heller for the Respondent
Mr Pavlos Panayi QC (instructed by Stephen Fidler & Co) and Mr Stephen Fidler for AB
and CD

Ms Elizabeth Lambert (instructed by Simon Bethel Solicitors) for EF
Mr David Bedenham also appeared for the Legal Aid Agency and Mr Jonathan Kinnear QC
for the Director of Public Prosecutions

Hearing dates: 23 March and 10 April 2017

Approved Judgment

The Court:

This is the judgment of the court.

Introduction

1. The Appellants are presently awaiting trial at Southwark Crown on an indictment containing a single count of conspiracy to defraud (contrary to common law) and a single count of doing acts tending and intended to pervert the course of public justice (contrary to common law). The particulars of the conspiracy charge are that the Appellants conspired together and with others between August 2007 and December 2013 to defraud the Legal Aid Agency (“the LAA”) through the submission of claims for payment in respect of work which a solicitors’ practice in London (“the practice”) had not performed; the loss to the LAA is said to be £4 million. The charge of perverting the course of justice alleges dishonest activity in the form of forging client files and submitting them to the LAA to conceal the alleged fraud once the Appellants became aware that the practice was under investigation. The First Appellant, AB, was the principal of the practice; the Second Appellant, CD, its compliance officer and practice manager was AB’s husband; the Third Appellant, EF, was the office (and billing) manager.
2. The prosecution is not brought by the CPS or the SFO. It is brought by Thurrock Council (“the Council”), the unitary local authority for the borough of Thurrock in Essex, following an investigation made by the Fraud Investigation Department (“the FID”) of the Council for the LAA.

The issue on the appeal and the form of the proceedings

3. At a preparatory hearing on 12 December 2016 under s.29 (1) of the Criminal Procedure and Investigations Act 1996 (“the CPIA”), the Appellants contended that the Council had no power to bring the prosecution under s.222 of the Local Government Act 1972 (“s.222”) (“the LGA”). No point was taken as to the Council’s power to investigate.
4. S.222 opens Part XI of the LGA (entitled “*General Provisions as to Local Authorities*”) under the heading “*Legal Proceedings*” and provides as follows:

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

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

(b) they may, in their own name, make representations in the interests of the inhabitants at any public inquiry held by or on behalf of any Minister or public body under and enactment.”

5. In a reserved ruling, HH Judge Grieve QC (“the Judge”) concluded that there was no good reason to find that the prosecution was invalid on the ground that it had not been properly brought under s.222. The appeal against that ruling comes before this court as an interlocutory appeal brought under s.35(1) of the CPIA with the leave of the Judge.
6. The precise basis of the application to the Judge was never identified and no formal application notice was ever issued. In July 2016, shortly after the Council had initiated the prosecution, the Appellants considered applying for judicial review of the Council’s decision to prosecute on the basis that the Council had no power to do so under s.222 and the case should be prosecuted by the CPS; the Council and the LAA had taken the position that the challenge should be made by an application for a stay in the criminal proceedings.
7. As the issue as to the Council’s power to prosecute under s.222 had been the issue on the application to the Crown Court judge, we considered that the better course was to proceed on the basis that the application to the Judge was in substance an application for a stay for abuse of process. This is consistent with the approach identified in *R (on the application of Barons Pub Company Limited) v Staines Magistrates’ Court* [2013] EWHC 898 (Admin) where the court stated (at [36]):

“In our view the Magistrates’ Courts have no power of review of a prosecutorial decision other than through an abuse of process application. As has been made clear in a number of decisions, including R v A (RJ) [2012] EWCA Crim 434..., and more recently in Moss & Son Ltd v CPS [2012] EWHC 3658 (Admin), if there is a challenge to the decision to prosecute, it must always be made in the criminal proceedings, unless there is some reason why it cannot be so made. The only way in which it can be made in Magistrates’ Court proceedings is by an abuse of process application. That in itself is an exceptional remedy. It is only if that cannot be done, that there can be an application of this court: see R(Pepushi) v CPS [2004] EWHC 798 (Admin) at paragraphs 42-50, R v A(RJ) and Moss.....”

8. As a result of wider concerns raised by us during the course of the first hearing, we adjourned the matter following full submissions by the parties to allow for the attendance of the Legal Aid Agency (“the LAA”) and the Director of Public Prosecutions (“the DPP”) at a second hearing.
9. The evidence before the Judge and us was in the form of statements; further statements were placed before us during the course of the hearing.

Prosecution Case

The audit by the LAA

10. The case has yet to be tried and the following is a summary of the prosecution case as outlined to us in the respondent’s case summary. The appellants each deny the allegations made against them. The practice had a contract with the LAA to provide advice and assistance in relation to immigration matters. Between January 2000 and

January 2013 it made 18,415 asylum and immigration claims with a value of just under £10.5million. All claims were made by the Third Appellant, EF, or someone using his login account details for the legal aid billing portal.

11. As part of its agreement with the LAA the practice was required to make “*Contracted Work and Administration*” submissions on a monthly basis. In February 2013 the LAA noticed anomalies in the information being supplied. Claims were being made under similar names but with differing dates of birth and addresses. The practice was asked to provide 50 files. The LAA received 3 boxes of files in June 2013. The LAA auditor immediately noticed what were said to be irregularities and it appeared from checks with the Home Office that sample names were false.

The approach of the LAA to the Council

12. Ms Eshelby, the head of Counter Fraud and Investigations at the LAA, had heard a presentation earlier in 2013 by Mr David Kleinberg (“Mr Kleinberg”), head of the FID. The LAA approached the Council on either 24th or 28th October 2013 initially to seek the assistance of the FID’s forensic computing ability for the purposes of the investigation into the practice. The LAA visited the practice on 4th November 2013 with the FID.
13. The FID is a counter fraud and criminal investigation service that is responsible for the prevention, detection and deterrence of economic crime committed against the public purse. It was a new unit set up by the Council in 2013, following an internal review of the Council’s responses to fraud, bribery, corruption and money laundering offences. It now has 26 officers trained to the same standards as the police service in complex crime accredited by the College of Policing including in national serious crime detective accreditation. Prior to 2013 the Council’s only fraud function was its benefit fraud investigation department funded by the Department for Work and Pensions (“the DWP”) but funding by the DWP for this service was withdrawn.

