



Neutral Citation Number: [2021] EWHC 2205 (Admin)

Case No: CO/1043/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 August 2021

Before :

MRS JUSTICE YIP

Between :

The Queen (on the application of Joseph Anderson)

Claimant

- and -

Liverpool City Council

Defendant

David Lock QC and Galina Ward (instructed by JMW Solicitors) for the Claimant
Louis Browne QC (instructed by Liverpool City Council Legal Department) for the Defendant

Hearing dates: 20 July 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 3rd August 2021.

Mrs Justice Yip :

1. This is a claim for Judicial Review against the refusal by Liverpool City Council to provide the claimant, Mr Anderson, with an indemnity in respect of legal costs incurred in relation to the defence of criminal allegations. The claimant claims that the Council misdirected itself as to its own legal powers and policy, wrongly concluding that it would be unlawful to provide the indemnity. The defendant Council maintains that it correctly interpreted its policy and correctly concluded that it did not lawfully permit the granting of an indemnity on the facts.

The background leading to the challenged decision(s)

2. The claimant was the elected Mayor of Liverpool from May 2012 until May 2021. He decided not to stand for re-election in view of the allegations which had been made against him, for which he remains under investigation although no charges have been brought.
3. On the morning of 4 December 2020, the claimant was arrested by Merseyside Police as part of a criminal investigation known as Operation Aloft. The claimant was informed that he was being arrested on suspicion of bribery and witness intimidation. Information shared by the police with the Council on 11 December 2020 described Operation Aloft as “an investigation into Misconduct in Public Office, Bribery, Fraud and Witness Intimidation.”
4. In or about 2016, Lancashire Constabulary were investigating activity at Lancashire County Council and Liverpool City Council (“Operation Sheridan”). The Claimant was invited to attend for interview voluntarily in connection with allegations of misconduct in a public office, which he did. He was interviewed over four days. He instructed Mr Evan Wright, a solicitor and partner of JMW Solicitors, who has provided a statement in these proceedings. Mr Wright attended the police interviews and subsequently prepared written representations as to why the Claimant should not face criminal charges. According to Mr Wright, a charging decision has not yet been made in Operation Sheridan.
5. The defendant Council granted an indemnity to the claimant for his legal defence fees in connection with Operation Sheridan. The indemnity covered the fees for Mr Wright’s attendance at the interviews and for the subsequent work. The City Solicitor, Jeanette McLoughlin, has confirmed in her statement that the indemnity in connection with Operation Sheridan remains in place.
6. By way of further background, Ms McLoughlin indicates that the claimant had earlier been provided with an indemnity against the costs associated with a claim for unfair dismissal against the governors of Chesterfield High School because the Council considered that his dismissal was directly linked to election as Mayor.
7. Following the claimant’s arrest on 4 December 2020, the Council was contacted for confirmation that a similar indemnity would be provided for the claimant’s legal fees in connection with Operation Aloft. Confirmation was provided that the claimant would be provided with an indemnity for the legal fees associated with his interview under caution, subject to a requirement to report back following the interview.

8. It appears from the evidence of Ms McLoughlin and Mr Wright that both parties were focused on the urgency of the situation. The Claimant had been arrested and the police were ready to interview him. Mr Wright prioritised attending the police station. Ms McLoughlin also recognised that there was limited time to make arrangements for the Claimant's interview and was prepared to grant an indemnity in respect of the fees which would be incurred immediately for Mr Wright's attendance.
9. Following the initial interviews on 4 December, the Council sought further information about the nature of the allegations to allow the Statutory Officers Group to consider the appropriateness of the indemnity continuing. A request for information sharing was made to Merseyside Police on 7 December. The Claimant cooperated by providing the necessary authority and information was provided by the police on 11 December.
10. The information set out details of two alleged offences:

“(i) Between 25th September 2015 – 30th August 2020 you requested / agreed to receive / accepted a financial or other advantage, intending that in consequence, a relevant function or activity, namely give favourable treatment to various companies and individuals and that your duties should be performed improperly.

“(ii) From 23rd July 2020 – 19th November 2020 you committed an act which harms and is intended to harm and you did so knowing or believing the person harmed or threatened has assisted into the investigation into an offence and you did so because of that knowledge or belief.”

It then set out a broad outline of areas of questioning under six headings, namely:

i) Matters relating to SSC

The Claimant's son David Anderson is a director of Safety Support Consultants Limited, a company who secured contracts on Council projects. The allegations appear to centre around preferential treatment for SSC and/or the facilitation of access for others, with potential rewards for the Claimant and/or his son through property transactions relating to the Claimant's home and caravans owned by him and his son.

ii) Matters relating to Thomas Mee

This appears to involve a specific allegation of seeking to have a construction company appointed to a Council project in return for payment through SSC.

iii) Matters relating to purchase of land for Tarmacadmy

The suggestion here was that the Claimant had committed the City to buying land at an overvalue, allowed a private company he was connected with to use the land rent free and authorised payments for connected works.

iv) Matters relating to Mark Norris / Election Campaign

This heading appears to relate to electoral impropriety and the non-disclosure of material connections of those involved in the Claimant's re-election campaign.

v) Matters relating to King Construction (other than Tarmacademy)

This heading concerns an allegation of expedited payments being made without proper checks.

vi) Matters relating to witness intimidation

The matters set out under this heading include seeking to discredit or cause financial loss to witnesses, specifically Tony Reeves, the Council's Chief Executive. They also include allegations that the Claimant obtained a disciplinary file, contrary to Council procedures, relating to Nick Kavanagh, a former Council officer, who had already been arrested as part of Operation Aloft.

