Neutral Citation Number: [2017] EWHC 273 (QB)

Case No: HQ13X02927 AND HQ14X01020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2017

**Before** :

**MR JUSTICE MITTING**

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**Between :**

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|---|---|
| **JONATHAN REES** | **1st Claimant** |
| **GLENN VIAN** | **2nd Claimant** |
| **SIDNEY FILLERY** | **3rd Claimant** |
| **GARRY VIAN** | **4th Claimant** |
| **- and -** | |
| **COMMISSIONER OF POLICE FOR THE METROPOLIS** | **Defendant** |

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**MR NICHOLAS BOWEN QC**
(instructed by **FREEDMAN ALEXANDER SOLICITORS**)
for the **First, Second and Third Claimants**
**MR STEPHEN SIMBLET**
(instructed by **GN LAW**) for the **Fourth Claimant**
**MR JEREMY JOHNSON QC, MISS CHARLOTTE VENTHAM & MISS CATRIONA HODGE**
(instructed by **DIRECTORATE OF LEGAL SERVICES, METROPOLITAN POLICE**)
for the Defendant

Hearing dates: 17th January 2017 to 10 February 2017

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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## MR JUSTICE MITTING :

1. The four claimants claim damages against the Metropolitan Police Commissioner ("the Commissioner") for malicious prosecution and misfeasance in public office. On 30 November 2016 I ordered that the trial of liability be dealt with as a preliminary issue. This is my judgment on that issue. After the first mention by name of any individual (other than counsel) I will refer to him or her by surname alone, except in the cases of Glenn Vian, Garry Vian and Jimmy Cook, to whom I will refer by their full name, to avoid confusion. I intend no discourtesy. References to documents are to volume and page number of the trial bundle, save where additional documents were produced during the trial.

### The basic facts which gave rise to the police investigations

2. After dark on the evening of 10 March 1987 Daniel Morgan was killed in the rear car park of the Golden Lion Public House, Sydenham, SE26. He had been struck four or five times to the head with an axe. The final blow was almost certainly struck while he was on the ground and left the axe embedded in his face. The car park was not overlooked. No eyewitness of the killing has ever come forward.

3. Morgan was a married man of 37 with two children. He and the first claimant, William Jonathan Rees, were the only partners in Southern Investigations ("the partnership"). The principal business of the partnership was private investigation, bailiffs' work and private security. Its office premises were in Thornton Heath. It was profitable and its turnover was increasing, but it had two potential liabilities: an unmet tax debt, estimated by its accountant, William Newton, at £23,400 plus interest and penalties and a claim by one of its customers, Belmont Car Auctions Limited ("Belmont"), for £18,280.62 arising out of the theft on 18 March 1986 of takings entrusted to the partnership carried by Rees. On 5 March 1987 the partnership was given leave to defend Belmont's claim on condition that it paid £10,000 into Court within 21 days.

4. Rees was a 32 year old married man with three children. His wife was the sister of the second and fourth claimants, Glenn and Garry Vian. Morgan and Rees had each conducted an affair with Margaret Harrison, whom Rees subsequently married.

5. Glenn Vian was the 29 year old elder brother of Garry Vian, then 27. Both were married, Glenn Vian with three children. Both did occasional work for the partnership.

6. Sidney Fillery, the third claimant, was a 41 year old detective sergeant stationed at Catford. He and Rees knew each other well. He subsequently took over the management of Southern Investigations while Rees was imprisoned for an unrelated crime.

### Operation Morgan

7. Morgan's body was discovered at about 9.40 pm by Thomas Terry on 10 March 1987. The police were called, arrived at the scene at 9.52 pm and an investigation into the killing, led by Detective Superintendant Campbell commenced. Fillery was an

investigating officer until 16 March 1987. He obtained the first witness statement taken from Rees on 11 March 1987.

8. The focus of the investigation was on the consequences of the theft of the Belmont takings on 18 March 1986, on the movements of Rees and Fillery on 9 and 10 March 1987 and on Rees' telephone calls on the evening of 10 March 1987. The working hypothesis was that the motive for murder was connected to the theft, which was believed to have been a sham robbery of Rees carried out by two police officers working for the partnership part-time. There was evidence that Morgan believed that this is what had occurred and this, together with the need to raise £10,000 to satisfy the condition for leave to defend the Belmont claim, caused such ill-feeling between Morgan and Rees as to provide a motive for Rees to wish to have him killed. Fillery, together with the two police officers mentioned, had attended Belmont's premises and there was evidence, from Peter Newby, the partnership's office manager that Fillery had removed the Belmont office file during the investigation on 11 March 1987 and suppressed it. There were inconsistent explanations of Rees' movements and the persons to whom he had made telephone calls on the night of 10 March 1987 in particular about a 12 minute call which he said was made to him by his wife, but she denied making, at 9.04 pm. Both Glenn and Garry Vian were believed to have played some part in providing security for Belmont on behalf of the company and Glenn Vian had attended the hearing at the Royal Courts of Justice at which conditional leave to defend had been given.

9. On 3 and 4 April 1987 the four claimants and the two police officers were arrested on suspicion of murder and released on bail.

10. Thereafter, further evidence was obtained from the company's unqualified accountant Kevin Lennon, then on bail awaiting trial for serious offences of tax fraud. On 28 July 1987 a friend of Lennon, former Detective Chief Inspector Bucknole, covertly recorded claims by him that Rees had asked him to find someone to kill Morgan. When formally interviewed on 21 August 1987, after the covert recording of his conversation with Bucknole was played to him, he admitted that he had told Bucknole about what Rees had said to him. On 4 and 15 September 1987 Lennon made witness statements in which he said that Rees had said, at least a year before the killing, that he would like to kill Morgan and had on at least two occasions asked him to find someone to do so. In the second statement, he said that Rees had discussed the proposed murder of Morgan with Fillery in May 1986.