The approach by the LAA to the police

14. It was not clear to us why the LAA had not required the police to investigate rather than approaching the Council. This was known to be a case alleging high value fraud (a document dated 12th November 2013 identifies the sum at issue being £6m). The evidence before us from the LAA and the Council was that the police would not take the case on. We will simply summarise the evidence without making any findings, as it is not necessary to do so for the purposes of our decision:
 - i) According to Mr McNally, CBE, who has been the Chief Executive of the LAA since April 2016, the LAA’s fraud team made an online report to *Action Fraud*, an online reporting mechanism, and e-mailed a contact at the City of London Police. The response to the online report was only a reference number. A follow-up was made to the City of London police who indicated on 23rd October 2013 that they would not be taking on the case. On 21st November 2013, the Council put the LAA in touch with DS Ward at the Metropolitan police who was to assist in executing warrants and making arrests. On 30 January 2016, there was a further meeting with DS Ward to discuss assistance. It was Mr McNally’s understanding that the Metropolitan

Police were not able to take on an investigation of this scale involving computer forensics.

- ii) According to Mr Kleinberg, he was informed by Ms Eshelby that she had met the City of London Police Fraud Squad on 31 October 2013; they had said they were unable to assist due to resource commitment and the same reply was given by the Metropolitan police.
- iii) The Appellants challenged these accounts on the basis that no documents had been provided and it was simply not credible that the LAA had made any real attempt to deal with the police at a higher level or to contact a senior officer of the Metropolitan Police. Our attention was drawn to *The Lord Chancellor v Blavo* [2016] EWHC 126 (QB), another case of alleged fraud on the LAA where the investigation was being conducted by the Metropolitan Police after being referred to the police by the LAA.

The decision of the FID to provide the investigative services.

- 15. Mr Kleinberg's evidence was that after the initial approach by the LAA he considered the position of the FID and the Council in providing such assistance and concluded that it was within the powers of the Council to act. He recognised that the LAA is a government public authority that provides financial assistance in the form of legal aid to persons who require assistance in legal proceedings, including the residents of Thurrock. He considered the Council's position. The Council is recognised by statute as a public authority funded by central government and the local council tax payers of Thurrock to protect the public purse. Its law enforcement powers come from various statutes, including the Regulation of Investigatory Powers Act 2000 (now 2016), the Proceeds of Crime Act 2002 and the LGA, which names the Council as a recognised agency. The Council has law enforcement duties under s.23(1) of the CPIA and those at the Council charged with a duty of conducting an investigation are subject to the Codes of Practice there provided for. The Council is a public authority non-police prosecuting agency in its own right under s.222.
- 16. He considered that a "*public-to-public partnership*" would benefit the overall reduction in fraud for the people of Thurrock and across the UK. The effect of the difficult decision by the Council to cut services generally would be lessened as a result, thus ensuring that other vital frontline services in the Council were protected by the annual cuts as the money paid to the Council could be "*ploughed*" into its budget to protect it. In his statements he set out his view that fraud is under-prosecuted in the public sector; the Council had addressed that situation.
- 17. He pointed out that the Council did not always prosecute its own cases that it has investigated. During an investigation concerning the Thurrock area it might be identified that there was a greater public interest in the CPS delivering a prosecution through working with the local police. But the point for such a consideration was when it was considered by the Council's prosecutors in the application of the Full Code Test of the DPP.
- 18. He stated that he could see that the "*loser*" from the alleged fraud was the public purse and listed 5 reasons why the investigation would promote or protect the interests of the residents of Thurrock as follows:

- i) 26 addresses used by the practice to facilitate its fraud were located in the area covered by the FID;
- ii) The misuse of these addresses might have constituted an offence under the Representation of the People Act 1983;
- iii) The legal aid system is provided to all citizens including those of Thurrock and the Council's joint work with the LAA would be in the interest of those in the Council's borough to protect the fund from abuse;
- iv) The LAA would be funding the resources in the FID assigned to investigate its matters, with their time shared for preventing and detecting fraud in Thurrock;
- v) The LAA was to provide the equivalent of 2 full time staff to the Council to work on this investigation and any fraud matters in Thurrock. They were to be "upskilled" in the conduct of fraud investigation by the FID.

The agreements between the Council and LAA

19. Having therefore decided that the Council would provide investigation services to the LAA, two documents were put together which in the result set out the agreement with the LAA. The first in point of time was an undated document titled "*Joint Working Arrangement*" between the Council and the LAA ("the JWA"); it was sent to the LAA on 27th November 2013. It is said that, although the parties never signed it, and it is expressly stated not to be legally binding, the parties have in fact honoured it in practice. The second document was a Memorandum of Understanding ("the Memo") between the LAA and the Council signed on 30th December 2013 by Ms Eshelby, for the LAA and Mr Kleinberg for the Council. These two documents were provided to us by the Council between the two hearings before us.
20. The JWA evidenced the intention of the Council to set up high level arrangements with the LAA to work together on "*the project*" as defined at Annex A. The project overview stated that the purpose of the agreement allowed the LAA to use the Council's specialist investigative resources to investigate allegations of fraud and corruption taking prosecution action (where necessary) against offenders. It would allow the LAA to use the Council to "*investigate, restrain, detain and confiscate assets under [POCA] and/or the Criminal Justice Act 1988.....*"
21. The Memo opened with the statement that it sought to set out the agreed "*undertakings, commitments and obligations of the ...FID, the Accredited Financial Investigator("AFI") and the ...LAA in respects (sic) to the consideration and conduct of financial investigations under the Proceeds of Crime Act 2002*". The AFI is not identified in terms, but can be taken to have been Mr Kleinberg or any other official within the FID. The Memo left open entirely the question of who the prosecuting authority (if any) would be (see for example paragraphs 7a), e), f), h) and 11).
22. The Memo provided that any criminal proceedings following an investigation under the Proceeds of Crime Act 2002 ("POCA") would be "*with a focus on achieving the POCA minimum "criminal lifestyle" qualifying criteria where this is applicable.*" At paragraph 16 the Memo stated:

“Confiscation order receipts will be split three ways in terms of incentivisation payments. These are based on each agency’s contribution. 2013-2014 arrangements are as follows: AFI employer 18.75%, Prosecuting agency 18.75% and HMCTS Enforcement Court 12.5%....”

At paragraph 17 it was agreed:

“Should however

(ii) (sic) no conviction be achieved or confiscation is not proceeded with,

or

(iii) the order is made in form of compensation, or

(iii) (sic) the investigation is purely money laundering and/or cash seizure with no confiscation pursued, or

(iiv) (sic) the percentage of incentivisation payments received are insufficient to cover the AFI’s time spent on the investigation

Then the [LAA] will pay [the FID] an amount calculated at an hourly rate of £50.00 per hour to recompense their costs and/or any shortfall in this respect.....”