11. It is fair to say that this document is hard to follow as a stand-alone explanation of the allegations faced by the Claimant. It would appear that some prior knowledge on the part of the reader is assumed. In his statement, Mr Wright sets out his belief that the information in the pre-interview disclosure provided to him had come from the City Council. Mr Wright broadly confirms that the two interviews conducted on 4 December 2020 covered the areas set out in the police disclosure. He provides some further detail and highlights a number of points made by the Claimant, including:
 - i) The scrutiny built into decision making by the Mayor;
 - ii) That a payment to the "Mayor's Fund" did not relate to him as elected Mayor but rather to the "Lord Mayor's Fund" which was completely separate;
 - iii) His denial of any inappropriate or unlawful behaviour in relation to contracts arranged with or through SSC;
 - iv) His denial of participation in any events said to relate to witness intimidation and his claim that officers were drawing inappropriate inferences from calls with innocent explanations;
 - v) His claim that he was entitled to have Mr Kavanagh's file in his capacity as elected Mayor.
12. Mr Wright also observes that at times the criminality alleged in relation to certain matters was unclear. Likewise, the relevance of the Claimant's connections with various individuals was not always apparent. Mr Wright suggests that analysis of the officers' questions reveal that they were exploring the possible existence of personal reward being gained from inappropriate use of the Claimant's public position.
13. On the same day as the police disclosure was provided to the Council, Mr Wright provided a written submission signed by the Claimant, setting out his request for continuation of the indemnity in respect of his legal costs. This included representations on the terms of the Council's policy, to which I shall return. Comparison was then made with Operation Sheridan with the Claimant asserting that

in both operations the police had misconstrued his “powers and ability to make decisions or influence outcomes without the constraints of statutory or administrative checks and balances.” The Claimant made it clear that he denied any wrongdoing and contended that criminality or misconduct could not be inferred from the matters set out in the police disclosure. This general point was then developed in specific comments made in relation to the matters set out by the police. As is acknowledged on both sides, his representations to the Council did not provide the time or the forum for a full response to the allegations against him. Rather, they were addressed to the issue of the indemnity.

14. The Claimant stated that he did not believe he had committed any crime. He contended that the relationships and politics involved were complex and submitted it was in the Council’s interests for his defence to be properly advanced, for which he believed he required proper funding of his legal costs. He indicated that he did not have access to other sources of funding for his legal costs. Confirmation of this last point was requested by Ms McLoughlin on 17 December 2020, which request was responded to affirmatively on the same date.
15. By email dated 23 December 2020, Ms McLoughlin notified the Claimant through Mr Wright that the Statutory Officers Group had received external advice that it would be unlawful for the City Council to apply the indemnity to the legal fees incurred by the Claimant in dealing with the current allegations and that the Council would accordingly not apply the indemnity in these circumstances. Detailed reasons for that decision were provided in a letter dated 5 January 2021. In summary, the Council concluded that there was no power to grant the indemnity sought. It was contended that none of the acts alleged to have been committed were committed with the authority of the Council, at its request, with its approval or for its purposes. It was said that if the Claimant acted as alleged he could not reasonably have believed that he was acting within the scope of his powers/ duties or within the powers of the Council. Further, the matters alleged would, if proven, constitute criminal acts and/or intentional wrongdoing.
16. On 27 January 2021, Ms McLoughlin responded to a request for reconsideration of the decision. In explaining why an indemnity had been granted for Operation Sheridan but not Operation Aloft, she said the decision whether to grant an indemnity was ‘exquisitely fact sensitive’, noting that Operation Sheridan concerned allegations of misfeasance in public office in respect of which one of the key ingredients is the exercise of public power. The response stressed that the Council had not predetermined that the Claimant was guilty of any criminal offence but rather had properly interpreted “the relevant provisions of the Resolution against matters presently known and/or understood.”.

The claim for Judicial Review

17. By this claim for Judicial Review, the Claimant challenges the decision dated 23 December 2020 not to provide him with an indemnity and, insofar as it was a further decision, that contained in the letter dated 5 January 2021.
18. Ground 1 challenges the decision of the Statutory Officers Group as set out in the email dated 23 December 2020. Ground 2 challenges the decision as communicated in the letter dated 5 January 2021. Essentially, both grounds raise the single point that

the Council acted unlawfully in refusing to provide the Claimant with an indemnity against his legal defence costs in connection with Operation Aloft because it misdirected itself as to its power and the terms of its own policy. The Claimant's case is that the Council does have the power to grant an indemnity and that therefore the decision should be quashed and the Council should be required to reconsider the request for an indemnity on the basis of the proper construction of the policy.

The defendant's position

19. The Council's primary position is that it did not misunderstand and/or misdirect itself as to its policy and/or the power pursuant to which it was acting. It contends that, on a proper interpretation of the terms of the policy, its decision that it would not be lawful to grant an indemnity was correct on the facts. In the alternative, should the Court find any misdirection, the Council relies upon section 31(2A) of the Senior Courts Act 1981 and invites the Court to find that it is highly likely, given the facts, that the outcome would not have been materially different had such misdirection not occurred.

