



Neutral Citation Number: [2022] EWCA Crim 1113

Case No: 202200816 B3, 202202247 B3, 202202248 B3, 202202249 BC, 202202250 B3,
202202252 B3, 202201866 B4, 202201868 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRADFORD

His Honour Judge Burn

ON APPEAL FROM THE CROWN COURT AT SNARES BROOK

His Honour Judge Southern

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2022

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE JEREMY BAKER

and

MRS JUSTICE CUTTS

Between:

THE QUEEN (CITY OF YORK COUNCIL)

Applicant

- and -

(1) AUH

(2) BIM

(3) AQE

(4) BNZ

(5) ABU

(6) BPC

Respondents

THE QUEEN (BIRMINGHAM CITY COUNCIL)

Respondent

-and-

(7) BIY

(8) ARA

Applicants

-and-

**THE SECRETARY OF STATE FOR BUSINESS,
ENERGY AND INDUSTRIAL STRATEGY**

Intervener

Jonathan Kirk QC, Cameron Crowe and Sabrina Goodchild appeared on behalf of **The City of York Council**
Anthony Barraclough and Paul Wood (instructed by **Keith Dyson Solicitors**) for the **First Respondent**

Nina Grahame QC and Charlotte Atherton (instructed by **Keith Dyson Solicitors**) for the **Second Respondent**
Richard Kovalevsky QC and Charlotte Ritchie (instructed by **Precedence Law and Cohen & Gresser LLP**) for the **Third Respondent**
Peter Killen (instructed by **Mark Jones & Partners**) for the **Fourth Respondent**
Charles Miskin QC (instructed by **JMW Solicitors**) for the **Fifth Respondent**
Lucy Wright (instructed by **Olliers Solicitors**) for the **Sixth Respondent**

Richard Barraclough QC and Joseph Millington appeared on behalf of **Birmingham City Council**

Sallie Bennett-Jenkins QC and Daniel Chadwick (instructed by **Edward Fail, Bradshaw & Waterson**) for the **Seventh Respondent**

Lewis MacDonald (instructed by **Edward Fail, Bradshaw & Waterson**) for the **Eighth Respondent**

Duncan Penny QC and Jonathan Lewis appeared on behalf of **the Intervener**

Hearing date: **20 July 2022**

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10am on 9 August 2022.

Lord Burnett of Maldon CJ:

1. These two appeals against rulings in separate preparatory hearings have been listed together because they raise a common issue. Does paragraph 46(1) of schedule 5 to the Consumer Rights Act 2015 (“the 2015 Act”) confer power upon a local authority to prosecute consumer offences irrespective of a connection with the area? Alternatively, is that power governed by section 222(1) of the Local Government Act 1972 (“the 1972 Act”) (a general power to prosecute and defend criminal and civil proceedings) which enables them to do so only when they consider it expedient for the promotion or protection of the interests of the inhabitants of their area?
2. The two trial judges reached conflicting decisions on this issue. We state our conclusion immediately. We are satisfied that paragraph 46 of schedule 5 to the 2015 Act confers a free-standing power to prosecute, unconstrained by section 222 of the 1972 Act. Each of the appeals before us raises additional matters, some of which may remain live following our resolution of the principal issue. We have invited the parties to identify those matters and will give directions for the further determination of the appeals.
3. In both cases the judge granted permission to appeal pursuant to section 35(1) of the Criminal Procedure and Investigations Act 1996. Accordingly, no written report of either the preparatory hearings or these proceedings shall be published until the conclusion of the trial of the accused. We will consider in the light of written submissions whether this judgment, in whole or redacted, can be published.
4. Both cases arise from alleged criminality which is said to comprise consumer offences under paragraph 46(2) of Schedule 5 to the 2015 Act, which the two Local Authorities, as local weights and measures authorities, have a duty or power to enforce within their areas, as domestic enforcers within the meaning of paragraph 3(1)(b) of Schedule 5 to that Act.

