Neutral Citation Number: [2017] EWHC 747 (Admin)

Case No: CO/3917/2016 and CO/4192/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2017

Before :

LORD JUSTICE GROSS
and
MR JUSTICE LEGGATT

- -

Between :

(1) The Queen on the application of Merida Oil Traders Ltd	**Claimant**
- v -	
Central Criminal Court	**1st Defendant**
Commissioner of Police for the City of London	**2nd Defendant**
Hammersmith Magistrates Court	**3rd Defendant**
and	
(2) The Queen on the application of Bunnvale Limited	**1st Claimant**
Ticom Management LLC	**2nd Claimant**
-v-	
Central Criminal Court	**1st Defendant**
Hammersmith Magistrates Court	**2nd Defendant**
City of London Magistrates Court	**3rd Defendant**
Commissioner of Police for the City of London	**Interested Party**

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(1) Rupert Bowers QC (instructed by **Abbey Solicitors**) for the **Claimant**
Andrew Bird (instructed by **The Comptroller & City Solicitor, City of London Corporation**) for the **Second Defendant**
(2) David Perry QC and Katherine Hardcastle (instructed by **Peters & Peters)** for the **Claimants**
Andrew Bird (instructed by **The Comptroller & City Solicitor, City of London Corporation**) for the **Interested Party**

Hearing date: 14 March, 2017

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Approved Judgment

Lord Justice Gross :

1. This is the judgment of the court to which Mr Justice Leggatt has made a very substantial contribution.

Introduction :

2. Protecting market integrity is of the first importance. Money laundering and other forms of corruption are corrosive and destructive of confidence. It is therefore essential that the London financial markets are honest and seen to be so. Where necessary, strong policing action must be taken and will be supported by the courts.

3. At the same time a core reason why the London financial markets enjoy confidence internationally is that they are subject to the rule of law. Investors in or through the London markets rely on the security of knowing that their assets will not be confiscated or seized other than through the due process of law, applied fairly to all.

4. The present case raises for consideration how these two laudable objectives are to be reconciled in the exercise of powers conferred on law enforcement agencies by the Proceeds of Crime Act 2002 ("POCA").

5. We cannot avoid giving expression to certain concerns arising from this case. It is or ought to be clear that applications are only to be made without notice when there is good reason why notice cannot be given – either because of extreme urgency or because it would defeat the purpose of the application. Further, when applications are made without notice, there is a duty of disclosure. The essence is the need for a fair presentation. Law enforcement agencies are entitled to support when engaged in proper and vigorous activity; but they cannot expect *carte blanche* and will lose support when, for no good reason, they keep relevant information from the very court whose assistance they are seeking. This is not a criticism of any individual; it is more a matter of the mindset underlying the making of the applications which led to the orders now under challenge.

The facts :

6. These two claims for judicial review, which have been heard together, arise out of the same facts. The claimant in the first action ("Merida") and the first claimant in the second action ("Bunnvale") are both companies incorporated in the British Virgin Islands which traded in energy derivative contracts on the Intercontinental Exchange ("ICE") in London. The trading was conducted through a broker, Archer Daniels Midlands Investor Services International Limited ("ADM"), which holds a clearing account with the ICE. The second claimant in the second action ("TICOM") is a Russian company affiliated with Bunnvale. TICOM had an agreement with ADM under which it was entitled to receive commissions on transactions undertaken by ADM for clients introduced by TICOM.

7. In May 2015 the ICE made a suspicious transaction report to the Financial Conduct Authority ("FCA") concerning the trading activities of Merida, Bunnvale and another company, Intoil SA. The essential concern identified in the report was that Bunnvale appeared to be making money on all of its transactions with Merida and Intoil. The

report suggested that this could be indicative of fraud or money laundering, although innocent explanations were also possible.

8. It does not appear that any action was taken by the FCA. However, in February 2016 the City of London Police ("CoLP") began an investigation into the activities of Bunnvale, Merida and Intoil and also into the activities of two employees of ADM, Mr Niadvetski and his assistant Mr Osbourne, who conducted the relevant trading on behalf of Bunnvale. On 23 March 2016 Mr Niadzetski was arrested and interviewed under caution. At about the same time ADM suspended the two ADM employees and froze the client accounts of Bunnvale, Merida, Intoil and also TICOM.

9. ADM decided that it wished to terminate its relationships with these companies and obtained the consent of the National Crime Agency ("NCA") and the CoLP to liquidate the trading positions of Bunnvale, Merida and Intoil. On 29 March 2016 Bunnvale and TICOM gave instructions to ADM to return the funds held in their accounts, but ADM replied that it was unable to accept these instructions. On 5 April 2016 English solicitors instructed by Bunnvale made a similar demand. On 8 April 2016 ADM sought consent from the NCA and the CoLP to pay the closing balances to the account holders. Such consent was refused.

10. On 19 April 2016 a meeting took place between Mr Brimble, the Director of Legal and Compliance at ADM, two representatives of ADM's solicitors, Eversheds, and two officers from the CoLP. At this meeting DC Dainty of the CoLP said that he could obtain a court order for the production of material including cheques or bankers' drafts. He invited ADM to create such cheques or drafts for the closing balances payable to their clients before he obtained such an order. ADM agreed to do so.

11. It appears that the position of TICOM was not discussed at this meeting but a few days later DC Dainty learnt from Mr Brimble that ADM also wished to terminate its relationship with TICOM, a company closely linked to Bunnvale which also held an account with ADM and acted as an introducing agent. DC Dainty told Mr Brimble that the CoLP would include TICOM in its investigation.

12. On 20 April 2016 ADM had informed Bunnvale that any queries relating to the freezing of its funds should be directed to Detective Inspector Mullish of the CoLP. Solicitors acting for Bunnvale attempted to contact DI Mullish on several occasions over the following days but the only response received was an email sent on 25 April 2016 saying "I will endeavour to contact you within the following 14 days".

13. The arrangements for the creation and production of cheques for the balances payable to the four companies were confirmed in an email sent by DC Dainty to ADM on 4 May 2016. This stated:

> "As discussed, we intend to seize this cash by means of Special Procedure Production Orders, which will require ADM to produce for the City of London Police the business material it holds for Bunnvale Ltd, Intoil SA, Merida Oil Traders Ltd and TICOM. This order will also specify the cheques or bankers drafts (payable to the account holders) for the outstanding balances on the five trading accounts ADM has for the

> companies. Please can you ensure these cheques or bankers drafts are in existence prior to the date or [sic] the Production Orders will be Friday 6 May 2016."

14. On the same day, Mr Brimble notified DC Dainty that the closing balances for which cheques would be drawn by ADM were as follows:

    - US$13,431,590.26 in Bunnvale's trading account;
    - US$2,819,328.12 and US$781,313.01 in the two trading accounts held by Merida;
    - US$4,690,429.41 in the trading account of Intoil; and
    - US$131,958.57 in the account of TICOM.