The Claimant's reply

20. In a somewhat surprising Reply, the Claimant asserted that the Council's stance in these proceedings was influenced by his present 'political toxicity' and represented a desire to shift a politically difficult decision away from itself and onto the court. The contents of the Reply frankly does not appear to accord with the respectful and considered approach otherwise evident in communications between the parties. There was no evidential basis for making what amount to the serious allegation that the Council's officers have acted disingenuously and/or with improper motives.
21. In her statement, Ms McLoughlin indicates that the decision was taken by the Statutory Officers Group, comprising the Chief Executive, the Director of Finance and Resources, the Assistant Director for Governance Audit and Risk and herself. Further, she explains that the decision was taken only after seeking independent legal advice from external Counsel. (I note that no point was developed in these proceedings about any potential conflict of interest arising from the Chief Executive being part of the decision making body and also apparently the alleged victim of the allegations of witness intimidation.) Ms McLoughlin also makes the fair point that the Council provided an indemnity in relation to Operation Sheridan despite adverse publicity around the funding of the costs of the unfair dismissal claim.
22. The Claimant's skeleton argument did not expressly abandon the suggestion of improper motive but stated that the reasons for the defendant's decision were irrelevant. That is plainly right since the question for the Court is not why the decision was taken but whether it was lawful. In the circumstances, it is perhaps all the more surprising that this serious and unproved allegation was made. In my view, it should not have been. I accept Ms McLoughlin's evidence that she has acted in good faith in accordance with her statutory duty as the Council's Monitoring Officer and having sought independent legal advice. During the hearing, Mr Lock QC indicated that he also accepted what the City Solicitor had said in her formal witness statement, supported by a statement of truth.

The issues

23. The essential issue I need to determine then is whether the Council correctly directed itself when taking the decision that it would be unlawful to provide an indemnity for the Claimant's legal fees. That necessarily involves determining the true meaning of the policy.

The law

24. During the course of the hearing, the parties largely agreed the applicable legal principles, resulting in some narrowing of the issues.
25. Historically, the power for a local authority to grant an indemnity to its members and officers was provided by the Local Authorities (Indemnities for Members and Officers) Order 2004 ("the 2004 Order"). The 2004 Order was made pursuant to section 101 of the Local Government Act 2000. Following statutory amendments to the 2000 Act, the 2004 Order ceased to apply in England. The implementation of the Localism Act 2011 giving a general power of competence to local authorities means that a specific statutory power in relation to indemnities is no longer required. It is not in dispute that the power to grant an indemnity now derives from the general power of competence.
26. Where a council adopts a policy that has legal consequences. Provided that the policy represents a lawful exercise of the discretion vested in the authority (as to which there is no dispute here), the law will require that policy to be followed unless there are good reasons for not doing so. See *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546 at [29-31].
27. The proper interpretation of the policy is a matter for the court, to be judged objectively in accordance with the language used, read in its proper context: *Tesco Stores v Dundee City Council* [2012] UKSC 13. If a local authority misconstrues its own policy, it will be acting unlawfully. It will be for the court to determine whether there has in fact been a misunderstanding and whether any such misunderstanding may have led to a flawed decision (at [23] *ibid.*)
28. Mr Browne QC referred to *Smith v South Wales Switchgear Limited* [1978] 1 WLR 165 and *Persimmon Homes Limited v Ove Arup* [2017] EWCA Civ 373, seeking to draw an analogy with contract law as to the construction of terms of a contractual indemnity. However, he did not particularly press this point. I do not find those cases of assistance. It seems to me that the principles relating to the construction of a policy as set out in *Tesco Stores v Dundee CC* sufficiently cover this situation, noting as I do the need to construe the wording of the policy in its proper context.
29. In summary, there is no dispute that the Council had the power to grant an indemnity pursuant to the general power of competence. Having adopted a policy as to the circumstances in which an indemnity would be granted and the terms of such indemnity, that policy provided the framework for the decision as to whether the Claimant should be granted an indemnity in relation to his legal costs associated with Operation Aloft. In order to act lawfully, the Council had to understand the scope and terms of the policy and apply that to the facts when deciding whether to grant the indemnity sought.

30. During the hearing Mr Lock QC highlighted the conceptual distinction between a decision that a public body does not have power to make (lack of *vires*) and one which it does have power to make but where the authority has a policy which it has decided should guide its decision-making powers. Since it is agreed that the latter situation applied here, it would be wrong for the Council to say that it did not “have power” to grant an indemnity. This point has been developed in a “Post Hearing Note” provided by Mr Lock QC and Ms Ward. They contend that the Council misdirected itself that it had “no power” to grant the indemnity. It did that by making a number of errors of law as to the application of the 2004 Order; the meaning of the Order and the Policy and in mistaking *vires* and the outcome of an evaluative decision. They contend that the Claimant has challenged what was a *vires* decision. Had the Council taken an evaluative decision on the merits refusing the indemnity, they say that would have been subject to challenge on different grounds.
31. For the Council, Mr Browne QC acknowledges the conceptual distinction between a *vires* decision and a merits decision. He contends that it is clear from the correspondence that the Council understood the framework within which it was operating and took the decision having directed itself according to the terms of that policy. He denies that the Council’s position was ever that it did not have *vires* to grant an indemnity. Rather, the power was to be exercised according to the policy. The Claimant did not fall within the policy and in the absence of any good reason to depart from the policy, it would not have been lawful to grant an indemnity.

The Policy

32. The Council’s policy is contained in a Resolution dated May 2019 entitled “Liverpool City Council Indemnities for Members and Officers” (‘the Policy’). According to the statement of Ms McLoughlin, the provision for an officer or employee to be indemnified against legal costs was first adopted into the Council’s constitution in the Municipal year 2004-2005, probably shortly after the 2004 Order came into effect.
33. The introductory paragraph to the Policy states that it is intended to be “given in general terms so as to cover all circumstances envisaged by the Local Authorities (indemnities for Members and Officers) Order 2004.” The 2004 Order was permissive rather than mandatory in that it gave local authorities the power to provide indemnities for legal costs to members or officers in certain circumstances but did not compel them to do so. However, it is notable that, while the 2004 Order provided for the circumstances in which an indemnity “may be provided”, the Policy reflects a resolution that a member or officer will be granted an indemnity where covered by its terms.
34. Given what is set out in the introductory paragraph, both parties agree that it is appropriate to have regard to the terms of the 2004 Order, and the explanatory notes to it, in interpreting the terms of the Policy. The wording of the Resolution largely reflects the wording of the 2004 Order. However, for reasons which are not clear, the order of some of the provisions has been changed. To the extent that the drafting of the 2004 Order may not have been as clear as it might have been, the re-ordering of paragraphs in the Resolution has not improved the clarity.
35. The structure of the 2004 Order, so far as is relevant to this case, is as follows:

- i) Article 3 provides the power to grant indemnities.
 - ii) Article 5, headed “Cases in which an indemnity may be provided” defines the factual circumstances required for an indemnity to be provided, referred to by Mr Lock QC as “trigger facts”.
 - iii) Article 6 places restrictions on what an indemnity may be provided for. Article 6(1) prohibits the provision of an indemnity for any action or failure to act which constitutes a criminal offence, fraud or other deliberate wrongdoing or recklessness. However, Article 6(2) allows an indemnity to be provided for the defence of criminal proceedings, subject to the terms set out in Article 8.
 - iv) Article 7 is a saving provision which applies “notwithstanding any limitation on the powers of the authority” and deals with matters that exceed the power of the authority, member of officer. It allows for an indemnity to be provided where an individual is acting outside the powers of the authority or that individual but where the individual reasonably believed they were acting within relevant powers.
 - v) Article 8 deals with the terms of any indemnity. There is an important provision at sub-paragraph (3) that there must be a term in relation to any indemnity covering criminal proceedings requiring repayment in the event of conviction.
36. The first substantive provision in the Policy is at paragraph 2(2). That sub-paragraph begins by setting out that the Council will indemnify its employees and members against the costs claims and expenses set out in paragraph 3 of the Policy (equivalent to Article 5 of the Order), subject to the exceptions set out in paragraph 4 (equivalent to Article 6) and on the terms of paragraph 5 (equivalent to Article 8).
37. Where the Policy departs from the structure of the Order is that it introduces into paragraph 2 the provisions of Article 7 so that, instead of appearing as a saving provision towards the end, it appears at the start. However, the wording remains similar, beginning “Notwithstanding any limitation of the powers of the Council”. This means it has the same effect as Article 7. I accept the Claimant’s submission that the second part of paragraph 2(2) falls for consideration only where there would otherwise be a limitation on the grant of an indemnity. So far as material it reads:

“Notwithstanding any limitation on the powers of the Council, the indemnity is effective to the extent that the employee or member in question – (a) believed that the action, or failure to act, in question was within the powers of the Council ... and it was reasonable for [him] to hold that belief at the time ...

The indemnity is also effective in relation to any act or omission which is subsequently found to be beyond the powers of the employee or member in question but only to the extent that he or she reasonably believed that the act or omission in question was within his or her powers at the time at which he or she acted.”

38. Paragraph 3 (the “trigger facts” paragraph) provides:

“The costs claims and expenses are those which arise from, or in connection with, any action or failure to act by, the employee or member in question, which:

(a) is or has been authorised by the Council; or

(b) forms part of, or arises from, any powers conferred, or duties placed upon that employee or Member, as a consequence of any function being exercised by that employee or Member
...

(i) at the request of, or with the approval of the Council, or

(ii) for the purposes of the Council.”

39. Paragraph 4 provides:

“The exceptions are that:-

(a) No indemnity is given in relation to any action by, or failure to act by, any employee or [*member*]* which –

(i) constitutes a criminal offence; or

(ii) is the result of fraud, or other deliberate wrongdoing or recklessness on the part of that employee or Member

(b) Notwithstanding paragraph (4)(a)(i), the indemnity does relate to:

(i) (subject to paragraph 5) the defence of any criminal proceedings brought against the employee or Member; and

(ii) any civil liability arising as a consequence of any action or failure to act which also constitutes a criminal offence.”

During the hearing, it was accepted by Mr Lock QC that reading the paragraph as a whole, it is a proper inference that the word “member” has been accidentally omitted from paragraph 4(a), as marked *.

40. It was suggested on behalf of the Claimant that the proper structure for decision-making under the Policy is to start by asking whether the costs, claims or expenses for which an indemnity is sought fall within paragraph 3. If the answer is yes, an indemnity is to be granted unless one or more of the limitations in paragraph 4 apply and the notwithstanding provision in that paragraph does not apply. The second part of paragraph 2 is not a pre-condition for an indemnity but rather acts as an exception to a limitation that would otherwise be applied. On the facts of this case, it is suggested that this provision was not relevant.

41. Ultimately, Mr Browne QC accepted on behalf of the Council that it was appropriate to address the issues within that structure and that the first key question was whether the Claimant's situation fell within paragraph 3 of the Policy. He contended that the Council had considered that question by reference to the police disclosure and the Claimant's response and had concluded that he did not fall within paragraph 3. Therefore, the Council was correct to decide that it would be unlawful to grant an indemnity.

The Council's decision dated 23 December 2020

42. The email confirming the decision was brief, simply stating:

“The statutory officers group has now received the external advice which states that it would be unlawful for the City Council to apply the indemnity to legal fees incurred by Mayor Anderson in dealing with the allegations which he currently faces.

The City Council will not therefore apply the indemnity in these circumstances.”