11. Campbell's eventual conclusion was that, although he suspected Rees of committing or commissioning the killing, there was insufficient evidence to bring criminal charges against him and none against Glenn or Garry Vian or the police officers, including Fillery. He reported in these terms to HM Coroner. No charges were laid against the claimants or the two police officers. All were released from their bail conditions.

12. At the inquest, Lennon repeated the allegations made in his witness statements and said that Rees hated Morgan and that, in his opinion, he was determined to kill him or to have him killed and to replace him as a business partner with Fillery. On 25 April 1988 the inquest jury delivered a verdict of unlawful killing.

## The Hampshire Police Inquiry

13. On 24 June 1988, Hampshire Police began to reinvestigate the killing and the Metropolitan Police investigation into it, at the request of the Police Complaints Authority.

14. The investigation focussed on Lennon's allegations and inconsistencies in the accounts of telephone calls and movements on 10 March 1987 of Rees, Paul Goodridge and his partner Jean Wisden. Goodridge was the uncle of Glenn Vian's wife, Kim. Rees suggested that he was a potential source of the £10,000 needed to fulfil the condition on which leave to defend Belmont's action had been given.

15. Lennon was interviewed by Hampshire officers on 1 September 1988. He did not impress them. It is not necessary to set out the reasons for their conclusion which was,

> "There is no doubt that the credibility of Lennon is diminishing and his truthfulness must now be in question." (2/1506).

16. Despite that, on 2 February 1989, Rees and Goodridge were charged with murder and Wisden with doing an act tending and intended to pervert the course of justice. The case was referred to the Director of Public Prosecutions and the advice of counsel, including leading counsel, sought. The upshot was that, on the application of the Crown on 11 May 1989, all three were discharged by Farham Justices.

## Operation Two Bridges

17. On a date which I do not know prior to 17 September 1998, Stephen Warner supplied one kilogram of cocaine to an undercover police officer. He asked him if he knew of anyone who would carry out a contract killing. He was introduced to another undercover officer, to whom he supplied a photograph of the intended victim, Jimmy Cook and a Browning automatic handgun. Warner was arrested on 17 September 1998 and charged on 18 September, with conspiracy to murder and to supply Class A drugs.

18. In a series of interviews, initiated by an approach by Warner to Detective Inspector Critchell, between 30 September 1998 and 24 February 1999, Warner provided information about the Morgan murder. What he said was distilled into a statement signed by him on 22 January 1999. He said that in 1989 or 1990 Jimmy Cook told him that he and Glenn Vines (sic) had committed the murder of a partner in a private investigation firm in Thornton Heath. He said that Jimmy Cook told him that Glenn Vines had struck the victim on the head with an axe and that he, Jimmy Cook, had driven Glenn Vines to meet the victim. Jimmy Cook said that he and Vines had been paid by Rees to commit the murder. The only claimed source of his information was Jimmy Cook: he said that neither Vines nor Rees were present when Jimmy Cook told him about the murder.

19. Warner's evidence led the Metropolitan Police Service Directorate of Professional Services (DPS) to install a probe in the business premises of Southern Investigations. This had two purposes: to obtain evidence about the murder of Morgan and about corruption and criminal activity by police officers. The probe revealed clear evidence

of Rees's willingness to attempt to manipulate the evidence of Lennon about the Morgan murder and of the commission of a serious crime: a conspiracy to plant drugs in a car driven by the wife of a client of Southern Investigations and to manufacture her arrest, to influence the outcome of family proceedings in relation to their children. The conspiracy was put into effect and the woman arrested and charged. Rees was prosecuted for this and, on 15 December 1999, convicted of a conspiracy to pervert the course of justice, for which he received a sentence of seven years imprisonment.

20. The attempt to manipulate the evidence of Lennon had nothing to do with criminal proceedings. It was to obtain evidence in support of Rees's claim against the solicitors that he had instructed to bring a claim for false imprisonment and malicious prosecution against the Commissioner (3/2264-2294). The probe picked up an exchange of potential significance on 13 August 1999, following publicity about the get away car used in the Morgan murder. In the following extract, the reference to "he" is to Jimmy Cook.

> "Rees: What happened to the car, I mean did he have the car at one time?
>
> Glenn Vian: He did yeah he roped someone else in. He would have to go right the other way wouldn't he. And someone else has said I think he's got too much to lose to go right the other way. He's been involved in too many people." (3/2230)

Mr Johnson QC submits that that is a reference, by Glenn Vian, to the possibility that Jimmy Cook would provide information to the police and give evidence in support of it – at least about the get away car used in the murder of Morgan. This evidence would have been evidence against Glenn Vian and Rees; but its value would have been limited because it was as consistent with a discussion about a fellow criminal by people who believed they knew what he had done, as with an admission of participation in the murder themselves.

21. Two months before Rees was sentenced, a cold case review of the Morgan murder was conducted by Detective Inspector Steve Hagger. He concluded that the case presented by Hampshire Police against Rees, Goodridge and Wisden "was certainly a thin one" and that, as far as Rees was concerned,

> "There is without doubt circumstantial evidence to provide a motive for the murder but insufficient to mount a successful prosecution." (3/2327 and 2349).

He recommended that a further investigation be undertaken.

## Operation Abelard I and Operation Morgan 2

22. The renewed investigation pursued a twin track strategy: an overt enquiry by the Serious Crime Group at Hendon under the leadership of Detective Chief Superintendant David Cook, aided by publicity on the Crime Watch programme; and a covert programme, to place probes in the home of Glenn Vian and in the home and motor car of Jimmy Cook.