23. It appears that the approval of the LAA was obtained through a briefing paper prepared by Ms Eshelby for the LAA Executive which was copied to Mr Kleinberg and produced by him to us. The LAA briefing paper is revealing. By way of background it included the following:

“The City of London Police has declined to take on the case due to a lack of resource. We are therefore proposing to work with [the Council’s] Fraud Team, which is a prosecuting authority alongside the Metropolitan Fraud Squad, to pursue a criminal action.”

At paragraph 5.2 it stated :

“Under POCA, the LAA can make an application for all losses due to fraud going back for a period of 6 years and also 50% of any losses incurred due to general criminal conduct (50% goes to Treasury under the Home Office Incentivisation Scheme). This would be in addition to our identified losses.”

24. This was misleading, in the sense that it suggested that losses could be recovered under POCA proceedings by the victim who had sustained loss. A POCA confiscation order is addressed by a criminal court after consideration of orders for compensation. Moreover, it made no reference to the distribution agreement with the Council of 50% of the proceeds of any confiscation order (as set out in paragraph 16 of the Memo).

The LAA itself was never going to retain that 50%. In essence it wrongly indicated that the LAA could seek to recover all losses going back for 6 years and 50% of any confiscation proceeds, that is to say, a profit over and above the LAA's direct losses. Ms Eshelby (and Mr Kleinberg) appear to have been happy for the document nevertheless to go before the LAA Executive Committee. It went before the Committee chaired by Mr Mathew Coates, the then Chief Executive of the LAA, in January 2014 and the agreement was approved. It appears that the agreement between the LAA and the Council was subsequently approved by the Minister for Courts and Legal Aid at the Ministry of Justice, but it is not clear what was put before the Minister.

25. Although the timing suggests that the creation of the JWA and the Memo may have been triggered by the investigation into the practice, it is evident both the JWA and the Memo are generic templates – with the parties looking forward to mutually beneficial investigation and prosecution activities together on the basis of these documents.

The investigation by the FID

26. Several site visits were made by the LAA and the Council in November 2013. The practice's contract with the LAA was terminated in December 2013. On 29th January 2014 warrants of entry obtained under s.40 of the Proceeds of Crime Act 2002 (POCA) were executed with the assistance of the Metropolitan Police at the practice's offices and at its off-site storage facilities and also at the Appellants' home addresses. The Appellants were also arrested by the Metropolitan Police on the same day on a charge of conspiracy to defraud. In interviews in 2014 and 2015 all three Appellants denied any knowledge of or involvement in fraud.
27. On 7th February 2014 pre-charge restraint orders were made at Basildon Crown Court in respect of the Appellants which in due course were the subject of further proceedings. The appellants submitted that the restraint orders were of no effect on the ground that the Council had no jurisdiction to prosecute. On 3rd May 2016 the Appellants lodged notice of application to discharge the restraint orders principally for delay but also on the basis of the jurisdictional challenge.
28. The Crown Court was told by counsel instructed for the Council:
 - i) In a Skeleton Argument dated 25th February 2016:

“If [the Council] is prevented from prosecuting the instant case, it is unlikely that any other public body will take it.”
 - ii) At the hearing on 6th May 2016, that any suggestion that the CPS would take on such a case at a time of austerity was “*fanciful*”.
29. The hearing of the applications was adjourned on the basis that a charging decision was imminent.

The commencement by the Council of the prosecution

30. On 4th July 2016 the prosecution was commenced by the Council by informations being laid at Westminster Magistrates Court by Ms Fiona Taylor (“Ms Taylor”), head of legal services at the Council. Although she had obtained the advice of counsel, it was her decision. Her evidence was that she complied with the Code for Crown Prosecutors.
31. Neither the DDP nor anyone at the CPS was asked to consider instituting this very significant prosecution:
- i) The position of Ms Taylor was that she took the decision to prosecute. Mr Campbell-Tiech QC, on behalf of the Council, was able to tell us on instructions that Ms Taylor’s reasoning in making the decision to prosecute was the same as that of Mr Kleinberg when deciding to investigate. It did not occur to her to refer the matter to the DPP.
 - ii) The position of the LAA was that its Executive Committee approved the option of the Council prosecuting the action on 5th July 2016 because of concerns as to delay. The view was that the prosecution could be progressed more expeditiously and efficiently by continuing to use the Council’s services than through the CPS.
32. It is unfortunate (and surprising) that there is no minute or memorandum of the Council’s decision to prosecute. The explanation of Ms Taylor is again somewhat surprising, not least since, as Mr Kleinberg’s statement makes clear, the decision at the prosecution stage is a different one involving different considerations. It is at this stage, for example, that the question of who should be the prosecutor directly arises and whether the matter should be referred to the DPP. For this purpose she stated that she considered and agreed with Mr Kleinberg’s statement of February 2016 in its consideration of s.222. She stated that she saw no reason to record her decision, or the reasons for it, given the history of the matter, in relation to which she had been briefed throughout, and the existence of counsel’s advices. She stated that she had been told by Mr Kleinberg that the LAA had by mid-November 2013 approached the police but that the police had declined to act because of a lack of resources, as we have set out at paragraph 14.
33. On enquiry by the court, the Council has also produced the scheme of delegations under which Ms Taylor is said to have proceeded (as she has now expressly confirmed to have been the case). At paragraph 4.13 the scheme provides :

“The Director of Law & Governance is authorised:

- a) to take any action to implement any decision taken by or on behalf of the authority, including the signature or service of statutory and other notices and any document*
- b) to institute, defend, settle or participate in any legal proceedings in any case where such action is necessary, in the view of the Director of Law & Governance, to give effect to decisions of the authority or in any case where the Director of Law & Governance considers that such action is necessary to protect the authority’s interests.”*

34. Mr Kleinberg emphasised the commercial interest in this matter, being compensatory in nature, where the expense incurred by the investigation and subsequent prosecution is funded “*at cost*” by the LAA. He suggested that the approach is to provide expertise that would otherwise be unavailable or not deployed.