The letter dated 5 January 2021

43. This letter was said to provide the reasons why the Council could not and would not agree to provide the Claimant with an indemnity in respect of any further defence costs arising from his arrest as part of Operation Aloft. It indicated that in reaching its decision the Council had paid full regard and given appropriate consideration to the Claimant's submissions. Having set out the background, the letter dealt with the provisions of the 2004 Order under the heading “The relevant statutory material”. It then dealt with the terms of the Council's Resolution having stated “This follows the 2004 Order in material respects.” It indicated that the Council was proceeding on the basis that what the Claimant had said about the absence of other means to fund his legal costs was correct. The letter then addressed what the Council said was the correct interpretation of its Resolution.
44. The Council stated that paragraph 2(2) of the Policy sets out the circumstances in which an indemnity may be provided. It then described paragraph 2(2)(a) as restricting the power “to cases in which the member or employee believed that the action, or failure to act, in question was within the powers of the Council ... and it was reasonable for that employee or member to hold that belief at the time when he acted or failed to act.” The Claimant contends this was a misunderstanding of the Policy in that it treated the provision as a pre-condition or limitation rather than an exception to a limitation. Paragraphs 16 to 18 contained correct directions as to the meaning of paragraphs 3 and 4 of the Policy.
45. Having identified that paragraph 4(b) of the Policy provided that the indemnity does relate to the defence of criminal proceedings, the letter went on at paragraph 19 to say that paragraph 4(b) will only apply “where the conditions in the preceding paragraphs are met”. Those conditions were said to be:

“(a) The member or employee reasonably believed at the time when he acted/failed to act that his action, or failure to act was within the powers of the Council [Paragraph 2(2)(a)]

and (b) The action or failure to act:

(i) is or has been authorised by the Council;

(ii) formed part of or arose from, any powers or duties placed upon that employee or member; or

(iii) was at the request of, or with the approval of the Council; or

(iv) was for the purposes of the Council. [Paragraph 3(a) and (b)]

and (c) does not constitute a criminal offence or, is the result of fraud, or other deliberate wrongdoing on the part of the employee or member.”

46. It was submitted on behalf of the Claimant that this paragraph does not represent a correct summary of the proper decision making process. It is contended that sub-paragraph (a) repeats the misdirection as to the nature of the second part of paragraph 2(2) of the Resolution. Sub-paragraph (c) operates to make it a condition of obtaining an indemnity for criminal proceedings that the allegations do not constitute a criminal offence. The Claimant contends that is circular and would render the “notwithstanding” provisions of sub-paragraph 4(b) of the Policy meaningless.
47. Having set out the Council’s interpretation of its policy, the letter then addressed the Claimant’s position, addressing each of the matters in paragraph 19. It concluded that if the Claimant acted as alleged by the police, it was inconceivable that he could have considered he was acting within the powers of the Council. Further, it pointed out that specific allegations relating to witness intimidation, the election campaign and the property transactions clearly and obviously fell outside the scope of the Claimant’s role as Mayor.
48. The letter then addressed the test at paragraph 3 of the Policy, referring to the matters already set out in relation to the question of whether the allegations formed part of the powers or duties placed upon him as a consequence of any function being exercised. It then stated that the Council did not and would not authorise the Claimant to act as alleged, nor were the acts carried out at the request or with the approval of the Council. Further, the acts would not be carried out for the lawful purposes of the Council.
49. The letter then dealt with paragraph 4 of the Policy, concluding that if what was alleged, namely bribery/ conspiracy to commit bribery and witness intimidation were proven against him, they would amount to criminal acts and the Claimant would have

engaged in intentional wrongdoing. Therefore, it was concluded that the Council was prohibited from granting an indemnity.

50. The Council's conclusions were summarised at the end of the letter as follows:

“33. For the reasons set out herein, the Council considers that it has no power to grant the indemnity sought. Further none of the acts alleged to have been committed by Mr Anderson were committed with the authority of the Council, at its request, with its approval of for its purposes.

34. Wholly without prejudice to paragraph 33, for the reasons set out at paragraphs 21-25 above if Mr Anderson acted as alleged he could not have reasonably believed that he was acting within the scope of his powers/duties or within the powers of the Council.

35. Further, the matters alleged would, if proven, constitute criminal acts and/or intentional wrongdoing.

36. For all these reasons, the Council will not grant Mr Anderson the indemnity sought.”

Reconsideration and letter dated 28 January 2021

51. Following a request for reconsideration, Ms McLoughlin responded in a letter dated 28 January 2021. That letter addressed a number of points that had been raised by Mr Wright on the Claimant's behalf. By way of conclusion, it repeated that, for the reasons explained in the letter of 5 January 2021, it contended that “none of the allegations concern what might reasonably be regarded as the exercise by JA of his day to day powers/duties as Mayor”. Therefore, the Council maintained its decision that it had “no power to grant the indemnity sought.”

The alleged misdirections

52. As a general point, the Claimant asserts that insofar as the Council relied on the 2004 Order as restricting its powers in any way, that would be an error of law. I can deal with this point shortly. The letter of 5 January 2021 refers to the 2004 Order as “relevant statutory material”. It is relevant, as these proceedings have demonstrated. Just as the letter referred to the Order, both sides have done so in their submissions. It is expressly referred to in the Resolution and is therefore relevant to the construction of the Policy. The Council did not assert that they were considering their power to grant an indemnity under the terms of the 2004 Order. Rather, having set out the relevant terms of the Order, they addressed the Resolution. It is clear from the structure of the letter of 5 January 2021 that they addressed the terms of the Policy when making their decision rather than the terms of the Order. In the circumstances, I do not consider that there was any material error of law arising out of the reference to the 2004 Order.

53. In relation to the Statutory Officers Group decision communicated on 23 December 2020, the Claimant contends that the decision was unlawful because it was taken on

the basis that the Council did not have the power to offer an indemnity and because it failed to follow a decision making process which complied with its policy.