23. On the Crimewatch programme which was watched by Glenn Vian and his wife, Cook said that he had received information about the car possibly involved in the murder. The probes produced nothing of evidential value.

24. The deployment of probes was resumed at the beginning of October 2002. They revealed an attempt by Jimmy Cook to arrange a false alibi for the night of 10 March 1987 with Gwendoline and John Sturm on 2 and 3 October 2002. On 4 October 2002, the probe in Glenn Vian's home recorded a qualified admission to his wife,

> "Remember Garry told me, it might be Sid. One of them told me. Right. Just run in there and pay for it. That's how he got the axe." (3/2521).

25. This was and is admissible evidence against Glenn Vian, but is as consistent with his knowledge of something done by his brother as with his actual participation in murder.

26. On 19 October 2002 Glenn and Garry Vian discussed how to shorten and deploy a shotgun. The tenor of their discussion and background noises suggest that they had the gun in their possession. I have heard the relevant portion of the recording and do not accept that an innocent construction can be placed upon it. This was admissible evidence of a propensity on the part of both to use lethal violence.

27. On 7, 19 and 24 October 2002 Jimmy Cook, Garry Vian and Glenn Vian respectively were arrested on suspicion of the murder of Morgan. On 16 December 2002, Rees was produced from the prison in which he was serving his sentence and questioned about the murder. On 17 January 2003 Fillery was arrested for possession of indecent images of children, an offence of which he was subsequently convicted in May 2003.

28. The evidence thus far gathered was submitted to the Crown Prosecution Service. As noted in the case closure meeting held on 2 November 2003, they decided that there was insufficient evidence to convict and they declined to prosecute.

**Assistant Commissioner John Yates's report to the Metropolitan Police Authority dated 31 January 2006.**

29. The report is a thorough retrospective analysis of all that had happened under the signature of an intelligent and distinguished senior police officer, Yates. He read and approved it, but it was drafted by Cook. It set out the conclusions to be learnt from the failed investigations. It also summarised the position as at the end of the investigation which had begun in 2002 in paragraph 275 of the report.

> "This investigation did unearth some new evidence and a substantial amount of new information. This was presented to Treasury Counsel for review. His conclusion was that he was satisfied that we now know the identity of those responsible for Daniel Morgan's murder but that the evidence available did not meet the threshold to enable a prosecution to be commenced."

30. The simple position is that, on the basis of the evidence reviewed in the Yates report and by Treasury Counsel, no prosecution of the claimants and Jimmy Cook could then

be justified. The evidence considered by them may have been capable of supporting new evidence which came to light after his report, but that is the limit of its effect. For a prosecution to be mounted, worthwhile new evidence was required.

**Operation Bedingham and James William Ward**

31. Ward was a professional criminal. He was also, intermittently, a police informant. He was aware of the advantages which could accrue to someone convicted of a serious offence who provided intelligence to the police about other offences. In 1987 a sentence for drug trafficking which would have been seven years imprisonment was reduced to two after the provision of a text to the sentencing judge. He has provided information to the police under two pseudonyms, Bert Roote and Jack Baker. He claimed that much of the information was true, but admitted that some of it was false.

32. On 1 October 2002 Ward was seen, in the presence of his solicitor. He said that he knew nothing about the Morgan murder.

33. Operation Bedingham was an investigation, conducted between February and 24 August 2004, into large scale drug trafficking by Ward, Garry Vian and others. On 24 August 2004 Ward and Garry Vian were arrested. They were charged the next day and remanded in custody on 26 August 2004 by Horseferry Road Magistrates.

34. On 1 December 2004 Cook noted that an approach had been made by Ward to the police about the Morgan case. (4/2840). After consultation with the CPS, Cook made arrangements for Ward to be removed from HMP Belmarsh to Plumstead Police Station, where he was interviewed by Cook on 2 February 2005, in the presence of Detective Chief Inspector Hibberd. A note was taken by Alison Chipperton, a higher investigation officer with HM Customs and Excise, to which Cook had been seconded to conduct an internal investigation. The conversation was not tape recorded, but a full note, which I accept to be substantially accurate, was taken by Chipperton. (4/2846 – 2854). Ward made it clear that he was looking for "some help", which Cook understood to be a request for a text. He explained the options,

> "You could be classed as what we call a CHIS. You can give information inside the Court – supergrass routine and turn QE."

Ward's response was unenthusiastic.

> "When you say QE – from the box?...That will resolve in someone's death, my wife, son, grandchildren. Not worth it."

35. Cook explained that if Ward was willing to give evidence, he could be provided with an enhanced level of protection and that he could "purge" himself. Ward was unenthusiastic.

> "I don't think that me standing in the dock will do me or the Met any good. I am aware, how the other door works I have used it before."

That must have been a reference to his earlier provision of information, from which he benefitted by the provision of a text and a reduced sentence.

36. According to the Chipperton note, Ward did not expressly state that he would refuse to give evidence, but that is the clear tenor of his exchanges with Cook. The remainder of the note makes clear that Cook believed that Ward would only be willing to provide information and not give evidence. Towards the end of the interview, following a discussion about CHIS status, the following exchange occurred,

> Cook: "We will record you in our handling system. Not given a name, but a number. Things are done differently now."
>
> Ward: "Years ago I used to get RCS (Regional Crime Squad) Christmas Cards. They said I could carry on with puff but not the A Class. All I can give you is the back door and the key."

This exchange shows that both Cook and Ward understood that, at that stage, Ward was only willing to provide information and not to give evidence. It is a significant fact that no attempt was made to debrief Ward in 2005.