15. On 6 May 2016 DC Dainty applied to the Central Criminal Court for orders under section 345 of POCA requiring ADM to produce material relating to each of the five accounts, including cheques for the amounts set out above. The application was made without notice to the companies to whom the cheques were payable and was therefore heard in their absence. The application was heard by HHJ Gordon, who made the orders sought. Officers from the CoLP then attended the offices of ADM's solicitors and took possession of the cheques.

16. Also on that day (which was a Friday), Bunnvale obtained an account statement from ADM which referred to a payment by cheque to the CoLP for the entire balance in Bunnvale's account. Bunnvale's solicitor tried to contact DI Mullish by telephone and managed to speak to him. However, DI Mullish refused to explain what had happened in relation to the funds in Bunnvale's account, saying only that all would be revealed the coming Monday.

17. On Monday, 9 May 2016 the CoLP sent emails to the companies to whom the cheques were payable attaching a written application, to be heard at 10am the next day at Hammersmith Magistrates' Court, for an order under section 295 of POCA authorising the continued detention of cash seized from the companies in the amounts of the cheques. The email intended for Merida was sent to the address of its trader in Moscow. The day on which it was sent was a holiday in Russia, and the email was not seen until after the hearing. The email giving notice of the application to Bunnvale and TICOM was sent to their English solicitors, who attended the court in which the application was listed on 10 May 2016 with counsel to oppose the application. However, the application was heard in a different court in their absence. At the hearing District Judge Coleman made an order authorising the continued detention of the cash for a period of six months.

18. Bunnvale and TICOM subsequently applied under section 297 of POCA for the funds to be released. That application was heard at the City of London Magistrates' Court on 10 and 16 June 2016 by District Judge Ezzat. In a judgment handed down on 8 July 2016, the district judge rejected the application on the ground that it had not been shown that there had been any relevant change of circumstances since the original order for detention was made on 10 May 2016.

19. Further orders to continue the detention of the funds were made on 8 November 2016 and 6 February 2017. Those orders were not opposed by the claimants, pending the outcome of these proceedings. Before those orders were made, however, the solicitors acting for Bunnvale and TICOM indicated that their clients intend to oppose the further detention of the funds relying on expert evidence at a contested hearing. That hearing has been fixed for 12 April 2017.

These proceedings :

20. In these proceedings, which were begun in August 2016, the claimants challenge the entire procedure by which cheques representing the funds in their accounts with ADM were ordered to be produced to the CoLP and were then seized and ordered to be detained. The claims have been resisted by the CoLP. The courts which made the orders under challenge are named as defendants but have taken no part in the proceedings.

21. At the centre of these claims are the provisions of POCA already mentioned under which production orders were made, the cheques produced by ADM were seized and detention of the funds was ordered. But in considering some of the issues raised by the claims, it is necessary to have a wider view of the statutory scheme and the place of these provisions within it.

The statutory scheme :

22. POCA is a complex statute, which is divided into 12 parts. Several different parts of the Act are relevant to the issues in this case.

Criminal confiscation proceedings :

23. The Act establishes two different regimes for the confiscation or forfeiture of property obtained through criminal conduct. The first of these regimes (which is contained in Part 2 of POCA) provides for the making of confiscation orders in criminal proceedings in the Crown Court. A confiscation order may be made against a person who has been convicted of a criminal offence and who is found to have benefited from criminal conduct.

24. As part of this regime, the Crown Court has power to make a restraint order prohibiting a person against whom a confiscation order may ultimately be made from dealing with any realisable property held by him (section 41). A restraint order may be made if: (a) a criminal investigation has been started in England and Wales with regard to an offence; and (b) there are reasonable grounds to suspect that the alleged offender has benefited from his criminal conduct (section 40(2)).

Civil recovery proceedings :

25. The second regime (contained in Part 5 of the Act) enables an enforcement authority to recover the proceeds of crime in civil proceedings. The principal "enforcement authority" for this purpose is the NCA. Such proceedings may be brought in the High Court against any person who the authority thinks holds "recoverable property" (section 243). Subject to exceptions, property obtained through unlawful conduct is "recoverable property" (section 304). "Unlawful conduct" in this context means

conduct which is unlawful under the criminal law, but whether such conduct has occurred is established by applying the civil standard of proof on a balance of probability rather than the criminal standard of proof (section 241). If the court is satisfied that any property is recoverable, it must make a recovery order, which vests the property in a trustee (section 266). The trustee is responsible for realising the value of the property and applying the proceeds in accordance with the Act. Any sum which remains after payment of certain expenses is to be paid to the enforcement authority (section 280).

26. The equivalent in civil recovery proceedings of a restraint order in criminal confiscation proceedings is a "property freezing order". Such an order is similar to a freezing order made in ordinary civil proceedings in the High Court. A property freezing order may only be made if the court is satisfied that there is a good arguable case that the property to which the application for the order relates is or includes recoverable property (section 245A(5)). The court may vary or set aside a property freezing order at any time (section 245B).

Recovery of cash in summary proceedings :

27. Within the civil recovery regime there is a sub-set of rules (contained in Chapter 3 of Part 5) which provide for the recovery of cash in summary proceedings. For the purposes of these provisions, "cash" means:

> "(a) cash or coins,
> (b) postal orders,
> (c) cheques of any kind, including travellers' cheques,
> (d) bankers' drafts,
> (e) bearer bonds and bearer shares,
> found in any place in the United Kingdom."

See sections 289(6) and 316(1).

28. Sections 289 and 294 create, respectively, powers to search for and seize cash which is reasonably suspected to be the proceeds of unlawful conduct or intended for use in such conduct, provided the amount is not less that the "minimum amount" (currently £1,000). Cash seized under section 294 may be detained initially for a period of 48 hours (section 295(1)), not counting Saturdays and Sundays (section 295(1B)(a)). This period may be extended by an order made by a magistrates' court, which may authorise the detention of the cash for up to six months if either of two conditions is satisfied (section 295(2) and (4)). The condition relevant for present purposes is that:

> "there are reasonable grounds for suspecting that the cash is recoverable property and that either –
>
> (a) its continued detention is justified while its derivation is further investigated or consideration is given to bringing ... proceedings against any person for an offence with which the cash is connected, or

> (b) proceedings against any person for an offence with which the cash is connected have been started and have not been concluded."

See section 295(5). (The other condition contains parallel requirements which apply where there are reasonable grounds for suspecting that the cash is intended to be used in unlawful conduct.) The magistrates' court may make further orders under section 295 continuing the detention of the cash for up to six months at a time subject to an overall maximum of two years (section 295(2)).