54. The brief email of 23 December 2020 does not refer to having “no power”. Instead, it suggests that it would be “unlawful” to grant an indemnity. Mr Browne QC submits that can be read as being consistent with a decision that granting an indemnity would fall outside the Policy. While I recognise the point made by Mr Lock QC that the grant of an indemnity outside the Policy would not necessarily mean that the Council was acting unlawfully, I do not consider that argument sufficient to dispose of this claim. I agree with Mr Browne QC that the reasoning underpinning the decision has to be read as a whole. It is therefore necessary to look to the letter dated 5 January 2021 to consider whether there was any material misdirection as to the application of the Policy.
55. In his grounds, the Claimant identifies four alleged errors in that letter:
- i) Treating the grant of an indemnity as a matter of discretion rather than entitlement if the terms of the policy were met;
 - ii) Making decisions on the assumed basis that the unparticularised and largely unknown police allegations were true, when not entitled to approach its decision making in that way;
 - iii) Relying on the allegations as engaging the exception in relation to criminal conduct to refuse an indemnity, despite the policy providing that an indemnity would be available for the defence of criminal proceedings and, in doing so, assuming the Claimant was guilty of the criminal acts alleged;
 - iv) Failing to follow a decision making process which followed the Policy.

The purpose of the Policy

56. I agree with the submission on behalf of the Council that the purpose of the Policy is to protect members and employees from individual personal liability for costs, claims and expenses when they are engaged on Council business. I also agree that it does not create a freestanding right for any member or employee to be granted an indemnity in relation to the costs of any criminal investigation, subject only to the duty to repay in the event of conviction. I am unable to discern the intention contended for in the introduction to the Claimant’s skeleton argument that there should be a near equality of arms when a public servant is accused of criminal acts in connection with the discharge of his duties.
57. The 2004 Order expressly permitted local authorities to grant indemnities to their members and employees and set out the parameters within which such indemnities could be given. A central condition was that the power to grant an indemnity was restricted to cases in which the costs, claims or expenses arose from or in connection with the performance of Council functions. It also covered the situation where an individual inadvertently exceeded his powers and/or the powers of the Council. If acting in good faith (that is reasonably believing he was acting within the relevant powers), the indemnity could still apply.

58. Plainly, the criminal investigation of the Mayor for matters which had no connection to the mayoral role would fall outside the scope of what was intended, even if it was the case that the fact of being a public official led to greater scrutiny of that person's conduct.
59. While the 2004 Order was permissive rather than mandatory, the Council chose to adopt a policy which granted an entitlement to an indemnity to the full extent permitted under the Order. The 2019 Policy apparently maintained the position adopted in response to the 2004 Order. The wording of the Policy, and indeed of the underlying Order, is not as clear as it might be. The explanatory notes to the Order indicate that the intention is to restrict the power to grant indemnities to cases in which the employee or member is carrying on any function at the request of, with the approval of, or for the purposes of the authority. Where such a function is being performed, the indemnity will apply to costs, claims and expenses which "arise from, or in connection with" its performance. The scope is therefore fairly wide.
60. The "notwithstanding" provision in paragraph 2(2) of the Policy does not create an additional restriction for the grant of an indemnity. Rather it extends the availability of the indemnity to cover a Member or employee who inadvertently exceeds his powers and/or the powers of the Council. The combined effect of paragraph 2(2) and paragraph 3 is that a Member or employee will be protected from personal liability when acting within the scope of their official function or reasonably believing they are doing so.
61. Paragraph 4(a) of the Policy prevents an employee or member who has acted criminally from benefitting from the indemnity. It would be unlawful to indemnify an individual against his own proven criminal conduct. However, paragraph 4(b) does allow an individual who denies wrongdoing to claim an indemnity in respect of criminal proceedings, on the basis of a repayment clause in the event of conviction. That provides a mechanism for allegations of criminal wrongdoing to be determined before determining whether the individual is entitled to benefit from the indemnity. The repayment clause theoretically provides protection for the public purse if the individual is found to have committed a criminal offence, although full enforcement of the repayment provisions may not always be realistic.

The correct approach to making a decision under the policy

62. Drawing together the legal principles and the construction of the Policy, the correct approach to a request for an indemnity is as follows:
 - i) The Council may grant an indemnity to a member or employee (or former member or employee). The power to do so stems from the general power of competence pursuant to section 1 of the Localism Act 2011.
 - ii) Having adopted a policy for the circumstances in which an indemnity will be granted, the Council is required to follow it unless there are good reasons for not doing so.
 - iii) The Policy provides for the circumstances in which an indemnity will be provided rather than when one may be granted.

- iv) The first question to be addressed under the Policy is whether the costs, claims or expenses for which an indemnity is being sought fall within the terms of paragraph 3.
 - v) Paragraph 3 restricts the provision of an indemnity to cases in which the action, or failure to act, has been authorised by the Council or where the member or employee is carrying on any function at the request of, with the approval of, or for the purposes of, the Council.
 - vi) To come within paragraph 3(b), the costs for which indemnity is sought must arise from, or in connection with, any action or failure to act which forms part of, or arises from, powers conferred or duties placed upon the employee or member as a consequence of any function which has been requested or approved by the Council or is for the Council's purposes. Strictly, the qualifications set out at paragraph 3(a)(i) and (ii) apply to the function the member or employee is carrying out rather than his actions, although one will often go with the other.
 - vii) If the costs for which an indemnity is sought fall within paragraph 3, the indemnity should be granted unless one of the limitations at paragraph 4 apply, namely that the action or failure to act constitutes a criminal offence or is the result of fraud, other deliberate wrongdoing or recklessness.
 - viii) Notwithstanding the limitation identified at vii) above, the Policy provides that an indemnity will cover the defence of criminal proceedings. In such a case, the terms of the indemnity will require repayment in the event of a conviction which is not overturned on appeal.
 - ix) The indemnity will only cover actual loss or expense which is appropriately evidenced. It will not cover any loss or expense in respect of which the member or employee can obtain reimbursement from any other source such as an insurance policy.
 - x) If the action or failure to act falls outside the powers of the Council or of the member or employee, an indemnity will still be provided if the member or employee reasonably believed the action or failure to act was within the power of the Council or within his powers as the case may be.
63. It is now agreed that a sensible structure involves starting with paragraph 3 of the policy. However, that agreement evolved over the course of a day of legal argument in court with a focus upon narrowing and defining the issues for the court's determination. It is difficult to be critical of a decision-maker who addresses the paragraphs of a policy in the order in which they appear. It is also notable that the Claimant's submission in support of an indemnity (drafted by his solicitor) took the same course. There was a logic in doing that, albeit careful legal analysis and cross-referencing with the 2004 Order upon which it was based suggests a better way to approach the decision-making process. In some cases, it is important to ask the right questions in the right order so as to arrive at a correct decision. That is not always so. There will be other situations where as long as the relevant questions are answered, the order in which that is done is less important. Here, the order in which the issues were addressed was less critical than ensuring the right questions were asked.