The ruling of the Judge

35. The Judge concluded that he should take a pragmatic view on the question of whether or not the court had power to look into the prosecutor’s authority to act. He considered that s.222 of the LGA had been properly taken into account. As its scope was wide and it was for the Council to consider what was expedient; the Council was not restricted to looking at the interests of those within the area of Thurrock. He concluded on the basis of reasons (iii) – (v) given by Mr Kleinberg as set out at paragraph 18 above that the interests of the citizens of Thurrock could properly be said to extend to ensuring that suspected serious crime was prosecuted and stepping in if other public authorities declined to do so; furthermore if the arrangement between the Council and the LAA provided extra manpower for the investigation of fraud within Thurrock, as well as freeing up manpower for other services, such facts were capable of properly being taken into consideration. There was no good reason to find that the prosecution was invalid on the ground that it had not been brought properly under s.222.

The issues before us

36. The issues before us on this evidence were:
- i) Can the court look behind the Council’s decision at all?
 - ii) If so, can it be said that the Council’s decision was so unreasonable that the court should interfere?
 - iii) In any event, does the Council have a self-standing right to prosecute?
37. It is important to emphasise again that the Appellants made no challenge to the decision to investigate. Rather, they sought to challenge the decision to prosecute. The evidence before the Judge was that of Mr Kleinberg; his reasoning related only to the Council’s decision to investigate. He elided in places what are properly to be treated as two separate processes: investigation and prosecution. Thus, although his witness statement referred to s.222, when his statement is read as a whole, he was in truth only addressing the question of investigation. The evidence as to the decision to prosecute is largely that of Ms Taylor, which was not put before the Crown Court. It was submitted to this Court after we had raised the issue.

The submissions of the parties

38. It was contended on behalf the First and Second Appellants, in submissions adopted by the Third Appellant, that the judge was wrong. The only relevant link to the Council appeared to be the fact that the LAA chose to engage the services of the FID to investigate and prosecute; the Council’s decision was made on a purely commercial basis to outsource the expertise of the Council to any organisation prepared to enter into a mutually advantageous funding arrangement with Thurrock. The FID was a

“*phoenix unit*” set up as a result of the forced closure of Thurrock’s fraud unit which had previously investigated and prosecuted benefit frauds. If the justifications put forward by Mr Kleinberg were correct, any local authority could offer an investigation and prosecution service to any individual or organisation prepared to pay. The Judge failed to distinguish between the investigation and the prosecution of offences.

39. The proper authority to prosecute was the CPS, not the Council. The Council does not have access to the digital case system. All documents have been served in hard copy. This makes keyword searches much more difficult (in terms of time and money) and unreliable. There have been real conflict problems: the LAA is said both to be the victim of the alleged crimes, funded the investigation and is funding both the prosecution and defence. There have been disclosure problems, requiring confidentiality undertakings, and there is the possibility that the activities of certain individuals at the LAA will be put under scrutiny by the Appellants at trial. The Council has failed to serve a schedule of unused material, even though it is now nine months since the Appellants were charged.
40. The Council’s primary position was that s.222 was merely declaratory of a local authority’s common law right to prosecute (and defend) criminal proceedings; we refer to this submission in more detail at paragraphs 58 and following below.
41. Its alternative position, and in direct response to the Appellants’ position, was to submit that the “*conditions precedent*” to the exercise of the power in s.222 were met. It was for the Local Authority to determine what was expedient; the criminal courts were not equipped to do so. Although the court should ignore the first reason given by Mr Kleinberg in paragraph 18 above (as the addresses in question did not in fact fall within the Council’s remit at all), there remained three sound reasons advanced as to why the Council considered the instant case to be expedient within the meaning of s.222. It remained in the interests of the inhabitants of Thurrock that the legal aid system, from which all may benefit, should not be defrauded; the agreement with the LAA provided income to the FID which could fund other cases benefitting the inhabitants of Thurrock; the income also keeps the FID in being. The prosecution was supported and funded by the Ministry of Justice. There was no bar on a local authority taking financial imperatives into account under s.222. Absent the power to offer its expertise to other public bodies, the FID was likely to be disbanded.
42. Local authorities regularly investigated and prosecuted serious criminal cases and were well equipped to do so. A defendant could not choose his prosecutor. The Council was not any less able properly to prosecute the matter than the CPS; there was in this case an advantage in continuity in the investigating body continuing with the prosecution.

Issue (i) Can the court look behind the Council’s decision at all?

43. In our judgment it is clear from the cases to which we refer that the court has jurisdiction to review the Council’s decision to prosecute. However, that is an exercise to be carried out sparingly and within the parameters of the very broad discretion granted to the Council under s.222. There is, however, a high hurdle to be overcome before the court will interfere with a local authority’s exercise of discretion under s.222.

44. In *Barking & Dagenham (LB of) v Jones* [1999] All ER (D) 923 (“*Barking*”) Brooke LJ stated:

“Section 222 of the [LGA] gives a local authority power to bring proceedings like these in their own name where they “consider it expedient for the promotion or protection of the interests of the inhabitants of their area”. It is for the local authority to make that judgment not the court, and the judge misdirected himself as to his proper role when he questioned whether the inhabitants of Barking were being truly served by the issue of these proceedings in the way which the section required, and impliedly gave the answer “no” to that question

In Mole Valley DC v Smith...Lord Donaldson MR said at p450:

‘...It is not for the courts in these proceedings to review the decision of the respondent councils under [s.222]..where the balance of the public interest lies is for the respondent councils to determine and not this court’.

45. Brooke LJ then went on to rule that there was evidence that justified the decision of Barking and Dagenham Council to prosecute:

“In my judgment there was ample evidence to justify the council using its powers under s222 if it saw fit to do so. All this unremitting criminal activity was being conducted from premises within the council’s area. It was the council alone which had the power under the Trade Descriptions Act to enter, seize and search. The council was entitled to consider that it was in the interests of the inhabitants of its area that these criminal activities, which could well be giving the area a bad name, should be brought to an end, particularly as all businesses in its area could be at risk of Mr Jones’ frauds.”

46. It is clear that Brooke LJ did not understand *Mole Valley District Council v Smith* [1994] 2 HLR 442 (“*Mole Valley*”) to suggest that there was no role for the courts to review or interrogate a council’s decision under s.222. He was right to take that approach. In *Mole Valley* the councils in question were seeking to proceed under s.222 to prevent further breaches of planning control by the defendants. There was no attempt to ask the court to conduct a judicial review of the councils’ decisions to bring those proceedings. The court, however, expressly recognised the possibility of such a challenge. In *Barking* Brooke LJ appears to have been saying no more than that the (incorrect) approach of the judge below was to seek to substitute his own opinion for that of the local authority, rather than to review it.