37. This sets the context for an exchange which was noted in paragraph 165 of his judgment on the admissibility of the evidence of Gary Eaton by Maddison J on 25 March 2011.

> Ward "Where shall we start?"
>
> Cook: "Tell me what you know. I'll give you a head start. It was Glenn with the axe, Garry was there and Jimmy with the car. Over the car auction. "
>
> Ward: "One part was confirmed by Glenn. Some of this is correct and some incorrect….
>
> Garry knows I know this because he told me. I don't know what he knows. The motive is wrong as far as you describe it. To break the case I can tell you, it's distasteful, you might not want to do it.
>
> The people involved at the time were Glenn with the axe and Jimmy driving the car. It was purposely done. Jonathan Rees wanted it done. Who paid? Rees…
>
> Glenn – axe, Jimmy Cook – car. Did he know? I don't know. If you are going to frighten someone then you wouldn't need to tape it (the axe). Some called it "HP murder" – not paid for. Glenn called it the "GoldenWonder" murder because DM had a bag of crisps in each hand at the time…
>
> Rees was close by…
>
> Money
>
> Not Belmont Car Auctions. I don't think this was to do with Jonathan Rees, but Garry…

> Motive
>
> Why did get it done? It's to do with a bird that worked there at the office at the time 10, 12, 14 years later she still worked there."

Later, he said that Garry Vian had told him that he was not present at the scene.

38. As Ward intended, the information which he provided resulted in a text prepared under the name of Hibberd dated 20 July 2005. The text did not procure the benefit for which Ward had hoped. On 27 July 2005 he was sentenced to 17 years imprisonment for the Operation Bedingham offences. On 8 August 2005, he complained to Cook (4/2856).

39. Meanwhile, an investigation into Ward's finances, conducted by DS Mark Hewitt and DC Mark Anness, was in train, with a view to the making of an order under s6(5) of the Proceeds of Crime Act 2002. A statement under s16(3) was produced dated 24 January 2006 which put the recoverable property at a £3.089m. Ward realised that he faced the confiscation of all his assets and a significant sentence of imprisonment in default of payment. He must have got wind of the conclusion of Hewitt and Anness before the s16(3) statement was served on him, because on 5 January 2006 he contacted Cook with a view to a further interview. Arrangements were made for the removal of Ward from his prison on the pretext of an interview by Hewitt.

40. On 12 January 2006 Ward was interviewed by Cook, in the presence of DS Jerry Tizard. A detailed note of the discussion was prepared, ostensibly – probably in fact – by someone other than Cook. (4/2956 -2964). Cook again invited Ward to consider being interviewed on tape and giving evidence. Ward declined, because at that stage, he thought it was a step too far. He repeated that Garry Vian had told him that Glenn Vian had murdered Morgan and said that Glenn Vian had also told him face to face. He described an incident in which he had spoken to Glenn Vian about wanting a criminal tenant of a flat owned by him called Hill killed. He said that Glenn Vian told him he would do it for £25,000 and had done it before: he had put an axe in Morgan's head. He said that Glenn Vian had told him on another occasion, the detail of which he could not recall, that he had killed Morgan.

41. The interview concluded with Cook's invitation to Ward to be produced from prison on a further date to be properly debriefed, an invitation which Ward accepted.

42. Ward and his wife Jackie had been the subject of a money laundering investigation. According to the note of the discussion on 12 January 2006, Cook told Ward that he had discussed his wife's health with the CPS and that a discussion was going to take place on that day. According to an intelligence log prepared by Tizard on 16 January 2006, Cook told Ward on that day that a decision had been made that his wife would not be charged. (4/2966)

43. On 20 February 2006, Hibberd and DC Alan Cammidge explained the debriefing process to Ward, on tape.

44. On 23 February 2006 Ward's sentence for the Operation Bedingham offences was reduced on appeal to 15 years. A text in similar terms to that provided to the sentencing judge was provided to the Court of Appeal, signed by Cook.

## Operation Abelard II

## Ward

45. The re-investigation of the Morgan murder started in March 2006. The trigger was the declared willingness of Ward to provide evidence in taped debriefing interviews. Initial interviews took place on 23 and 25 May 2006. They were properly conducted by persons not connected to the investigation. DCI (now retired) Noel Beswick, appointed as deputy senior investigating officer for Abelard II said in oral evidence that the debriefing process of Ward was a text book exercise. I agree that it was. It took place over eight months. I have seen transcripts of seven days debriefs – 23, 25 and 30 May 2006, 6, 19 and 22 June 2006 and 25 August 2006. The end result was a 32 page witness statement signed by Ward on 9 November 2006. In it, he states that in 1993 or 1994 Garry Vian told him that Glenn Vian had killed Morgan and that Jimmy Cook had driven the car and that Rees had ordered the murder. Garry Vian said that he played no part in the murder but was close by driving a second car. Again in 1994, Glenn Vian had told him that he would "do" Ward's troublesome tenant with an axe "the same as Morgan". Later, he said that he had been paid for the murder in instalments – he believed £20,000 or £25,000. He said that Glenn Vian referred to it as "the Golden Wonder murder". He also described an incident in 2001/02 in Garry Vian's kitchen. Garry and Glenn Vian were in the kitchen. Rees arrived and there was an argument about Rees's ex-wife, their sister. During the argument Glenn Vian picked up a knife and cut Rees across the face. He said that Garry Vian then said to Glenn Vian,

> "That's fucked that I was going to ask him for some more money off the Morgan thing." (6/4660 – 4691).