64. What was important was for the Council to give sufficient focus to the core question of whether the case fell within paragraph 3 of the Policy. If it did not, no indemnity would be granted. If it did, the Council could then consider the exceptions under paragraph 4(a) and the position in relation to the costs of criminal proceedings under paragraph 4(b).
65. On the facts of this case, the “notwithstanding provision” in the second part of paragraph 2(2) does not appear to be relevant. It would be wrong to treat paragraph 2(2) as an additional restriction. However, if the Claimant comes within paragraph 3 the reality is that applying paragraph 2(2) would not create an additional hurdle. It only arises where someone is in fact acting beyond the scope of their powers but believes otherwise. That does not reflect the Claimant’s position. In a letter dated 12 January 2021, Mr Wright wrote:

“Joseph Anderson does not say that he acted in an unlawful manner as alleged thinking that it was in accordance with his powers and responsibilities. He says quite the opposite ...”

I do not consider it inconsistent in the way the Council suggests for him to assert that insofar as he may have done anything outside his powers, he reasonably believed he was acting within his powers at the time. However, he has not sought to argue within these proceedings that the circumstances provided for in paragraph 2(2) operate to disapply any limitation.

66. The relevant questions therefore were:
- i) Were the conditions in paragraph 3 met?
 - ii) Did a limitation under paragraph 4(a) apply, having regard also to paragraph 4(b)?

If the paragraph 3 conditions were met and a paragraph 4 limitation did not apply, the Claimant was entitled to an indemnity.

Analysis of the Council’s reasoning

67. Although it is right that paragraph 15 referred to the circumstances in which an indemnity “may be” provided rather than when one “will be” provided, the Council’s decision did not purport to have been made on a discretionary basis. Insofar as there was any error in treating the grant of an indemnity as a matter of discretion rather than entitlement once the conditions were made out, that did not affect the outcome. The conclusion was that the case did not fall within the circumstances provided for by the policy. The same result would flow from that conclusion whether treated as giving rise to a discretion or an entitlement. Equally, while I have concluded that it was unnecessary to address the ‘reasonable belief’ provisions of paragraph 2(2) as the Council did, that would not in itself be a material flaw because it did not in reality create an additional hurdle if paragraph 3 was satisfied.
68. I have set out above the terms of paragraph 19 of the letter in which the Council set out the conditions which they said were required for an indemnity in relation to the defence of criminal proceedings. In my judgment, paragraph 19 of the letter does not

reflect the careful, structured approach now agreed to represent the correct way of addressing the decision. However, what really matters is whether relevant questions under paragraph 3 were properly addressed.

69. The conditions of paragraph 3 were dealt with briefly at paragraphs 26-29 of the letter of 5 January 2021. In doing so, the Council referred back to the conclusions reached when addressing paragraph 2(2) on the question of whether the Claimant reasonably believed that he was acting within the powers of the Council. The reasoning in relation to paragraph 2(2) is conditional. It is said that if the Claimant acted as alleged, he could not conceivably have reasonably believed that he was acting within the powers of the Council. That is true and is not challenged by the Claimant.
70. It is plainly right that taking a bribe or engaging in witness intimidation could never fall within official functions. However, I consider that is to miss the point. The Claimant's case is that he has not taken a bribe or done anything motivated by a desire to intimidate a witness. His position, as communicated in his response to the allegations, is essentially that the police have misconstrued his actions and the scope of his powers and have wrongly linked unrelated personal matters (such as the transactions involving the Claimant's caravan and house) to actions which were done in the course of his duties as Mayor. It is not the personal property transactions which are said to fall within the Claimant's function as Mayor but his exercise of Council business. It is not therefore sufficient to say that those transactions did not fall within the scope of his duties as Mayor and are obviously purely personal. Indeed, that is exactly what the Claimant says.
71. Further, the reasoning in the letter does not engage with the wording of the first offence described in the police disclosure. That wording clearly appears to link the alleged financial advantage to actions performed in the course of the mayoral role. On that basis, the distinction which the Council seeks to draw between Operation Aloft and Operation Sheridan is not immediately obvious. I agree with the submission made by Mr Lock QC that it is the substance of the allegations that matters rather than the precise offence which is being investigated.
72. The Council has proceeded on the basis of the position if the allegations are true. However, those allegations have not yet been tested by way of criminal proceedings and the Claimant's defence is not addressed at all within the Council's reasoning.
73. Further, I consider that the Council's reasoning at paragraphs 31 and 32 of the letter of 5 January 2021 was flawed. Reliance was placed upon the fact that the allegations were of criminal acts as a reason why the Council was "prohibited from granting an indemnity". This fails to address the provisions of paragraph 4(b) of the policy in circumstances where the Claimant denied criminal wrongdoing. To approach the application of the Policy on the basis that if the Claimant had acted as alleged he was guilty of criminal conduct is to render the provision at paragraph 4(b) for the funding of criminal defence costs nugatory.
74. The Claimant acknowledges (Amended Statement of Facts and Grounds paragraph 35) that arguably the limitation under paragraph 4 may apply if the Council concluded that the Member had in fact committed the offence. However, in the reconsideration letter dated 27 January 2021, the Council expressly disavowed proceeding on the basis that any action by the Claimant constituted a criminal offence.