29. A magistrates' court may direct the release of the whole or any part of any cash detained under section 295 if satisfied, on an application by the person from whom the cash was seized, that the conditions in section 295 for the detention for the cash are no longer met in relation to the cash to be released (section 297).

30. Where cash has been detained under section 295, if a magistrates' court is satisfied that the cash is recoverable property or is intended by any person for use in unlawful conduct, the court may make an order for forfeiture of the cash (section 298). Such an order may be made even if no criminal proceedings have been brought for an offence with which the cash is connected (section 240(2)).

Money laundering :

31. Part 7 of POCA creates various money laundering offences. In particular, pursuant to section 329(1):

> "A person commits an offence if he—
>
> (a) acquires criminal property;
>
> (b) uses criminal property;
>
> (c) has possession of criminal property."

No offence is committed, however, if the person obtains the "appropriate consent" before doing the act in question (section 329(2)). Other provisions of Part 7 define the "appropriate consent" and how it may be obtained. It was under these provisions that, as mentioned earlier, ADM obtained consent from the CoLP to liquidate its clients' trading positions but was refused consent to pay over to them the balances in their accounts.

Investigations :

32. The last Part of the Act relevant for present purposes is Part 8, which makes provision for several different types of investigation. One type is a "detained cash investigation", defined (so far as relevant) as "an investigation for the purposes of Chapter 3 of Part 5 into the derivation of cash detained under that Chapter or a part of such cash" (section 341(3A)). Another is a "money laundering investigation", defined as "an investigation into whether a person has committed a money laundering offence" (section 341(4)).

33. For the purposes of an investigation under Part 8 of POCA, an application may be made to a judge under section 345 for a production order requiring a person who appears to be in possession or control of material specified in the application to produce it to an appropriate officer for him to take away. In the context of a detained cash investigation or a money laundering investigation, the application must be made to a judge of the Crown Court. The judge may make a production order under section 345 of the Act if he is satisfied that the requirements set out in section 346 are fulfilled. We will set out those requirements later when we consider the claimants' arguments that they were not fulfilled in the present case.

The issues :

34. Much of the argument in these proceedings has focused on whether the production orders made on 6 May 2016 requiring ADM to produce to the CoLP the cheques which they had drawn in favour of the claimants were lawfully made. The claimants challenge the lawfulness of the production orders on both substantive and procedural grounds. They also challenge the lawfulness of the orders subsequently made by the magistrates' court for the continued detention of the cash after the cheques were produced and seized. Although the claimants' grounds for claiming judicial review did not originally include a challenge to the lawfulness of the CoLP's seizure of the cheques, the claimants have applied to amend their claim forms to add such a ground, and we give permission to make this amendment.

35. The oral argument was efficiently conducted by reference to a list of issues and was completed within a day, although two days had been allowed for the hearing if necessary. We wish to pay tribute to the very helpful submissions we have received both in writing and orally from all counsel.

36. For ease of exposition, we propose to address the issues in a different order from that followed in argument and have re-worded some of the issues slightly (without affecting the substance). In the order that we will address them, the issues are as follows:

    i) Were the statutory requirements for making production orders met?

    ii) Were the cheques lawfully seized?

    iii) Were the production orders sought for a lawful purpose?

    iv) Were the detention orders lawfully made?

    v) Was there procedural impropriety in obtaining the production and detention orders?

    vi) What relief, if any, should be granted?

37. We will consider each of these questions in turn.

(i) Were the statutory requirements for making production orders met?

38. Section 345 of POCA, under which the orders requiring ADM to produce the cheques were made, specifies certain formal requirements with which an application for a production order must comply. In particular, subsections (2) and (3) provide:

> "(2) The application for a production order must state that—
>
> (a) a person specified in the application is subject to a confiscation investigation, a civil recovery investigation, an exploitation proceeds investigation or a money laundering investigation, or
>
> (b) property specified in the application is subject to a civil recovery investigation or a detained cash investigation.
>
> (3) The application must also state that—
>
> (a) the order is sought for the purposes of the investigation;
>
> (b) the order is sought in relation to material, or material of a description, specified in the application;
>
> (c) a person specified in the application appears to be in possession or control of the material.

39. In applying for the production orders, the CoLP used a standard form. The first section of the form requires the applicant to identify the investigation and the person(s) under investigation. In completing this section, the CoLP identified the investigation as a money laundering investigation and the persons under investigation as Bunnvale, Intoil, Merida and TICOM.

40. Where the investigation is a money laundering investigation, the form then asks the applicant to explain why the persons under investigation are suspected of having committed a money laundering offence. The explanation given by the CoLP included the following statement:

> "There are two aspects to this investigation:
>
> - A criminal investigation into the potential fraud by abuse of position and Market Abuse in London by ADM brokers Mr Niadvetski and Mr Osbourne. …
>
> - A cash detention investigation into the provenance of the money remaining in the Bunnvale, Intoil, Merida and TICOM ADM trading accounts."

41. The first of these "aspects" referred to an investigation which was evidently not the money laundering investigation specified earlier in the application form, as it was said to be an investigation into potential fraud (not money laundering) by two individuals

who were not among the persons said to be under investigation for money laundering offences.

42. The description of the second "aspect" gives the impression that the investigation was a "detained cash investigation". However, it is clear from the definition of a "detained cash investigation" quoted at paragraph 32 above that such an investigation can take place only after cash has been detained under Chapter 3 of Part 5 of POCA. At the time when the application for production orders was made on 6 May 2016 no cash had yet been detained under that Chapter. Indeed, the main purpose of the application was to obtain instruments which fall within the definition of cash in order to detain them. It follows that the application could not properly have stated that property specified in the application was subject to a "detained cash investigation".

43. On behalf of Merida, Mr Bowers QC sought to argue that the reference in the application to a fraud investigation and to a "cash detention investigation" meant that section 345(2) was not satisfied and that the court had no power to make a production order. We cannot accept this. The description of the "two aspects to this investigation", muddled as it is, cannot reasonably be read as negating or retracting the clear statement made earlier in the application form that the investigation for the purposes of which the order was sought was a money laundering investigation into whether each of the four named companies had committed a money laundering offence.

44. As mentioned earlier, the substantive requirements for the making of a production order are set out in section 346. So far as relevant, they are as follows:

> "(2) There must be reasonable grounds for suspecting that –
>
> …
>
> (c) in the case of a money laundering investigation, the person the application for the order specifies as being subject to the investigation has committed a money laundering offence;
>
> …
>
> (4) There must be reasonable grounds for believing that the material is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought.
>
> (5) There must be reasonable grounds for believing that it is in the public interest for the material to be produced or for access to it to be given, having regard to –
>
> (a) the benefit likely to accrue to the investigation if the material is obtained;

> (b) the circumstances under which the person the application specifies as appearing to be in possession or control of the material holds it."