46. After several iterations, the final s16(3) statement, prepared by Hewitt, was served on 22 November 2006. It assessed Ward's benefit from crime as £3.752m and his total available property at £1.428m. The principal reason for the difference between his figure for available property and that produced by Anness was that he removed £1.497 m of hidden assets from the assessment. He explained in evidence that the reason why he did so was that he did not believe that the foundation for Anness's assessment – a probe recording on 19 April 2004 in which Ward explained why drug trafficking was a more secure source of gain than robbery – was sufficient to justify it. He was adamant that the decision was his and was not influenced by any other person or consideration. He impressed me as a conscientious financial investigator and an honest witness. It was not suggested that the decision was not his. I accept his evidence about it and reject the suggestion, not now pursued, that he did so as an inducement or reward to Ward at the suggestion of Cook or any other investigating officer.

47. In his closing submissions, Mr Simblet tried a different tack. He suggested that Cook had called on Hewitt to re-interview Ward to secure a reduction in the amount of his assessed benefit and available assets, as an incentive to Ward to sign witness statements on 9 November 2006; and, after he had done so, deliberately concealed

from Hewitt the admissions of extensive wholesale drug trafficking made by Ward in his statement. Hewitt did see Ward in September 2006, at the request of an investigation team, and again on 14 November 2006 and was unaware of the extensive admissions made by Ward about his drug trafficking. If he had been, he might not have taken the view he did about the hidden assets. I do not accept that he was manipulated by Cook or any other investigating officer into doing so. If he had got wind of any such suggestion, he would have said so. He did not modify his (unaccommodating) response of 30 November 2006 to Ward's s17 statement dated 29 November 2006: (SB 197 – 200)

48. There was one further significant difference between Hewitt's statement and Anness's statements: a two bedroom house in Battersea, 21 Brynmaer Road, London SW11 4EN, was included in Anness's schedules as belonging wholly to Ward and having a value of £500,000, but was included in Hewitt's schedule as a half share only, valued at £250,000. An attempt has been made to show that the gross valuation (£500,000) was a serious under-valuation and that there was no reason to concede that Ward only owned a half share. There is nothing in the valuation point. Anness obtained informal valuations from reputable estate agents in January 2006 at £500,000. (Supplemental bundle (SB) 172 and 173). He was entitled to rely on them. The concession of a half share was more questionable. The house had been occupied by Ward's parents as council tenants. With the aid of a mortgage paid off by him, probably out of the proceeds of crime, they had acquired it under the "right to buy" scheme on 27 September 1983 (4/2773 – 2774). The property was transferred to them and Ward. The office copy of the entry in the land register does not contain any declaration of trust. If, as can safely be assumed, the entry accurately reflects the wording of the transfer, s34(2) Law of Property Act 1925 operated so as to transfer the property to Ward and his parents as joint tenants. Both parents have died. Accordingly, by operation of law, Ward became entitled to the sole beneficial ownership of the property. However, he had a sister, Christine Sadler who claimed that she was entitled to a half share in the property on the death of the parents under intestacy rules. She intervened in the confiscation proceedings on 5 December 2005 (SB 174) and a decision was made to accept her claim. Hewitt was not happy about it, but accepted the advice of Stuart Sampson, the senior CPS lawyer with oversight of the confiscation proceedings (and the investigation into the Morgan murder). He emailed Hewitt on 21 November 2006, saying that he did not "have any problem with the suggestion that Brynmaer is shared with sister" (SB 175). Hewitt accepted this decision and so included only a half share in his s16(3) statement. I accept his evidence. I do not know whether Sampson was, consciously or unconsciously, influenced by the significance of Ward's evidence in a possible prosecution of the claimants, but there is no evidence or ground to infer that any request was made to him by Cook or by any other investigating officer to concede Sadler's doubtful claim.

49. The remaining controversial item was a freehold house in Kent, "The Willows" Ruckinge TN26 2NT. It was included in both Anness's and Hewitt's schedule at £775,000. The valuation was properly founded on informal valuations provided by reputable estate agents in January 2006 (SB 205 – 206). In his statement of information under s17 dated 14 December 2006, Ward asserted that he had no beneficial interest in this property, which was wholly owned by his wife. Various different grounds had been advanced in support of this assertion, all of which had been effectively rebutted by Hewitt and Anness. Ward's solicitor was anxious to

strike a deal and was willing to concede that he had a half interest in the Willows, as his retrospective note of the confiscation hearing on 15 December 2006 makes clear (6/4968). Hewitt told me that, although he attended Court on that day, he played no part in any discussions. They took place between Sampson and perhaps also counsel instructed by the CPS, Ben Fitzgerald and Ward's solicitor. In Ward's s17 statement, drafted by his solicitor, he claimed as an exceptional feature justifying departure from statutory assumptions the fact that he had been debriefed in relation to Operation Abelard II. (6/4960:3 – 4960:4). This was a none-to-subtle plea for favourable treatment because of the co-operation which he had given to the murder inquiry. It is difficult to resist the conclusion that Sampson, consciously or unconsciously, responded positively to this plea. At any event, he conceded that Ward's interest in the Willows was limited to half its value. There is no evidence to suggest and no ground upon which I could find that his decision was prompted by Cook or another investigating officer. Even if it had been, the prompting could not have given rise to or formed part of the factual basis for a cause of action against the Commissioner, for two reasons (i) although there is no statutory provision equivalent to s73 Serious Organised Crime and Police Act 2005 for negotiated discounts in confiscation orders in return for assistance with investigation and/or the provision of evidence about a serious crime, the offering of such an inducement is not necessarily unlawful, any more than was the pre-section 73 practice in relation to provision of texts and sometimes, the giving of live evidence, about assistance provided by an offender (ii) the decision was made by Sampson and would have been made by him with full knowledge of the assistance provided by Ward. The Commissioner cannot be vicariously liable for that decision.