75. It follows that I consider that the Council did misdirect itself in a number of respects as set out above. The approach set out at paragraph 19 of the letter of 5 January 2021 was not correct. This led to a running together of a number of different issues rather than the structured approach that was required. In the circumstances, the Council did not clearly address the correct test under paragraph 3 of the policy. Further, it assumed that the limitation relating to criminal acts was engaged because criminal allegations were made. However, it did not then address paragraph 4(b) or consider the Claimant's position in relation to the allegations.

Outcome

76. Having found that there were material misdirections in the Council's reasoning as communicated in the letter of 5 January 2021, I turn to the parties' respective submissions as to the effect of such a finding.
77. The Council invites me to conclude that it is highly likely that the outcome would not have been substantially different in the event it had properly directed itself as to the terms of the Policy. Relying on section 31(2A) of the Senior Courts Act 1981, the Council therefore contends that I should refuse relief.
78. The Claimant maintains that the decision of 23 December 2020 and the reasons given on 5 January 2021 should be quashed and that there should be a mandatory order requiring the Council to reconsider the Claimant's request for an indemnity in accordance with the proper interpretation of the policy. The Claimant goes further and seeks a declaration that on the true construction of the Policy, the Council has power to grant an indemnity to the Claimant and further that he is entitled to an indemnity.

Conclusions

79. I find that the reasoning set out in the letter of 5 January 2021 demonstrates that the Council did misdirect itself as to the terms of the Policy.
80. It is plain that the Council had power to grant an indemnity. That is not now in dispute. The issue was whether the Claimant was entitled to an indemnity applying the Policy to the facts.
81. Leaving aside any other misdirection, the Council did not sufficiently grapple with the application of paragraph 3 of the Policy, particularly having regard to the wording for "offence 1" as supplied by the police and the Claimant's stated position that the police had misinterpreted his actions and wrongly linked personal transactions to activities which formed part of his function as Mayor. This is something that has still not been fully addressed.
82. In the circumstances, I am unable to say that it is highly likely that the outcome would not have been substantially different had the Council properly directed itself on the terms of the Policy.
83. Equally, I do not consider that, on the basis of the material before me, I can conclude that the Claimant is entitled to an indemnity.

84. It was apparent at the hearing that both parties had a greater understanding of matters relevant to what is alleged against the Claimant than appeared from the evidence filed in these proceedings. It may be that proper consideration of all relevant facts could still lead to the conclusion that the matters being investigated fall outside the scope of paragraph 3. An example was ventilated in the hearing, although it had not formed part of the Council's reasoning at the time of making the decision. In connection with the alleged witness intimidation, it is said to be relevant that the Claimant had a disciplinary file at home. He contends that this arose out of his function as Mayor. The Council pointed to evidence that he was not entitled to have the file. Its position was that whatever his motives for doing so this could not be linked to any power conferred or duty placed upon him as Mayor. Such an analysis may, in my view, properly lead to a conclusion that this allegation does not and could not fall within the scope of paragraph 3. Similar analysis of other actions which the Claimant contends have been misinterpreted by the police could potentially lead to a similar view being taken that those actions also fell outside the scope of paragraph 3. If that is the view taken, it needs to be fully explained as a decision on the Claimant's entitlement under the policy rather than on the basis of a lack of power to provide an indemnity. At this stage, I do not consider that the issues have been sufficiently ventilated before the court to allow for proper consideration of whether the conditions under paragraph 3 apply and/or whether there is any proper basis for applying the limitation under paragraph 4. Further, I can foresee that it may well be that the Council will wish to seek further information from the police and/or Claimant before making a determination.
85. It follows that I consider the appropriate course is to quash the decision of 23 December 2020 together with the reasons given on 5 January 2021. The Council should reconsider the Claimant's request for an indemnity applying the correct interpretation of the Policy as identified above, recognising that the Council has power to grant an indemnity, that the Policy provides an entitlement to one if its terms are satisfied and that the fact that criminal allegations are made is not determinative given the provisions at paragraph 4(b).

ORDER

UPON the trial of this matter.

AND UPON hearing leading and junior counsel for the Claimant (Mr David Lock QC and Ms Galina Ward) and leading counsel for the Defendant (Mr Louis Browne QC).

IT IS ORDERED:

1. The decision of the Defendant made on 23rd December 2020, as explained in reasons set out in a letter dated 5 January 2021, not to grant the Claimant an indemnity to meet the legal costs of investigations by the police under Operation Aloft is quashed.
2. The Defendant shall reconsider the Claimant's application for the said indemnity in accordance with the terms of its Resolution ("Policy").
3. The Defendant shall pay the Claimant's costs of this action, such costs to be assessed on the standard basis if not agreed.
4. The Defendant shall make an interim payment on account of £25,000 towards the liability under paragraph 3 hereof.
5. Any application by the Defendant for permission to appeal shall be made to the Judge in writing within 7 days of the date hereof, with any response from the Claimant within 3 days and shall then be determined by the Judge on paper.