45. Although the claimants maintain that there is an entirely legitimate explanation for the pattern of trading observed in the ICE report, all parties have accepted that these proceedings for judicial review are not the occasion to examine whether the suspicions raised in the ICE report were well founded. Thus, for the purpose of these proceedings the claimants have not disputed that there were – or at least that the judge who made the production orders was entitled to consider that there were – reasonable grounds for suspecting that Bunnvale, Intoil and Merida had committed a money laundering offence.

46. A submission was nevertheless made by Mr Perry QC on behalf of TICOM that the application was wrong in describing TICOM as a company "which receives commission from Bunnvale trades". The evidence filed on behalf of Bunnvale and TICOM indicates that the commission paid to TICOM under its introducing agent agreement with ADM was paid in respect of trades to which Bunnvale was not a party. Mr Perry also emphasised that the ICE report did not suggest that TICOM had entered into any suspicious transactions and that TICOM did not itself do any trading. These points are relevant to the claimants' contention, which we will consider later, that there was a breach of the duty of disclosure. We cannot say, however, that on the information presented to him, the judge made any error of law in finding that the requirement set out in section 346(2)(c) was met in relation to all four companies specified in the application, including TICOM. Nor are we in a position to conclude on the limited evidence before this court that there were in fact no reasonable grounds for suspecting that TICOM had committed a money laundering offence.

47. The principal ground on which the claimants have argued that the statutory requirements for the making of a production order were not fulfilled was that section 346(4) was not satisfied because there were no reasonable grounds for believing that the cheques were "likely to be of substantial value to the investigation for the purposes of which the order was sought". Counsel for the claimants submitted that it could not possibly, let alone reasonably, have been believed that getting hold of the cheques would be of any help at all in investigating whether a money laundering offence had been committed. Given that the cheques had been created by ADM on 5 May 2016 at the instigation of the CoLP, the cheques were manifestly of no investigative value whatever.

48. On behalf of the CoLP, Mr Bird responded that the criterion of "substantial value to the investigation" in section 346(4) is not restricted to material which is of evidential value. He submitted that there is a relevant distinction between the power to make a production order under section 345 of POCA and the power to make a production order under section 9 and Schedule 1 of the Police and Criminal Evidence Act 1984, or the power to issue a search warrant under section 8 of that Act. Under the latter provisions the judge must be satisfied not only that the material is likely to be of substantial value to the investigation but also that the material "is likely to be relevant evidence": see section 8(1)(c) and Schedule 1, para 2(a)(iv). Sections 345 and 346 of POCA do not contain this additional requirement. Mr Bird submitted that the absence of such a requirement signifies that under POCA a production order may be made for material which is not of evidential value and which is sought in order to gain a purely

tactical advantage. He gave the example of an order requiring a solicitor or an accountant to produce a document giving the name and address of his client. Such a document, Mr Bird argued, could be of substantial value to the investigation if it would enable the investigator to locate the client for the purposes of surveillance or arrest. He submitted that in the present case obtaining production of the cheques so that they could be seized and detained under Chapter 3 of Part 5 of POCA was likewise likely to be of substantial value to the investigation, albeit not of evidential value, as it would preserve the funds intact and lead to the possibility of forfeiture.

49. In order to identify whether production of particular material is capable of being of value to a money laundering investigation, it is necessary to consider what the object of such an investigation is. As indicated earlier, a money laundering investigation is an investigation into whether a person has committed a money laundering offence (see section 341(4) of POCA). Money laundering offences (defined in section 415) are a particular category of criminal offence. The object of investigating whether a person has committed a criminal offence is to gather evidence with a view to ascertaining whether a person should be charged with such an offence or whether a person charged with such an offence is guilty of it: see, for example, section 22(1) of the Criminal Procedure and Investigations Act 1996.

50. Mr Bird is plainly correct that the material which may be the subject of a production order under section 345 of POCA is not limited to material which there are reasonable grounds for believing is likely to be relevant evidence. Such material may include, as in the example given by Mr Bird, material which, although not itself evidence, is likely to be of substantial value to the investigation because it will assist in the gathering of evidence – for example, by helping to locate a person with a view to obtaining evidence from or in relation to that person. It cannot be said, however, that the cheques drawn by ADM came into this category. Obtaining those cheques was not capable of providing the CoLP with any information which they did not have already. Nor was production of the cheques sought for such a purpose.

51. It is clear on the evidence that the only purpose for which production of the cheques was sought was so that they could be seized and detained as cash under the provisions of Chapter 3 of Part 5 of POCA. The purpose of an investigation, whatever its subject matter, is to find out information with a view to taking some action or decision. The seizure and detention of cash under Chapter 3 of Part 5 of POCA has a different object. It has nothing to do with obtaining information and does not serve any investigative purpose. Its object is to facilitate the recovery of cash through summary proceedings under that Chapter, if the cash can be shown to be recoverable property (or intended for use in unlawful conduct). Evidence obtained through a cash detention investigation or other investigation under Part 8 might be used to establish that detained cash is recoverable property, but gathering evidence for that purpose is a very different thing from detaining cash so that it is available for recovery.

52. Accordingly, seeking the production of the cheques payable to the claimants in order to invoke the provisions of Chapter 3 of Part 5 of POCA was not capable of being of value to a money laundering investigation (or any other type of investigation). This conclusion is indeed inescapable, given the provenance of the cheques. Nor could it properly be stated, in accordance with section 345(3)(c), that orders for the production of the cheques were sought for the purpose of such an investigation (or any investigation).

53. Mr Bird emphasised that the question whether there were reasonable grounds for believing that the cheques were likely to be of substantial value to the investigation into whether the claimants had committed a money laundering offence was a question for the judge who decided the application, and that this court is not dealing with an appeal from the judge's decision but with an application for judicial review. We think it clear, however, that, for the reasons given, making an order for the production of material which is sought for the purpose of seizing it as cash under section 294 of POCA is outside the scope of section 345. It follows that there was no power to make production orders in this case in relation to the cheques which were in the possession of ADM.

(ii) Were the cheques lawfully seized?

54. On behalf of the CoLP, Mr Bird submitted that, even if – as we have held – the orders for production of the cheques were made unlawfully, the seizure of the cheques produced by ADM pursuant to the orders was nevertheless lawful. Mr Bird submitted that the power of seizure under section 294 of POCA is a freestanding power. It could have been exercised without obtaining a production order – for example, after entering the premises of ADM or their solicitors by invitation or under a search warrant. He also argued that, even if the CoLP had entered the premises unlawfully, that would not have made seizure of the cheques unlawful. In support of these submissions, Mr Bird relied by analogy on S*ecretary of State for the Home Department v Tuncel* [2012] 1 WLR 3355. In that case the applicant sought to challenge the lawfulness of an order for the forfeiture of cash under section 298(2) of POCA on the basis that the cash had been unlawfully seized. Keith J rejected the challenge, stating (at para 18) that:

> "there is no doctrine in cases concerning the forfeiture of cash denying the authorities the 'fruits of the forbidden tree', unless the relevant statutory regime made the forfeiture of the cash dependent on the cash having been lawfully seized and obtained in the first place."