47. In *Brighton and Hove v City Council v Woolworths plc* [2002] EWHC 2565 Admin (“*Woolworths*”) Field J (at [31] and [33]), with whom Laws LJ agreed, accepted the submission that the council had no power to prosecute, amongst other things, “*because such a prosecution could not be expedient for the promotion or protection of the interests of the inhabitants of their area as required by [s.222]*”.

48. In *R (on the application of Sharyn Donnachie) v Cardiff Magistrates Court* [2009] EWHC 489 (Admin) (“*Donnachie*”) Sweeney J (at [42]) considered s.222, concluding on the facts that it was self-evidently in the interests of the inhabitants of Cardiff for the claimant to be prosecuted for alleged offences in Gloucester and Newport. Equally, in *Oldham v Worldwide Marketing Solutions* [2014] EWHC 1910 (QB) (“*Oldham*”) Phillips J concluded (at [24]) that the council was fully entitled to conclude that the bringing of proceedings was expedient in the interests of the inhabitants of Oldham.

Issue (ii) If so, can it be said that the Council’s decision was so unreasonable that this court should interfere?

49. The power under s.222 arises by reference to a consideration of expediency; the expediency must be for the promotion or protection of interests. The interests are those of the inhabitants of the local authority’s area. If those elements are satisfied, then the local authority may prosecute.
50. Relevant considerations are not limited strictly by geography. In so far as it was suggested in *Woolworths* (at [33]) that a breach outside a local authority’s area could “*ex hypothesi*” not be expedient for the purpose of s.222, it was wrongly decided (see for example the decision in *Donnachie*). Perhaps the most useful recent summary is to be found in the decision of Phillips J in *Oldham*:

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

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

“25. First, the inhabitants of an area have a clear and obvious interest in the local authority taking reasonable steps to procure that undertakings it has extracted from traders (such as that given by the defendants in this case) are enforced through proceedings where breached. If such steps are not taken, and undertakings are seen to be breached with impunity, the force and utility of such undertakings will be undermined, lessening their effect and usefulness and consequently leading

to greater expense in taking proceedings instead of or in addition to accepting undertakings. It follows that a local authority can properly take the view that it is in the interests of the inhabitants of its area to bring (and to be seen to be bringing) proceedings against a trader who has given but then breached an undertaking, even if the trader has subsequently left the authority's area."

52. Each case will turn on its own facts, but, as we have said the court should be slow to interfere, given the very broad power given to a local authority under s.222.
53. In our judgment the Council's decision to prosecute fell outside the ambit of its broad powers under s.222. There were no proper grounds for it to consider that that it was expedient for the promotion or protection of the interests of the inhabitants of Thurrock to prosecute the Appellants (and not to refer this very serious matter to the DPP for prosecution). The Council could not reasonably have thought that there were.
54. As for the suggestion that it could be considered in the interests of the inhabitants of Thurrock that the legal aid system, from which all may benefit, should not be defrauded, the alleged criminality to be prosecuted must have an actual or potential impact on the inhabitants of Thurrock as inhabitants of Thurrock, not just as UK taxpayers more generally. For the requirements of s.222 to be met, the interests of the inhabitants of Thurrock must be engaged over and above their interests merely as ordinary citizens of the nation. The clear policy of the LGA, as reflected in the wording of s.222, was that the power in question was being conferred for the benefit of the inhabitants of Thurrock as such.
55. As for the question of funding, Mr Campbell-Tiech on behalf of the Council fairly conceded that the Council's motivation in agreeing to prosecute was commercial in the sense explained by Mr Kleinberg. Without seeking outside work such as this, the FID would have inadequate funding. He accepted that the Council has no particular expertise in legal aid fraud (though it does in computer fraud). The Council was in effect setting up a prosecution service for which it was being paid by the LAA. Mr Campbell-Tiech accepted that, on his case, the Council could set up a service to defend burglars in another part of the country.
56. In our judgment, however, this type of general financial justification does not come close to meeting the requirements of s.222. Otherwise, s.222 would empower any local authority to offer a prosecution service (or indeed a defence service) to any individual or organisation prepared to pay for it. This cannot have been Parliament's intention. We do not accept the submission that local authorities are now encouraged to be profit-making or that initiatives such as, for example, the Localism Act 2011, assist the Council. S.222 empowers a local authority only to prosecute in the specific interests of its own inhabitants, even if broad policy considerations can be taken into account. There is nothing on the facts here that comes close to the facts of *Oldham* or *Donnachie*, where in each case the connections with the interests of the relevant local authority's inhabitants could readily be identified.
57. For these reasons, and subject to consideration of the Council's case that it had an unfettered common law right to prosecute, we conclude that the prosecution proceedings were commenced unlawfully.

Issue (iii) Does the Council have a common law right to prosecute?

The submissions of the Council on issue (iii)

58. As presaged at paragraph 40 above, the Council’s case was that in any event s.222 is merely declaratory of a local authority’s common law right to prosecute (or as it was also suggested by the Council only “exhortatory”). The Council is a species of private prosecutor. The proceedings are thus lawful without more and without reference to s.222.
59. The Council rehearsed the legislative history of s.222, suggesting that it had its genesis in and owes much of its phrasing to s2 of the Borough Funds Act 1872. S.2 in turn was largely reproduced in the Local Government Act 1888 and the Local Government Act 1933.
60. The Borough Funds Act 1872 was “an Act to authorise the application of Funds of Municipal Corporations and other governing bodies in certain cases”. By s.2:
- “When in the judgment of a governing body in any district it is expedient for such governing body to promote or oppose any local and personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund ...” (emphases added)*
61. The Council submitted that this section did not confer a power to prosecute but rather provided a mechanism for the funding of an existing power. The wording has none of the hallmarks of a prosecuting scheme.
62. By s.15 Local Government Act 1888, s.2 of the Borough Funds Act was extended to the newly-created county councils:
- “The county council ... shall have the same powers of opposing Bills in Parliament, and of prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the county, as are conferred on the council of a municipal borough by the (Borough Funds Act) and subject as herein-after provided the provisions of that Act shall extent to a county council as if such council were included in the expression ‘governing body’... Provided that –*
- (a) No consent of owners and ratepayers shall be required for any proceedings under this section;*
- (b) This section shall not empower a county council to promote any Bill in Parliament, or to incur or charge any expense in relation thereto.” (emphases added)*
63. The Council submitted that this section, like its predecessor, was concerned with funding. A county council was deemed to be a “*governing body*” within the meaning of s.1 of the Borough Funds Act and thus could lawfully defray its legal costs.