The York Case

5. *R (The City of York Council) v AUH and others* (“the York case”) involves fourteen accused who are alleged to have conspired to defraud individuals by operating a bogus model agency. Individuals from across England, many of whom were teenagers, were invited through advertising on social media and the like to send in photographs of themselves. The accused suggested to the individuals that they had been specially selected to attend a free test shoot. When the individuals attended the test shoots, it is alleged that they were subjected to high pressure sales techniques to persuade them to pay for digital photographs for their portfolio, which was a prerequisite to joining the model agency and their becoming professional models. The photographs were said to be of poor quality.
6. Part of the alleged offending, known as “Operation Airfix”, had been the subject of an investigation commenced in 2015 by the South-West Regional Investigation Team, a regional section of the National Trading Standards Board. It was “hosted” by Bristol City Council. A subsequent investigation into other parts of the alleged offending, known as “Operation Gilbert”, was commenced by City of York Council. It was funded by the National Trading Standards Board. In due course City of York Council took over the earlier investigation and on 13 December 2019 a decision was taken to prosecute the various accused.

7. On 5 May 2020, an instrument of delegation of functions was executed between Bristol City Council and City of York Council, pursuant to section 101(1)(b) of the 1972 Act, whereby Bristol City Council delegated its powers, including those under section 222(1) of the 1972 Act and paragraph 46 of Schedule 5 to the 2015 Act to investigate and prosecute Operation Airfix. In July 2020, City of York Council commenced proceedings against the various accused in the York Magistrates' Court. They were sent for hearing at Bradford Crown Court.
8. The trial judge (HHJ Burn) conducted a preparatory hearing over a period of two and a half weeks. He handed down judgment on 4 March 2022. He ordered a stay of the proceedings as an abuse of the process. He concluded that City of York Council had no power to commence the proceedings against the accused because, regardless of paragraph 46(1) of Schedule 5 to the 2015 Act, its power to prosecute was governed by section 222(1) of the 1972 Act, and the prosecution did not satisfy the expediency test.

The Birmingham Case

9. *R (Birmingham City Council) v BIY and another* ("the Birmingham case") involves an allegation of illegal money lending. Neither accused initially held a licence from the Office of Fair Trading to operate a consumer credit business, nor did they latterly have authorisation by the Financial Conduct Authority to engage in money lending.
10. The investigation was undertaken by the Illegal Money Lending Team operated by Birmingham City Council which is funded by central Government. It found unexplained cash deposits in the accused's bank accounts from 2013 onwards to the value of £260,000. In addition, there was cash and other documentary material which is said to show loans to 23 individuals between 2016 and 2019, totalling £147,000.
11. Birmingham City Council decided to prosecute the accused in respect of this alleged offending. In due course they appeared at Snaresbrook Crown Court on an indictment alleging offences including unlawfully engaging in the activities of a consumer credit business without a licence, contrary to section 39(1) of the Consumer Credit Act 1974 and unlawfully engaging in the activities of a regulated activity, namely money lending, when not authorised or exempt, contrary to section 23(1) of the Financial Services and Markets Act 2000.
12. The trial judge (HHJ Southern) conducted a preparatory hearing. He handed down judgment on 9 June 2022. He dismissed an application to stay the proceedings as an abuse of the process. He concluded that although the expediency test under section 222(1) of the 1972 Act had not been met, Birmingham City Council nevertheless had power to prosecute the accused for these offences pursuant to paragraph 46(1) of Schedule 5 to the 2015 Act.

Statutory provisions

13. Parliament granted local authorities a general power to prosecute or defend legal proceedings by section 222(1) of the 1972 Act. It provides:

“(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 any enactment.”

14. Since then, Parliament has granted local authorities specific powers to investigate, prosecute and/or bring proceedings for various offences including those under the General Product Safety Regulations 2005, the Animal Welfare Act 2006, the Prevention of Social Housing Fraud Act 2013 and, in the present cases, the Consumer Rights Act 2015. Paragraph 46(1) of Schedule 5 of the 2015 Act provides:

“A local weights and measures authority in England or Wales may bring proceedings for a consumer offence allegedly committed in a part of England or Wales which is outside that authority’s area.”

15. Paragraph 45 provides a parallel power for such authorities to bring civil proceedings. Schedule 5, in general, is concerned with the investigation and enforcement of consumer law by a range of enforcers, including “domestic enforcers”, of which local weights and measures authorities are but one. It is common ground that the two councils are local weights and measures authorities.