50. On 15 December 2006 HH Judge Kramer QC made a confiscation order in the sum of £737,229. Because a mistake had been made in the arithmetic, pointed out by Ward's solicitor, this sum was revised upwards on 20 December 2006 to £999,229. By consent, the order was varied on 30 October 2007, to reduce the sum to be paid to £632,965.40 (8/6479). The reason for the reduction was explained by Ward's solicitor in his s23 statement dated 17 October 2007: the net proceeds of sale of the half share in 21 Brynmaer Road were reduced to the sum offered by Sadler and her husband and accepted by the Confiscation Unit, £200,000: the net proceeds of sale of Ward's half share in "The Willows" was £330,958.25. These transactions reduced the available assets by just over £94,000. The balance was accounted for by Ward's solicitor's costs, which were paid out of the net proceeds of sale of Ward's property in Earl Barton. (8/6474). The acceptance of £200,000 rather than £250,000 from Sadler may have been generous, but in all other respects the reduction gives no ground even for suspicion of impropriety. The reduction, by itself, cannot give rise to a finding that Cook or another investigating officer subverted the confiscation process.

51. Ward got his reward on 9 March 2007. For 13 drug trafficking offences and nine taken into consideration, he was sentenced to four years imprisonment. Under s74 Serious Organised Crime and Police Act 2005, the sentence for the Operation Bedingham offences was also reduced to five years imprisonment.

52. On 17 July 2007 Ward's sentence for the 13 drug trafficking offences was reduced on appeal to three years imprisonment.

53. Subject to the power of the trial judge to exclude Ward's evidence under s78 Police and Criminal Evidence Act 1984, Ward provided evidence that was admissible

against Glenn Vian of the commission by him of the murder and against Garry Vian of presence nearby. His other evidence against Garry Vian was of limited effect: it was capable of supporting other evidence, but, by itself, was as consistent with knowledge of what his brother had done as with participation in it. What he said Glenn Vian had said about Rees would only be admissible as hearsay against him under s114(1)(d) Criminal Justice Act 2003 in the unlikely event that the trial judge ruled that it was in the interests of justice to admit it.

**The missing crates**

54. The money laundering investigation referred to in paragraph 42 above gave rise to a further problem during the course of the proceedings before Maddison J. It generated a substantial number of documents and two CPS reports. The documents, together with others which related to the information provided by Ward under the pseudonyms Bert Roote and Jack Baker were, at some time in 2007, made available to the murder investigators. 18 crates were stored, unopened in a DPS office in Putney. By June 2007, the occupant of the office wanted them removed. A request was made to one of the investigating officers, DC Edith Anderson. She remembers little about the circumstances, beyond what is stated in an email exchange on 18 and 25 June 2007 between the officers concerned (8/6455). They demonstrate that she must have asked Beswick and/or Cook, one of whom told her that the boxes could be removed to storage. She did not examine their contents.

55. Nor did Beswick. He accepts that, in hindsight, he should have done. His explanation for not doing so is that he read the two CPS reports about the money laundering investigation and concluded that the contents of the boxes were unlikely to be relevant to his investigation. The truthfulness of this evidence was questioned by Mr Bowen QC. The implied suggestion is that either he or Cook or both did examine the contents of the boxes and deliberately suppressed them or that he and Cook took a deliberate decision not to examine them, lest they contained material which undermined Ward's evidence. I reject all of these suggestions. Beswick impressed me as a determined, experienced and competent former investigator and I am satisfied that he has told me the truth as he remembers it about this and other matters. I agree with Maddison J's finding, made as part of his reasons for refusing to extend custody time limits on 3 March 2010 that he had no reason to believe that he or the defence were deliberately misled. (20/17050). I agree with his conclusion that the omission to inspect the contents of the crates was an error and displayed a want of due diligence, conclusions which Beswick accepts. I have not, of course, heard from Cook; but I have no reason to believe that in this instance his state of knowledge about the contents of the crates was any greater than that of Beswick. I reject the suggestion that either of them deliberately suppressed material which they knew or believed might have undermined Ward's evidence.

**Terry Jones**

56. Terry Jones was a man without previous conviction who lived overseas. On 1 November 2006 he spoke by telephone to Cook, having read an article which appeared in The Sun newspaper on 27 October 2006. He said that he was an associate of Garry Vian and that Garry Vian had told him that he was either the person with the axe or that he was present at the murder. He also mentioned someone called "Big Head", taken by the investigation team to be a reference to Jimmy Cook, who had a

large head. Arrangements were made for Beswick and DS Danny Dwyer to visit Jones and obtain a statement from him. The visits took place on 13, 14 and 15 November 2006. The first meeting was not tape recorded. The second was. A typed witness statement was prepared dated 15 November 2006.

57. In it, Jones gave a detailed explanation of his knowledge and dealings with Garry Vian (since 1983 – 84), Glenn Vian whom he had met "plenty of times", Ward and Jimmy Cook. He said that Garry Vian had told him that Morgan was murdered because he was looking into Garry Vian and others dealing drugs – he knew too much. He was not sure whether Garry Vian had said that he had done the murder, but definitely understood from him that he was there at the time and involved. Garry Vian believed that Jimmy Cook may have been a "grass" about drugs and feared that he might become an informant about the Morgan murder, because he was only involved as the driver.

58. Jones's evidence was admissible evidence of participation in murder by Garry Vian. It was suggested to Beswick that because of the circumstances and the place in which Jones lived, it would not have been possible to secure his attendance at trial. Beswick refuted that suggestion, because Jones had voluntarily come to the United Kingdom to sign his witness statement. I accept that evidence and see no reason to doubt that he would have been willing to give evidence at trial, either in person or by live link under s32 Criminal Justice Act 1988.