64. The Local Government Act 1933 was “*an Act to consolidate with amendments the enactments relating to authorities for the purposes of local government in England and Wales*”. In Part XV, under the heading “*General Provisions*” the Act addressed, amongst other things, “*Legal proceedings*” (in ss.276-278). By s.276, sub-headed “*Power of local authorities to prosecute or defend legal proceedings*”:

“Where a local authority deem it expedient for the promotion of protection of the interests of the inhabitants of their area, they may prosecute or defend any legal proceedings.”

65. The power to promote or oppose local or personal Parliamentary Bills, as declared in s.2 of the Borough Funds Act 1872 and s.15 of the Local Government Act 1888, was addressed by s.253 of the Local Government Act 1933:

“Subject to the provisions of this Act, where a local authority... are satisfied that it is expedient to promote or oppose any local or personal Bill in Parliament, the local authority may promote or oppose the Bill accordingly, and may defray the expenses incurred...”

66. S.276 of the Local Government Act 1933 was the direct predecessor to s.222. The Council submitted that Parliament reproduced s.276 in s.222, only substituting the verb “*consider*” for the verb “*deem*”. It also added the words “*and, in the case of civil proceedings, may institute them in their own name*” (in s.222(1)(a)). The purpose of this amendment was to reverse the decision in *Prestatyn UDC v Prestatyn Raceway Ltd* [1970] 1 WLR 33, in which the court had held that s.276 did not permit a local authority to bring civil proceedings to abate a public nuisance, namely noise from a race track. This power, the court had determined, rested solely with the Attorney-General or his relator – see *Stoke-on-Trent City Council v B&Q (Retail) Ltd* [1984] A.C. 754 (at 773C-F). The amendment consequently granted local authorities a power not exercisable by any other private prosecutor. The Council submits that this exception apart, s.222, like its legislative predecessors, does not create a power to prosecute or defend but merely restates or declares the existing power.

67. The Council submits that the Prosecution of Offences Act 1985 (“the POA”) further supports this analysis. By S.6(1) it is provided:

“6(1) Nothing in this part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director’s duty to take over the conduct of proceedings does not apply.” (emphasis added)

68. By s.5 and Schedule 1 of the Interpretation Act 1978, “*person*” includes “*a body of persons corporate or unincorporated*”, and so a local authority.

69. Unless excluded by statute or by its articles of association, a statutory body has the power to prosecute as “*any person*” – see *R v Rollins* [2010] 1 All ER 1183 (“*Rollins*”), where the Court of Appeal held that the Financial Services Authority (“the FSA”), a statutory corporate body, in addition to its statutory powers under s.402(1) of the Financial Services and Markets Act 2000 (“FSMA”) to prosecute the offences in that section, retained “*the power of a private individual to prosecute*” (see

[14] in particular). The Council submits that if Parliament had intended to exclude local authorities from the ambit of s.6(1), it would have been a simple matter so to legislate. There is no such provision. Therefore, by virtue of s.6(1), a local authority has the same power to institute and conduct criminal proceedings as enjoyed by a private individual.

70. The Council suggested that it would also be absurd if Mr Kleinberg could prosecute as a private individual but the Council could not: it is settled law that an officer of a local authority could prosecute in his own name: see *MFI Furniture v Hibbert* [1996] 160 JP 178. There Balcombe LJ said (at page 7):

“...Mr Hibbert, like any other person, had the power to prosecute...His authority to do so on behalf of the Council was irrelevant to the validity of the proceedings...”

71. Collins J went on to say (at page 8):

“Mr Hibbert was, although himself laying the information, purporting to do so “for and on behalf of the Council”. It is in general no concern of the criminal court whether he is in fact authorised by the Council provided that he has power to prosecute. He has laid the information. If he is not authorised to act on behalf of the Council, the validity of criminal proceedings is unaffected. Unless a prosecution can only be conducted by a particular body, in which case someone purporting to act on behalf of that body must be authorised so to act, it seems to me that it is unnecessary and undesirable for the criminal court to have to investigate whether there is proper authority to act.”

72. Reliance was also placed on *R (on the application of Gujra) (FC) v Crown Prosecution Service* [2013] 1 AC 484. There (at [10]) Lord Wilson referred to the “haphazard” manner “in which public authorities have come to assume responsibility for the vast majority of criminal prosecutions in England and Wales”. And (at [88]) Lord Mance commented that “[i]t]raditionally, all prosecutions.....could be described as private, even though brought in the name of the Crown.”

73. So, in summary, the Council submitted that s.222 does not create a power to prosecute or defend but merely restates or declares the existing power and is advisory as to its discharge.

The submissions of the appellants on issue (iii)

74. On the other hand, the Appellants contended that s.222 would be otiose if local authorities enjoy an unfettered common law right to prosecute in all cases where there is no restriction on private prosecutions. None of the cases suggested that the local authority might alternatively have prosecuted at common law or by virtue of s.6 of the POA. Mr Kleinberg was not purporting to exercise a common law right. S.6 merely begs the question because it refers to preclusion not creation.

Our conclusion on issue (iii)

75. In our judgment, and despite the industrious research of the legislative history, the Council's suggested approach is misconceived. Local authorities are entirely a statutory creation, and may only engage in activities which they are permitted to by the LGA and related Acts.

76. We refer in particular to Cross on "*Local Government Law*" ("Cross"):

"2-01

The powers of local authorities are all derived from statute, from public Acts and local Acts. The numerous powers referred to in this book all stem from public Acts, but individual authorities may supplement these general powers and acquire additional powers by means of local legislation."

77. Similarly, at 1-02 in Cross, the following statement appears :

"...The existence and powers of elected authorities depend on the provisions of Acts of Parliament."

And at 1-19 and 1-20 Cross addresses the doctrine of ultra vires stating :

"1-19 Perhaps the most important principle to be considered in relation to corporate status is the doctrine of ultra vires.....

*1-20 The doctrine as applied to statutory corporations is stated in Lord Watson's speech in *Baroness Wenlock v River Dee Co* ([1885] 10 App. Cas 354 at 362):*

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."

Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only do those things which it is authorised to do by statute, directly or by implication."

78. Reference to common law principles about private prosecutions does not therefore advance matters. Nor does s.6 of the POA avail the Council. That section does not prevent prosecutions by those other than the CPS, but it does not widen the power within s.222. Put another way, s.6 of the POA begs the question rather than answers it. Additionally, s.17 of the POA provides that a local authority (or anyone acting on behalf of a local authority) cannot be the beneficiary of a prosecution costs order out of central funds, thus distinguishing clearly between prosecuting bodies such as the Council on the one hand and private prosecutors on the other.