Competing submissions

16. Mr Kirk QC for City of York submits that paragraph 46(1) of Schedule 5 provides a free-standing power to the local authorities to bring proceedings for consumer offences committed in England or Wales outside their respective areas, regardless of whether the expediency test is fulfilled, as it does not apply to such cases. That is the effect of the clear language.
17. Mr Barraclough QC for Birmingham City Council adds that in April 2012, the Government established the National Trading Standards Board, with responsibility for prioritising national and cross-local authority boundary enforcement in England and Wales. That reflected the nature of increasingly sophisticated consumer offending. The Illegal Money Lending Team is based in Birmingham but it has a national remit and is funded by central Government rather than the local authority. There is no burden on the local inhabitants as payers of council tax.
18. Duncan Penny QC and Jonathan Lewis provided written submissions on behalf of the intervener, the Secretary of State for Business, Energy and Industrial Strategy, supporting the submissions made on behalf of the two local authorities.
19. Collectively, they refer to the background to the introduction of the 2015 Act. In 2011 the National Audit Office published a report entitled, “*Comptroller and Auditor General, Protecting Consumers – the system for enforcing consumer law, Session 2010 – 2012, HC 1087, National Audit Office, June 2011*”. It explained that while offences may occur solely within one local authority’s area, they often occur across boundaries

involving many or all local authority areas. Improvements to enforcement arising out of this problem were required.

20. Thereafter, the Department for Business, Innovation and Skills embarked on a process of consultation. It published a consultation document: *“Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement”*. A further consultation document followed: *“Enhancing consumer confidence through effective enforcement: Consultation on consolidating and modernising consumer law enforcement powers”*. The ministerial foreword included:

“Government also needs to tear down the bureaucratic barriers that prevent enforcers from operating efficiently across local authority boundaries, so that Trading Standards can be organised regionally and nationally as well as locally.”
21. Chapter 3 noted that although some local authorities had sought to rely upon section 222(1) of the 1972 Act in order to carry out cross-boundary prosecutions, there had been judicial decisions which determined that express authorisation was required and that this was bureaucratic and costly.
22. In March 2012, the Department published the results of its impact assessments in respect to changes in consumer law: *“Enhancing consumer confidence – Improving cross-border cooperation and authorisation”*. The Government indicated that its preferred option was, “to amend legislation to remove restrictions on local authorities to enforce or take legal proceedings in other local authorities.”
23. In the successive impact statements the Government had made two different proposals to achieve its end. In June 2013 it had stated that “Government has decided to achieve this by removing the restriction provided by [s222(1) of the 1972 Act], whereby proceedings can only be taken where such action is for the promotion or protection of the interests of the inhabitants of their area”. In the final impact assessment in January 2014, it said that “Government has decided to achieve this by clarifying the law to enable Trading Standards to enforce or take proceedings outside their local authority boundaries.”
24. In the light of this material, the councils submit that the pre-legislative history demonstrates that the intention in introducing this part of the 2015 Act was to free the prosecution of consumer offences from the constraints of requiring those responsible to satisfy the requirement of local expediency. Paragraph 46 achieved that.
25. Miss Grahame QC submits on behalf of BIM that the 1972 Act is of fundamental importance to the regulation of the affairs of local authorities. Without express amendment by subsequent legislation section 222 governs the ability of local authorities to engage in legal proceedings. The language of paragraph 46 does not achieve what she accepts was the clear intention set out in the pre-legislative materials, to some of which we have referred. Paragraph 46 remains subject to section 222 of the 1972 Act. That is true, she submits of other apparently free-standing powers to prosecute.

26. Miss Grahame submits, there being no such express amendment contained in the 2015 Act, one cannot be implied. In response to the submission on behalf of the councils that the interpretation contended for by the alleged offenders renders paragraph 46 otiose, she submits that its purpose was limited to removing the bureaucracy which was involved in entering into section 101 delegation agreements and memoranda of understanding between local authorities. Miss Grahame submits that if the Government's intention was to go further and dispense with the need to satisfy the expediency test this could have been achieved by the insertion of the words, "Notwithstanding section 222(1) of the 1972 Act....", immediately before the words, "A local weights and measures authority" in paragraph 46(1) of Schedule 5.
27. Mr Kovalevsky QC on behalf of AQE, adopts those submissions and points out that as paragraph 46(1) of Schedule 5 only applies to consumer offences allegedly committed outside a local authority's area, those committed inside its area must still be governed by section 222 of the 1972 Act. He submits that it would be illogical for Parliament to have intended that the expediency test should apply to locally committed offences, whilst not being required for out of area offences.
28. Moreover, he submits that the wording of paragraph 46(1) of Schedule 5, and in particular the use of the words "may *bring* proceedings", is insufficient to permit a local authority to commence a prosecution, without recourse to section 222(1) of the 1972 Act. Mr Kovalevsky submits that to achieve the end contended for by the councils Parliament would need to have used the word "*prosecute*" rather than "*bring*".
29. Miss Bennett-Jenkins QC on behalf of BIY, again adopts these submissions and stresses the fundamental importance of section 222(1) as being the primary source of a local authority's power to commence a prosecution.