Applying this test, the judge concluded that, on the proper interpretation of the relevant provisions, the power to order the forfeiture of cash under section 298(2) of POCA does not depend upon whether the cash has been lawfully seized under section 294.

55. The question raised in this case is similarly, in our view, one of statutory interpretation, albeit of section 294 rather than section 298 of POCA. Section 294 specifies the conditions which must be satisfied in order for cash to be lawfully seized under that provision. Those conditions do not include any requirement that access to the cash must have been lawfully obtained. Nor do we see any basis for implying such an additional requirement into section 294. There is nothing in the legislative scheme and no principle of common law which would support such an implication. We would therefore accept that whether the seizure of the cheques by the CoLP was lawful does not depend on the production orders having been lawfully made.

56. This brings us, however, to the claimants' central argument in these proceedings. They contend that the seizure of the cheques was unlawful – as also was the making of the production orders and the subsequent detention orders – for a reason which is

more fundamental than those we have considered so far. The claimants argue that it is contrary to the intent and scheme of the legislation, and a misuse of the power contained in section 294, to invoke that power to seize cash which has been brought into existence at the request or with the agreement of the police themselves in order to seize it under that provision.

57. The claimants submit, in our view correctly, that the rationale underpinning the provisions of Chapter 3 of Part 5 of POCA is that the possession of large quantities of cash is inherently suspicious in an age of electronic banking. As Sullivan J said in *R (Director of Assets Recovery Agency) v Green* [2005] EWHC 3168 (Admin) at paras 32-33:

> "… in today's 'cashless society', the ordinary law abiding citizen does not normally have any need to keep large numbers of banknotes in his possession. It will almost always be safer (bearing in mind the risk of loss through accident or crime), more profitable (bearing in mind the opportunity to earn interest), and more convenient (bearing in mind the many other ways of paying for lawful goods and services) not to be in possession of a large sum of money in the form of banknotes. The other characteristic shared by all of the forms of cash listed in subsection 289(6) is that cash is readily negotiable and unless seized promptly has a tendency to disappear without trace.
>
> Just as the law-abiding citizen normally has no need to keep large amounts of banknotes in his possession, so the criminal will find property in that particular form convenient as an untraceable means of funding crime."

58. This explains why Parliament has enacted a special regime involving a summary process under which it is easier to recover cash than it is to recover other types of asset in civil recovery proceedings. The rationale underpinning this regime has no application, however, in a case such as the present where the claimants did not choose to hold their money in cash and where instruments classified as cash only existed because the CoLP had arranged with ADM – without the claimants' knowledge or consent – for cheques payable to the claimants to be created.

59. Had the money held in the relevant accounts not been converted into cash by ADM, it could not have been seized and the claimants could only have been prohibited from dealing with the money if a restraint order had been obtained under section 41 or if a property freezing order had been obtained under section 245A of POCA. Obtaining a restraint order would only serve a useful purpose if criminal proceedings were brought against the claimant companies and they were convicted of an offence from which they were shown to have benefited. Furthermore, a restraint order ordinarily includes a requirement to report to the court on the progress of the investigation and will be discharged if proceedings are not started within a reasonable time (see section 41(7A)–(7C)). In the context of civil recovery proceedings, the general method for preserving funds pending the outcome of the proceedings is by obtaining a property freezing order. On an application for a property freezing order, however, it would be necessary to show not merely reasonable grounds for suspecting that the property in

question is recoverable property but a good arguable case that it is (see section 245A(5)). There is also a power, which has no counterpart in the provisions of Chapter 3, to exclude property from a property freezing order and to make exclusions from the prohibition on dealing with the property to which the order applies (see section 245C).

60. The claimants submitted that, having regard to the scheme of POCA, the use of the provisions in Chapter 3 of Part 5 to seize cheques which were brought into existence in order to take advantage of those provisions was a contrivance which sought to circumvent the greater protections which Parliament intended the owners of money held in bank accounts to have in contrast to persons who have chosen to hold large quantities of cash.

61. Mr Bird's response on behalf of the CoLP was to emphasise that there can often be more than one statutory power or procedure available to a law enforcement agency and that in such circumstances the agency is entitled to choose which to use, subject only to its duty to act in the way which it believes will best serve the public interest. As Edis J observed in *National Crime Agency v Simkus* [2016] EWHC 255 (Admin), para 105:

> "Where Parliament provides two different procedures which are available to the state in respect of the same subject matter…, it is for the state to choose which to use. The state ought to choose the procedure which will produce the greater benefit to the public, providing that no injustice is caused to the respondent."

Mr Bird submitted that such a choice existed in the present case. The fact that there were other ways of preserving the relevant funds by applying for a restraint order or a property freezing order did not make it unlawful for the CoLP to use their power of seizure under section 294 of POCA. Mr Bird further submitted that the use of this power was consistent with guidance issued the Home Secretary and the Attorney-General under section 2A(3) of POCA, which recognises that the use of "non-conviction based powers" including cash forfeiture may be appropriate.

62. We entirely accept that there can be situations in which a law enforcement agency has alternative powers or procedures lawfully available to it and is entitled to choose which to use. The key question in this case, however, is whether the procedure adopted by the CoLP was one which in the circumstances was lawfully available. We think it plain that it was not.

63. In *R v Crown Court at Lewes, ex parte Hill* (1991) 93 Cr App R 60 at 65-66, in discussing the exercise of powers conferred by the Police and Criminal Evidence Act 1984, Bingham LJ said:

> "The Police and Criminal Evidence Act governs a field in which there are two very obvious public interests. There is, first of all, a public interest in the effective investigation and prosecution of crime. Secondly, there is a public interest in protecting the personal and property rights of citizens against infringement and invasion. There is an obvious tension

> between these two public interests because crime could be most effectively investigated and prosecuted if the personal and property rights of citizens could be freely overridden and total protection of the personal and property rights of citizens would make investigation and prosecution of many crimes impossible or virtually so.
>
> The 1984 Act seeks to effect a carefully judged balance between these interests and that is why it is a detailed and complex Act. … It is, in my judgment, clear that the courts must try to avoid any interpretation which would distort the parliamentary scheme and so upset the intended balance."