79. Such an approach is consistent with the comments of Lord Edmund-Davies in *Gouriet v Attorney-General* [1978] AC 435 (at 513):

“There are certain exceptions to the general rule [that no one except the Attorney-General can sue to enforce a public right], but none of them applies here. For example, there are exceptions, such as [s.222] which enables a local authority to institute civil proceedings for the promotion or protection of the interests of the inhabitants of their area.” (emphasis added)

80. The legislative history relied upon by the Council also supports the proposition that the parliamentary intention was, by the legislation, to create new powers. Thus the preamble to Borough Funds Act 1872 recorded that it was “*expedient to extend the powers of governing bodies so as to enable them to apply the borough or other funds under the control of such governing body towards ...costs, charges and expenses.....*” S.15 of the Local Government Act 1888 spoke of “*conferred*” powers on the local authority in question. Further and in any event, even if the earlier legislation is to be read restrictively, if it was not lawful to use funds for the purpose of prosecution, then there was no power to prosecute. S.222 gave the Council the power to prosecute within its terms.

81. So much is also supported by the fact that in none of the many authorities hitherto where s.222 has been under scrutiny has it been suggested that a separate common law right to prosecute existed.

82. As for the ability of an individual officer to prosecute in his own name, that cannot influence the existence (or not) of the Council’s powers as a matter of substance. As Cross makes clear, a local authority is not in the same position as a natural person. As for *Rollins*, this was a very different case. In the first place, the FSA is a national (rather than a local) governing body incorporated in June 1985 (then under the name of The Securities and Investments Board). *Rollins* established that, by reference to the FSA’s objects, there was to be implied (before the enactment of FSMA) a power to prosecute for any offence which fell within such objects, as defined by its memorandum and articles of association, subject to any restriction or condition that was imposed by the statute that created the offence in question. Reference was made by Sir John Dyson JSC (at [9]) to *Broadmoor Special Hospital Authority v R* [2000] QB 772 where Lord Woolf MR said (at [25]);

“The statutes only rarely provide expressly that a particular body may institute proceedings in protection of specific public interests. It is usually a matter of implication. If a public body is given responsibility for performing public functions in a particular area of activity, then usually it will be implicit that it is entitled to bring proceedings seeking the assistance of the courts in protecting its special interests in the performance of those functions.”

83. Clause 3(A)(i)(a) of the FSA’s memorandum stated that its objects included the promotion and maintenance of high standards of integrity and fair dealing in the carrying on of investment business, insurance and other commercial business. It was implicit in the FSA’s powers before the introduction of FSMA that the FSA had the

power to prosecute, albeit a circumscribed one, as set out above. The Supreme Court held that it was unlikely that by the introduction of FSMA Parliament had intended to limit the FSA's powers to the prosecution of offences in s.401 and 402 of FSMA.

84. The argument before us has not been advanced by reference to the existence of any implied power on the part of the Council to prosecute. Rather, what is said is simply that the Council, like any other person, has an unfettered free-standing common law right to prosecute. This cannot be right, for the reasons we have stated. But for the avoidance of doubt, we cannot identify (nor have we been taken to) any object or power of the Council from which a general unfettered power to prosecute could be implied.
85. We therefore reject the submission that s.222 is "*exhortatory*" only. As the Appellants submit, if this were the case, s.222 would be otiose. The Council is a creature of statute; its power to prosecute arises under s.222. It has no common law power to prosecute more generally.

Was the prosecution brought by the LAA?

86. There is one further and final point. For the sake of completeness, we record the submission made for the Council towards the end of the second hearing, namely that in fact the LAA was to be treated as the prosecutor, with the Council effectively acting qua solicitor. Mr Campbell-Tiech fairly accepted that this was not how the case had been advanced hitherto for the Council.
87. We reject this submission for reasons which can be shortly stated:
- i) As a matter of fact, this is not how the Council proceeded. Ms Taylor laid the informations. Her evidence (and that of Mr Kleinberg) is clearly that the Council was the prosecutor and the criminal proceedings have been progressed on that premise;
 - ii) It is also not the basis on which the LAA proceeded, as Mr Bedenham for the LAA confirmed. Indeed, the LAA cannot be a "*person*" for the purpose of s.6 of the POA. The LAA could only sue on behalf of the Lord Chancellor. There is no suggestion that any such prosecution was ever instigated;
 - iii) Whilst it might be that the Council could establish a company to provide legal services under s.4 of the Localism Act 2011, this did not in fact happen. We heard no argument on the scope or effect of that provision and express no view upon it.

The position of the parties as to the future conduct of the prosecution

88. The position of the Council, the Appellants, the LAA (as set out in the witness statement of Mr McNally) and the DPP (as set out in a note from Mr Neil Moore, the DPP's legal advisor) was by the conclusion of the hearing on 10 April 2017 as follows:
- i) The Appellants had no objection to prosecution by the DPP;
 - ii) The Council would welcome the intervention of the DPP;

- iii) The LAA by then had accepted that the DPP should have been approached with a view to taking over the prosecution in June/July 2016. Regardless of the outcome of this appeal, the LAA would be conducting a review of the decision-making surrounding this matter and would endeavour to agree a protocol with the CPS in relation to potential future cases;
- iv) The DPP understood the importance that this case should be, and be seen to be, prosecuted by the main state prosecutor. The CPS Specialist Fraud Division is well equipped and designed to deal with cases of this nature. The Director therefore accepted the significance of the public interest matters raised by the court as a matter of principle and was equally concerned that this case was being prosecuted by a local authority; the policy of successive Directors has been to ensure that prosecutions relating to central government are brought under the auspices of the DPP. However, there were important practicalities relating to the mechanics of takeover that require resolution.

89. On 21 April 2017, the DPP informed the court and the parties that she had exercised her powers under s.6(2) of the POA to take over the conduct of the prosecution and to continue it.

The relief to be granted

90. As the DPP has taken over the conduct of the prosecution, it is not necessary for us to consider whether we should stay the proceedings. The proceedings must therefore continue with the DPP conducting the prosecution. We will simply declare that the Council had no power to prosecute under s.222.