**Gary Eaton**

59. In April or May 2006 Yates and Cook, in the presence of Beswick, briefed a Sun crime reporter, Mike Sullivan, about Operation Abelard II. One of the purposes of the meeting was to encourage publication of reports about the re-investigation in the hope that it would generate new information from members of the public. A small article on an inside page of the edition of The Sun published on 12 July 2006 gave brief details of the re-investigation.

60. Somehow or other – the means by which it occurred is obscure – Eaton learnt that Sullivan was interested in the re-investigation of the Morgan murder. He told Sullivan that he had information about the murder. His motive may have been financial or to get back at Jimmy Cook of whom he was a long-time associate, or it may have been incapable of rational explanation. Sullivan passed Eaton's details to Cook. Eaton was a criminal with offences of his own to admit who was apparently willing to provide evidence about the murder – in police jargon, an assisting offender. On 25 July 2006, a decision was made by Cook that he would take the primary role in debriefing Eaton at a hotel room in Central London. His decision was conditionally endorsed by Commander Shaun Sawyer on 26 July 2006.

> "Whilst it is not desirable that the SIO (Senior Investigating Officer) should be involved at this level I must accept through operational necessity for DCS Cook to make the initial meeting. However, once credibility etc. has been established, responsibility for any further meeting should be handed over to other officers employed on the investigation and DCS Cook revert back to his role as SIO. He must not meet the individual on his own and I fully agree that for integrity and officer safety

> purposes the meeting must be made subject of covert recording. A directed surveillance authority must therefore be put in place."

The reasons given by Sawyer for his decision were clear and emphatic. They amounted to a specific and limited exception to the protocol laid down by the Association of Chief Police Officers in a draft manual and adopted by the Metropolitan Police Service for obtaining evidence from assisting offenders. Paragraph 7.37 of the draft manual provides,

> "7.37 **Sterile corridor**
>
> The SIO and Debriefing Manager must:
>
> - Create a sterile corridor to support the integrity of the debriefing process and in particular the information being provided by the Assisting Offender, between the debriefing officers and the investigation teams.
>
> - Select an Intelligence Liaison Officer to act as (sic) the sterile corridor by acting as a bridge between the debriefing staff and the investigation team.
>
> - Ensure that the investigation team do **not** know the location of the debriefing centre. This will ensure that any allegations made of contamination from the investigation team can be defended and also it assists with the security of the location for the current debriefing operation and any future operations."

As is implicit in that paragraph, and as Beswick confirmed, the purposes of the instruction are twofold: to ensure the integrity of the evidence; and to be able to rebut allegations of contamination by the investigation team. For the purposes of the interests of justice, the first purpose is the more important.

61. On 26 July 2006 Cook and DS Gary Dalby met Eaton at a Central London hotel. Their conversation was covertly recorded by Dalby. After introductory remarks, of which the main purpose was to reassure Eaton about Cook's uprightness – demonstrated by the fact that he had secured the conviction of Fillery for "the paedophile stuff" – and determination to bring those responsible for the murder of Morgan to justice, the following exchange occurred,

> Eaton: "See the thing is, your not only talking about Sid (Fillery) are you? Because the people that are involved in this you have got to have them as well because if they don't all go."
>
> Cook: "Give me the name of the brothers"
>
> Eaton: "Because if they don't all go I am at risk all the time."

> Cook: "Give me the name of the brothers."
>
> Eaton: "The main person of the brothers, you want the main name?"
>
> Cook: "Yeah."
>
> Eaton: "We have been talking about him haven't we?"
>
> Cook: "Jimmy."
>
> Eaton: "Yeah."
>
> Cook: "Yeah, the other one was there though. I know who it is but I want you to tell me."
>
> Eaton: "I don't know the other. All's I know was Jimmy."

62. Eaton then explained that he had worked for the partnership and knew Morgan, Rees and Fillery well. He explained his fears about police corruption and his fears for his family. In response to a direct question about Fillery's involvement in the murder, he said

> "Sid set it up."

He said that he had been offered £50,000 by Jimmy Cook to carry out the murder, but had refused. He said that Rees was having an affair, but that that was not the reason for the murder, which was that Morgan had found out about drugs and money laundering. Cook then asked him about Rees's role.

> Cook: "What was Rees's involvement in all this?"
>
> Eaton: "What John? I don't think he had any involvement in the actual murder myself.
>
> …"
>
> Cook: "Did he play a part. Did he put it up. Did he cover it up?"
>
> Eaton: "He was well aware of it. He did have involvement in that side of it. I am 99% sure he did."
>
> Dalby: "Who was gonna pay the money?"
>
> Eaton: "I was going to get paid from Jimmy. It was coming from Sid's side."

After further discussion, arrangements were made for a second meeting on the following day. (4/3411 – 3473)

63. The only direct accusation, capable of being converted into admissible evidence, made by Eaton at this interview was that Jimmy Cook had offered him £50,000 to

murder Morgan. When asked a direct question, twice, about "the brothers", he did not mention Garry or Glenn Vian, but named only Jimmy Cook. This must either have been because he was then unwilling to say anything about them or did not know.

64. On 27 July 2006 Dalby visited Eaton and his partner and made arrangements for their accommodation. During an extensive recorded discussion, Eaton mentioned another man, by name, as either a candidate for the killer of Morgan or as someone who would be able to provide information about his identity.

65. On 28 July 2006 Dalby, DC Malcolm Samuels and, later, Cook, met Eaton. Their discussion was not recorded, because of an equipment failure. The note about the meeting records that Cook explained, in general terms, the debrief process. (5/3668).