These observations are equally applicable to POCA, which likewise seeks to effect a carefully judged balance between the public interest in preventing criminals from profiting from their unlawful conduct and the public interest in protecting the property rights of citizens. It would, in our view, upset the intended balance and distort the parliamentary scheme if the Act were to be interpreted as authorising the use of the powers conferred by Chapter 3 of Part 5 on the facts of the present case.

64. In particular, Parliament cannot sensibly be taken to have intended that the power to seize cash should be exercisable where the person to whom the cash belongs is not itself in possession of the cash, has not chosen to convert its property into cash and did not even know that this was being done. Still less can Parliament sensibly be taken to have intended that the power should be exercisable where the police themselves have engineered this situation in order to take advantage of the statutory provisions. Such an exercise of the power of seizure amounts, in our view, to a clear abuse of the statutory power.

65. Accordingly, we hold that section 294 did not authorise the CoLP to seize the cheques made payable to the claimants by ADM.

(iii) Were the production orders sought for a lawful purpose?

66. Our conclusion that, on the proper interpretation of the Act, the power contained in section 294 of POCA could not lawfully be used to seize the cheques made payable to the claimants provides a further reason why the production orders were unlawfully made. Just as it is clearly contrary to the intention and scheme of the legislation to use the power contained in section 294 to seize cash which has been created for the very purpose of seizing it under that provision, so too in our opinion it is, for the same reasons and by the same token, unlawful to use the power to make a production order under sections 345 and 346 for the purpose of getting access to the cash in order to seize it.

(iv) Were the detention orders lawful?

67. It also follows from our conclusion that the seizure of the cheques under section 294 of POCA was unlawful that the subsequent orders by the magistrates' court authorising the continued detention of the cash seized were unlawful as well. There are two reasons for this.

68. First, we think that section 295 of POCA, properly interpreted, only permits cash to be detained where its seizure was lawful. That is because the reference in section 295(1) to "cash seized under section 294" is naturally and reasonably understood to mean "cash lawfully seized under section 294". It would be unwarranted and unsustainable to interpret section 295(1) as authorising the continued detention of cash where section 294 was wrongly invoked to try to justify the seizure of the cash although there was no power to seize it under section 294. Similarly, it would be unwarranted and unsustainable to interpret section 295(2) as giving a magistrates' court the power to extend a period of unlawful detention.

69. Secondly and separately, the reasons which made it unlawful to use the power to seize cash under section 294 in the circumstances of this case apply equally to any other use of the provisions of Chapter 3 of Part 5 of POCA including the power to detain cash under section 295. It is inconsistent with the scheme and purpose of the legislation to use section 295 to detain cash which only exists in that form because the money has been converted into cash at the instigation of the police themselves, without the knowledge of the person to whom the money belongs or is owed, so that it can be made the subject of the summary process for the recovery of cash established by Chapter 3.

70. We therefore conclude that the orders made in this case to continue the detention of the cash seized by the CoLP were orders which the magistrates' court did not have power under section 295 to make.

(v) Was there procedural impropriety?

71. As well as contending that the orders for production of the cheques were unlawful for substantive reasons, the claimants have also criticised the procedure by which the orders were obtained. Two criticisms are made. First, the claimants say that they should have been given notice of the application. Second, they say that the CoLP was in breach of the duty of disclosure owed by a party who makes an application without notice. In our view, both criticisms are valid.

Notice :

72. The claimants were clearly persons affected by the application for production orders but a decision was made not to give them notice of the application. They therefore had no opportunity to oppose it.

73. It is a basic principle of fairness and natural justice that an order should not be made which affects a person's rights without first giving the person an opportunity to be heard. There are circumstances in which it is justifiable to depart from that principle but they are necessarily exceptional. In the case of an application for a production order, those circumstances are prescribed by 47.5(3) of the Criminal Procedure Rules. This states:

> "The court must not determine such an application in the absence of any respondent or other person affected, unless—
>
> (a) the absentee has had at least 2 business days in which to make representations; or

(b) the court is satisfied that—

(i) the applicant cannot identify or contact the absentee,

(ii) it would prejudice the investigation if the absentee were present,

(iii) it would prejudice the investigation to adjourn or postpone the application so as to allow the absentee to attend, or

(iv) the absentee has waived the opportunity to attend."

74. In this case the CoLP relied on (b)(ii) and has not suggested that any other limb of the rule might apply. Thus in the application form, which was completed on 5 May 2016, the reason given for asking the court to decide the application for production orders in the absence of the persons under investigation was that "it would prejudice the investigation if they were present". By way of explanation, it was said:

> "This investigation has only just commenced and if the account holder(s) became aware the police were investigating their accounts it is believed they would take action to conceal their activity, alter or destroy evidence and dissipate the proceeds of crime."

75. It may be that this is a standard form of words which is regularly used by the CoLP in applying for production orders under section 345 of POCA and that no proper thought was given to whether it was accurate in this case. Had proper thought been given to that question, it would or should have been apparent that there was no valid basis for making the statement.

76. In the first place, as the CoLP knew, all the account holders had been aware since 23 March 2016 that their accounts with ADM were frozen and at least one of them, Bunnvale, was also aware that its account was under some form of police investigation and had been given the name of DI Mullish to contact. Solicitors acting for Bunnvale had sent emails and left telephone messages attempting to contact DI Mullish to discuss the situation (see paragraph 12 above). Contrary to the impression given to the judge, therefore, at least one of the claimants was already aware (and had been aware for some time) that the police were investigating their account.

77. Secondly and still more importantly, the fact that the claimants' accounts with ADM had been frozen for some six weeks and that ADM had been refused consent by the CoLP to pay over the money held in the accounts to the claimants meant that there was no risk that the funds would be dissipated if the claimants were given notice of the application. Nor could the CoLP have believed that there was any such risk. Bunnvale and TICOM had already given instructions (both directly and in Bunnvale's case also through solicitors) to ADM to return to them the funds held in their accounts, and had been told by ADM that it was unable to comply with these instructions. The only conceivable risk if the claimants had been notified of the application for production of cheques representing the balances of their accounts was that they might have given instructions to ADM to provide the cheques or otherwise

pay the sums in question to them – which, given the cooperation between ADM and the CoLP, would undoubtedly have met with the same response as before.

78. There was equally and for the same reasons manifestly no risk that any of the other material specified in the application – which consisted of account statements, mandates, client identification documents and other similar documents in the possession of ADM – would be altered or destroyed if notice of the application was given.