Observations on wider public policy issues

- 91. As was apparent during the course of the hearing, we raised significant concerns as to the events giving rise to the prosecution by the Council of such a significant case that was in no way related to Thurrock and contrary to generally accepted national prosecution policy. As we have explained, the allegations of the prosecution relate to an alleged very large scale fraud involving grave allegations and of considerable public and state interest. Alleged abuse of the legal aid system is always serious; it assumes a particular importance in the field of immigration where there is a very significant drain on legal aid resources. It is precisely the sort of prosecution that should be pursued by the national prosecuting authority.
- 92. In terms of contemporaneous consideration as to the possible involvement of the police or DPP, the evidence of Mr McNally reveals that:
 - i) As set out at paragraph 14 the evidence in relation to the approaches to the police is unclear and begs many questions.
 - ii) As set out at paragraph 31 no approach was made in June 2016 or at any stage prior to this appeal by the LAA or the Council to the DPP to prosecute this matter.

93. The unhappy facts of this case demonstrate well the dangers inherent in a system where agencies try to act as substitutes for prosecutions by the CPS in respect of national issues. In particular:
- i) The Memo and the JWA are curious documents. Paragraph 16 of the Memo (which we have set out at paragraph 22 above) is troublesome in so far as it seeks to distribute 50% of any confiscation proceeds as “*incentivisation payments*”, the remaining 50% going automatically to the Treasury. We were provided with a Home Office Memorandum entitled “Asset Recovery Incentivisation Scheme 2013-14” and a similar document for 2014-5. This set out arrangements made by the Home Office for the distribution of 50% of assets recovered by means of a confiscation order. We do not consider that this Incentivisation Scheme was in any way intended to benefit a local authority undertaking the kind of arrangement the Council made with the LAA. The Incentivisation Scheme was plainly intended for the incentivisation of prosecutions undertaken in the normal course of operations of a governmental agency or local authority, not for the type of money making enterprise which the Council had arranged with the LAA. There was no Treasury or Home Office consent in place specifically directed at this arrangement. Ignoring the question of whether or not such an arrangement made between the LAA and the Council was legal (as it is not necessary for us to decide this), there is the obvious scope for conflict in an area of importance such as confiscation orders, which of course carry penal consequences. It could be said that the Council as prosecutor would have a real financial interest in undertaking the prosecution under the arrangements made with the LAA;
 - ii) The Memo appears never to have been presented directly to the LAA Executive Committee. Mr McNally had not seen it before this appeal. Rather it was advanced for approval only through the LAA briefing paper from Ms Eshelby that was both misleading and inaccurate;
 - iii) The LAA never considered independently the question of whether or not the Council had the power to prosecute in this case. Rather, it simply took the Council’s expressed view that it did at face value;
 - iv) Attempts to engage the police even at the investigation stage were half-hearted and at a low level. Thus, for example, the matter did not go directly to anyone above DS level at the Metropolitan Police and even then the contact was only in the context of discussions relating to assistance from the police in executing warrants and arrests;
 - v) Notwithstanding the gravity, scale and sensitivity of the alleged offending, the DPP was never invited to prosecute the matter. Whilst it is said that there were concerns over delay, the Council accepted that its motivation was at least in part financial: income was needed to support the FID. The LAA fairly now accepts that the DPP should have been approached;
 - vi) Despite that lack of contact with the DPP, of which the Crown Court and the Appellants were not informed at the time, the court was told in February and May 2016, as set out at paragraph 28 that it was “*unlikely*”, indeed “*fanciful*”, that any other body would agree to prosecute the matter. In the absence of

formal and informed confirmation to this effect from the DPP, such assertions should not have been made, particularly in circumstances where they were the subject of direct challenge by the Appellants. It was (rightly) submitted for the Appellants that it would be “*astonishing*” if the CPS were to decline to prosecute a prima facie case of this nature and gravity.

94. As we have set out at paragraphs 49 and following, the purpose of s.222 was to give local authorities powers to take action in the interests of their inhabitants. The claimed interest by the Council is an indirect one, namely that it is in the inhabitants’ interest to operate the FID, because it would attract income. The purpose of the scheme set up by Mr Kleinberg was and is avowedly to provide an investigations and prosecution agency which can take on the investigation and prosecution of fraud. His evidence describes it as being able to conduct such work on behalf of public bodies, including those which are national. The prosecution of such frauds is in no sense dependent on any link to the Borough or its inhabitants. It is patently a purely commercial enterprise, the link with the interests of the Council’s inhabitants being illusory at best. That explains the Council’s insistence on justifying its ability to prosecute on a basis other than that set out in s.222.
95. The scheme is only effective from the Council’s point of view if it can receive sufficient funds as a result. There are two ways in which it could do so:
- i) By being paid for its services by its customers;
 - ii) By making an arrangement that it can be paid out of the compensation or confiscation monies payable at the end of a prosecution.
96. As to a), that is likely to be more expensive for the probable “customer”, such as the LAA, than using the CPS. As to b) and compensation, compensation money is for the victim. That would be the LAA (or other customer of the Council). As to b) and confiscation, confiscation does not find its way to the victim. Thus, on the Council’s case, it would be receiving monies from confiscation proceeds for itself, amongst others. Given the fact that the FID is intended as a money-making exercise, there is a clear conflict of interest involved when it advances a case to a criminal court on the degree of benefits and available assets in a POCA hearing following conviction.
97. It is perhaps for these reasons that there are no known examples of a public body being represented by a local authority in a prosecution unless it relates to activities or inhabitants within that authority’s area or - if, for example, a number of authorities were to combine so as to appoint a lead authority for one particular kind of activity.
98. It is in the public interest that major prosecutions such as this are handled by the single prosecuting agency established by statute to conduct them. It is noteworthy that the Council does not seek to prosecute kinds of crime other than fraud. That has one simple reason - there would be no income stream derived from it. It is only because the Council considers that it can so manage the prosecution, its terms of agreement with the bodies it seeks to represent, and the receipt of confiscation monies, that it is seeking to pursue this arrangement. Mr Kleinberg’s witness statements reveal that he would wish to see the Council established as a significant financial investigation and prosecution service. The issue of the legality of the FID was not explored before us, and we decline to express any view. But insofar as the Council seeks to use the FID,

via prosecutions, to provide a national prosecutions unit, we consider not only that it falls well outside the scope of s.222, but that it would be harmful to the public interest to have such a unit established as an alternative to the CPS. The CPS is a statutory body, whose powers are given by statute; it performs a vital public function and ensures consistency in decision making. A local authority prosecution unit would have no statutory basis whatever; it would also be inimical to the public interest to have a parallel prosecution service for cases such as this.