Discussion

30. The starting point is the wording of paragraph 46(1) of Schedule 5 to the 2015 Act. The words are clear. On their face they enable a local weights and measures authority to bring proceedings for a consumer offence committed in England and Wales which is outside its area, without reference to section 222(1) of the 1972 Act. The pre-legislative history reinforces that conclusion. There is, in our view, no proper basis for seeking to read in the constraint contended for by the alleged offenders in these cases. Section 222(1) of the 1972 Act provides a general power which enables local authorities to engage in civil and criminal proceedings, public inquiries and the like but cannot be interpreted as qualifying legislation which confers specific powers. Paragraph 46(1) of Schedule 5 to the 2015 Act is an example of such a power. We recognise the importance of section 222(1) in governing most legal proceedings in which local authorities become involved, but Parliament is free to legislate to provide power unfettered by the local expediency test. That is what it has done in the 2015 Act. Paragraph 46(1) of Schedule 5 relates to a specific power, as opposed to the general power provided by section 222(1).
31. The context in which the legislation was passed included a concern to dispense with the need for the local expediency test before a prosecution could be commenced, due to the nature and range of modern consumer offending. Systems were established to centralise investigation and funding to support the changes made by the 2015 Act. We consider

there is force in the submission advanced by the councils that paragraph 46 would have little discernible purpose if interpreted as the alleged offenders suggest.

32. The legislative technique adopted mirrors that found in the other prosecutorial powers drawn to our attention (which were not suggested by counsel to be a complete list). The Animal Welfare Act 2006 gives a useful illustration. Section 30 provides that “a local authority in England or Wales may prosecute proceedings for any offence under this Act.” That section was considered by the Divisional Court, albeit *obiter*, in *Lamont-Perkins v Royal Society for the Prevention of Cruelty to Animals* [2012] EWHC 1002 (Admin).
33. In his judgment, Wyn Williams J, with whom Sir John Thomas PQBD (as he then was) agreed, observed that,

“22. ... I accept that section 30 confers an express power upon local authorities to prosecute under the Act and, of course, a local authority is a creature of statute. It seems to me, however, that this express provision is included so as to avoid any suggestion that a local authority has power to prosecute under the 2006 Act only if the requirements of section 222 of the Local Government Act 1972 are satisfied. Section 222 of the 1972 Act empowers a local authority to prosecute only if it considers it expedient for the promotion or protection of the interests of inhabitants in its area. If section 30 of the 2006 Act did not exist there might be scope for considerable argument about whether a local authority could satisfy section 222 of the 1972 Act if it decided to prosecute in an animal welfare case. Section 30 removes the scope for such argument and in my judgment is included within the 2006 Act deliberately so as to remove the scope for such an argument.”

34. We respectfully agree. The same is true of paragraph 46.
35. We see nothing in the point concerning the use of the words “may *bring* proceedings”, as opposed to “*prosecute*”, in paragraph 46(1) of Schedule 5. Their meaning in the context of these cases is the same.
36. Moreover, we see nothing “illogical” arising from the fact that paragraph 46(1) of Schedule 5 is concerned only with proceedings for consumer offences allegedly committed outside the local authority’s area. A prosecution for offences committed within the authority’s area would almost inevitably satisfy the requirement of local expediency under section 222(1) if prosecution were, in any event, the proportionate response.

Conclusion

37. We are satisfied that the clear words of paragraph 46(1) of Schedule 5 to the 2015 Act empower a local weights and measures authority to prosecute for consumer offences allegedly committed in a part of England or Wales which is outside the authority’s area, without reference to section 222(1) of the 1972 Act.