79. Nor is it tenable to suggest – as Mr Bird on behalf of the CoLP sought to do –that giving notice of the application would have prejudiced the investigation because it might have resulted in the account holders taking steps to conceal or destroy other material not held by ADM. It was the intention of the CoLP when they made the application for production orders to apply to a magistrates' court within 48 hours of seizing the cheques for an order under section 295 of POCA extending the period for which the cheques could be detained. Section 295(8) requires such an order to provide for notice to be given to persons affected by it. In addition, the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002 require a copy of an application for a detention order and notification of the hearing of the application to be given by the applicant to "the person from whom the cash was seized" (rule 4). The CoLP rightly understood this rule as requiring them to notify the payees of the cheques and not merely ADM as the drawer. Furthermore, the CoLP did give some notice of the application to the claimants on 9 May 2016 and presumably it was always their intention to do so. In circumstances where the claimants were going to be notified of the application for orders to detain the cash, there was no rational basis for believing that the police investigation would be prejudiced by giving notice to the claimants of the immediately prior application for production orders.

80. We therefore consider that the reason given in the application for production orders for asking the court to decide the application in the absence of the claimants was untenable and that there was no proper basis for making the application without notice to the claimants.

Non-disclosure :

81. When an application for an order is made without giving notice to a person whose rights will be affected by the order, it is a firmly established principle, and an important one, that the applicant must make full, fair and accurate disclosure of material facts to the court: see e.g. *R v Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 KB 486; *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, 1356. This duty has been described as a "high duty": *Memory Corporation Plc v Sidhu (No 2)* [1990] 1 WLR 1443, 1459-1460. Facts are material for this purpose if they reasonably could or would be taken into account by the judge in deciding whether to grant the application: *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, 437. Such facts therefore include any matter which might reasonably be considered capable of undermining the application.

82. This duty of disclosure applies in criminal as much as in civil proceedings. As Hughes LJ (as he then was) said in *In re Stanford International Bank Ltd* [2010] EWCA Civ 137; [2011] Ch 33 at para 191, in the context of an application for a restraint order made without notice:

> "… it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in the duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. … The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what, if he were representing the defendant or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge."

See also *R (Rawlinson & Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin); [2013] 1 WLR 1634, 1654, paras 81-82; *R (Golfrate Property Management Ltd) v The Crown Court at Southwark* [2014] EWHC 840 (Admin); [2014] 2 Cr App R 12, paras 22-24.

83. The duty of disclosure is reflected in the form which was used to make the application for production orders in this case, which contained the question:

> "Is there anything of which you are aware that might reasonably be considered capable of undermining any of the grounds of this application, or which, some other reason might affect the court's decision?"

The answer given to that question was "no".

84. The application was listed with a time estimate of 10 minutes to read the application and 20 minutes for any hearing. In the event, the hearing on 6 May 2016 lasted for 11 minutes. When it began, the following exchange took place:

> "THE JUDGE: Does [the application] disclose all the information that is material to the decision I have to make including anything that might reasonably be considered capable of undermining any of the grounds of the application?
> A: Yes, my Lord."

85. The claimants have made numerous complaints of what they say was failure on the part of the CoLP to comply with its duty of disclosure. Some of these complaints are more substantial than others. We think it sufficient to refer to three matters of real materiality which in our view plainly should have been, but were not, disclosed to the judge who heard the application.

86. First, we have already expressed our opinion there was no proper basis for the suggestion that it was necessary for the court to hear the application in the absence of the account holders because, if they became aware that the police were investigating their accounts, "they will take action to conceal their activity, alter or destroy

evidence and dissipate proceeds of crime". The misleading impression given by that statement was compounded at the oral hearing, at which the judge was told:

> "…the funds we are hoping to seize and detain are held like a bank and they are able to move funds across continents very quickly as part of the trading that goes on."

It ought to have been made clear to the judge that there was no imminent risk of any funds being moved, across continents or at all, as the accounts were frozen and ADM had made it plain that they would not release any funds to their clients in the absence of consent from the CoLP.

87. Second, it is apparent that the suspicions of the CoLP that the four companies under investigation had committed a money laundering offence were largely based on the ICE report referred to at paragraph 7 above. However, the ICE report was not itself provided to the judge. Instead, a description was given in the application of what the ICE was said to have reported. This description was not fair and accurate in several material respects. In particular:

    i) The impression was given that the trading activity described in the application had only just come to light and the judge was not told that the ICE report (which was dated 18 May 2015) was over eight months old at the time of the application.

    ii) The judge was not told that the ICE report contained significant qualifications, including statements that the concerns of the ICE were "largely circumstantial" and that innocent explanations for the patterns of trading observed were "quite possible".

    iii) The judge was told incorrectly that the suspicious trading activity reported by the ICE included activity between the other three companies and TICOM and was also incorrectly told that TICOM received commission from Bunnvale trades.

    iv) The application contained various gratuitous references to allegations of theft and breaches of international sanctions by Russian nationals which appear to have had nothing to do with the suspicions raised by the ICE.

88. Third, although the judge was told that ADM was cooperating with the investigation and would provide access to the material sought (including cheques in the amounts of the outstanding balances in the companies' accounts) if served with a production order, the judge was not told that the cheques had been created by ADM at the request of the CoLP without their clients' knowledge. Nor was it explained that the CoLP had asked for cheques to be created in order to invoke the favourable summary process for civil recovery provided for in Chapter 3 of Part 5 of POCA, when those provisions could not otherwise have been relied on.

89. We consider that, taken together, these misrepresentations and omissions amounted to a serious breach of the duty of disclosure. This breach would, in our view, have justified quashing the production orders, even if (contrary to our earlier conclusions) they had been orders which the judge had power to make.

The application for a detention order :

90. The failure to follow proper procedures did not end when the production orders had been obtained. The production orders were made just after 10.30am on Friday, 6 May 2016. At 2.40pm the orders were served on ADM at the offices of their solicitors, who handed over the cheques and other material specified in the orders to the CoLP. Copies of the orders were not at that stage sent, however, to the companies to whom the cheques were payable. Even if there had been a good reason to believe that the police investigation would be prejudiced if the companies had been given notice of the application for production orders – which we have made it clear that there was not – no such reason could be said any longer to exist after the orders had been made and executed. Nor was any step taken on 6 May 2016 to inform the claimants that cheques payable to them had been seized and that the CoLP intended to apply within the next two working days to a magistrates' court for an order for detention of the cheques.

91. We have referred at paragraph 16 above to a conversation which took place on 6 May 2016 between Bunnvale's solicitor and DI Mullish, in which DI Mullish refused to provide any information about what had happened to the funds in Bunnvale's account with ADM, saying only that "all would be revealed" on the following Monday. In hindsight that comment appears to show that a deliberate decision had been taken to wait until Monday, 9 May 2016 before giving notice of the application for a detention order. As described earlier (at paragraph 17), emails were sent to the claimants on Monday, 9 May 2016 attaching the application.

92. There was no basis for believing, and it has not been suggested that there was any belief, that the police investigation would or could have been prejudiced in any way if the claimants had been notified on the afternoon of Friday, 6 May 2016 of the production orders, the seizure of the cheques and the intention to apply to a magistrates' court for an order under section 295 of POCA. In these circumstances we can see no legitimate reason for not giving notice of these matters to the claimants until after the weekend.

93. As described earlier, despite the short notice, Bunnvale and TICOM attempted to appear by solicitors and counsel in Hammersmith Magistrates' Court on 10 May 2016 to oppose the application for a detention order, but the application was heard in a different court from the court in which the application was listed. There is no suggestion that this was deliberate and it appears that DC Dainty, who again presented the application on behalf of the CoLP, was unaware that representatives of any of the respondents planned to attend the hearing and were present in the court building. In circumstances, however, where the application was made on very short notice in the absence of the respondents, the CoLP again owed a duty to make a full, fair and accurate presentation to the court. The written application made to the magistrates' court was in similar terms to the earlier application for production orders, save that it also referred to the making of those orders and to the seizure of the cheques produced by ADM. The application therefore contained the same material errors and omissions as the application for production orders had done. There is no evidence or indication that any of the deficiencies in the written application were corrected by anything said at the oral hearing.

94. In correspondence after the order for the detention of the cheques was made, the CoLP provided answers to certain questions on which clarification was sought by the solicitors acting for Bunnvale and TICOM, but refused to disclose a copy of the production orders made in relation to those companies. The reason given in a letter from the CoLP dated 13 May 2016 for refusing the request was that "there is no obligation under the Criminal Procedure and Investigations Act to disclose unused material, including the Production Order referred to in your letter, unless directed by the court". The references to "unused material" and to the Criminal Procedure and Investigations Act 1996 were wholly inappropriate and do not survive scrutiny. First, the request was made in the context of civil proceedings, not a criminal prosecution. In any event, the production orders were not material gathered or generated in the course of an investigation which the CoLP did not intend to use: they were court orders affecting the claimants' interests which the CoLP had obtained on an application made without notice to the claimants and were the means by which the CoLP had got hold of the cash which they had then sought authority from the magistrates' court to detain. At the hearing before us Mr Bird accepted that he could not defend the refusal to disclose the production orders in response to the request made. He was right not to attempt to do so. There was no possible justification for it.

Subsequent proceedings in the magistrates' court :

95. The solicitors representing Bunnvale and TICOM attempted to arrange a hearing before the district judge who had made the detention order to consider whether the order was lawfully made. The court indicated in correspondence that the case could not be re-opened, but that an application could be made under section 297 of POCA. Such an application was made and was dismissed (see paragraph 18 above).

96. We think that District Judge Ezzat was right to hold that section 297 does not provide a basis for challenging the validity of an order for cash to be detained under section 295 of POCA. The jurisdiction of the magistrates' court under section 297 is limited to considering whether "the conditions in section 295 for the detention of the cash are <u>no longer</u> met in relation to the cash to be released" (our emphasis). These words indicate that the specified conditions are not met at the time when the application under section 297 is decided and does not extend to reviewing whether the order made under section 295 was lawful. With respect, it seems to us that (contrary to the view expressed by the court) an application could have been made to set aside the detention order made on 10 May 2016 on the ground that there was no power under section 295 to order the detention of the cheques. A court has an inherent power to set aside an order made in the absence of a party affected by the order. In view of the fact that Bunnvale and TICOM had been given inadequate notice of the hearing and that it had taken place in their absence through no fault of theirs, we think that the court had power to entertain and ought to have entertained such an application.

97. These procedural issues, however, have been overtaken by events. Although the first order made on 10 May 2016 to authorise the continued detention of the cheques was made without the claimants having had a proper opportunity to be heard, this criticism does not apply to the subsequent orders dated 8 November 2016 and 6 February 2017 which extended the period of detention. The claimants had the opportunity to oppose the making of those orders. However, they chose not to do so and, in the case of Bunnvale and TICOM, they agreed to the period being extended while evidence was served and preparations made for a contested hearing, which is listed for 12 April

2017. It cannot in these circumstances be said that the present position is affected by any procedural irregularity.

(vi) What relief, if any, should be granted?

98. We have concluded that the production orders made on 6 May 2016 which required ADM to produce to CoLP cheques which they had drawn in favour of the claimants at the CoLP's request were made unlawfully because:

    i) production of the cheques was not sought for the purposes of the money laundering investigation on which the application was said to be based or because there were any grounds for believing that the cheques were likely to be of any value to such an investigation, but for the purpose of seizing and detaining the cheques under Chapter 3 of Part 5 of POCA;

    ii) the planned seizure of cheques which had been created for the very purpose of seizing and detaining them as cash under Chapter 3 of Part 5 was in any case unlawful; and

    iii) the production orders were obtained through an improper procedure in (a) making the application without notice to the claimants and (b) misleading the court.

99. In the light of these conclusions, the production orders should be quashed. This will not itself have any practical consequence, however, as the production orders have already been complied with.

100. We have also held that in the circumstances of this case section 294 of POCA could not lawfully be used to seize the cheques made payable to the claimants which were specified in the production orders. We think it right to make a declaration to record this conclusion.

101. We have further held that the orders made by the magistrates' court under section 295 of POCA authorising the continued detention of the cash represented by the cheques were unlawfully made because (a) the cheques had not been lawfully seized under section 294 and (b) section 295 cannot lawfully be used to authorise the detention of cash which has been created at the instigation of a law enforcement agency so that it can be the subject of summary proceedings under Chapter 3 of Part 5 of POCA. The consequence of this conclusion is that the detention orders should also be quashed. It cannot be said that the opportunity to oppose the continued detention of the cash under section 295 at the forthcoming hearing in the magistrates' court fixed for 12 April 2017 provides an adequate alternative remedy or any reason not to exercise the discretion to make a quashing order in circumstances where we have held that the provisions of Chapter 3 of Part 5 cannot lawfully be used in this case. If the CoLP wish to pursue civil recovery proceedings in relation to the claimants' funds, such proceedings must be brought in the High Court under the general provisions of Part 5. The hearing listed for 12 April 2017 should therefore be vacated.

102. The effect of quashing the detention orders would be to require the CoLP to release the claimants' funds. However, before quashing the detention orders, we think it right to give the CoLP the opportunity to decide whether to bring civil recovery

proceedings in the High Court in relation to any of the money which they currently hold and, if so, whether to apply to the court for a property freezing order in connection with such proceedings; and whether, in addition or in the alternative, to apply for a restraint order in the Crown Court in connection with the money laundering investigation. We will in these circumstances grant a stay of our order for a short period (the period to be agreed by the parties, alternatively canvassed with the Court in writing by way of *short* submissions). If within this period an application is made for a property freezing order or a restraint order, the stay will continue until that application has been determined. We will also direct that any such application should be heard by a High Court judge who, as well as having experience of criminal law, is authorised to act as a judge of the Commercial Court.