66. On 29 July 2006 Cook prepared a threat assessment, directed primarily at possible threats to Eaton and his family and to police officers dealing with him. On page 9, it noted that his intelligence file suggested that he had had some mental illness, potentially through consumption of alcohol and/drugs, but now appeared to be committed to the debrief. Eaton was handed over to the Debrief and Witness Protection teams. If Sawyer's instruction and the sterile corridor protocol had been fulfilled, only they would have had direct contact with Eaton thereafter.

67. This did not happen. There was frequent telephone contact, both orally and by text, between Eaton and Cook. A schedule of telephone contact between Eaton and Cook and Eaton and Dalby between 24 July 2006 and 29 September 2007 was prepared, listing 25 instances of contact between Eaton and Cook. In a narrative passage at the head, for which Cook must have been the source, the author stated,

> "After the initial recruitment stage there was a determined effort by DCS Cook to avoid contact and discussion about the case referring everything to the debrief."

This statement was false.

68. What in fact occurred was carefully analysed by Maddison J in his judgment on the admissibility of the evidence of Eaton of 25 March 2011. His conclusions are accepted on all sides and I am satisfied that he was right to reach them.

69. Debrief interviews with Eaton took place on 67 days: 1, 9, 10, 16, 29, 30 and 31 August, 1, 2, 13, 14, 15, 20, 21, 22, 26, 27 and 29 September, 3, 19, 20 and 26 October, 1, 2, 3, 8, 9, 13, 27, 28 and 29 November, 4, 6, 15 and 22 December 2006; 15 and 17 January, 14, 19, 21, 22, 26 and 27 February, 8, 13, 14, 15, 26 and 29 March, 2 and 20 April, 10, 11, 24, 25, 20 and 30 May, 14 and 15 June, 13, 14, 15, 28 and 29 November and 18 December 2007; and 30 September and 1 October 2008. During this period, in particular between the date when debriefing began, on 9 August 2006 and when the schedule at (4/3476 – 77) ended, Cook was in contact with Eaton by text and/or phonecall on 36 days, of which only six were acknowledged by him in the final version of the schedule produced for the voir dire before Maddison J. (The larger number in the schedule at (4/3476 – 77) is accounted for by calls which did not connect or discussions between Cook and Eaton's partner). Maddison J's conclusion was set out in paragraph 156 of his judgment.

> "It is clear in my view that DCS Cook seriously understated the frequency of his previous contact with Mr Eaton when he completed these schedules, and he probably did so knowingly. I could readily understand some omissions due to human error and/or lack of time. However, the stark fact is the schedule in its final form referred to only one sixth of the days on which contacts were actually made."

He then went on to deal with significant omissions, to which I refer below.

70. In his first debrief interview on 9 August 2006, Eaton reiterated his claim that Jimmy Cook offered him money to dispose of Morgan. (5/3799). He did not claim to have been present at the scene of the murder. On 10 August 2006, he said that a few weeks after the murder, he had asked Jimmy Cook whether he was involved, whereupon he smiled and smirked and said that for Eaton's own safety it was best that he forget the conversation of a few weeks ago – i.e. the offer to pay for the murder of Morgan. (5/3819). Later on on the same day, he said that he was led to understand by Jimmy Cook that he was involved in the murder, by providing and driving the car. (5/3850).

71. Cook made two calls to Eaton of 9 minutes 22 seconds and 21 minutes 41 seconds on 28 and 29 August 2006. On 1 September 2006, the debriefers, including DS Tony Moore, began by noting that there was something that Eaton wished to mention to them, to which his response was,

> "You asked me earlier how I knew Jimmy Cook was the driver of the car and I said he told me. That wasn't' the truth actually but I knew he was the driver because I see it for myself."

In the light of the two relatively long suppressed telephone calls by Cook to Eaton on 28 and 29 August 2006, a possible inference is that Eaton was prompted or encouraged by Cook to raise the topic as he did, with the debriefers.

72. On 1 September 2006 Cook telephoned Eaton twice at 7.01 pm for 59 seconds, and at 7.36 pm for 43 minutes and 20 seconds. He called again on 2 September 2006 at 9.14 am for 12 minutes and 42 seconds. Telephone contact – at that stage believed to have been by Eaton to Cook – had already caused concern to the Criminal Justice and Protection Unit (CJPU), responsible for the safety and welfare of Eaton. David Meadows produced a report on 30 August 2006 noting that Eaton repeatedly made contact with Cook and that the sterile corridor had not been maintained. These concerns were ventilated on 4 September 2006 at a meeting presided over by Yates and attended by Sawyer and Cook and others. The minute of the meeting noted that Eaton had been telephoning Cook regularly. Yates, Sawyer and Commander Dave Johnston stated their concern about the calls made to Cook. Sawyer stated that "there must be no misunderstanding with the CPS and there needs to be records of decisions". Cook did not tell them that he had made calls to Eaton. If he had done, it would have been noted in the minute and prompted at least an expression of concern – more likely something stronger – by Yates, Sawyer and Johnston.

73. On the next day, 5 September 2006, events of critical importance occurred. Before 10.15 am, Cook took Eaton to a covert location for a "welfare visit". At 10.15, Eaton had a consultation with his solicitor, Keima Payton. He was then left alone in a

bedroom in a hotel. At 10.55 am Moore provided coffee and cigarettes for him and noted that he had broken down. At 11.25 am Cook sent him a text. There was no note of the text. It was not retained on his mobile telephone. Cook was unable in the voir dire to say what the text was about. At 11.50 am Eaton had a consultation with his solicitor and at 11.57 am, in her presence began to prepare a handwritten statement which said,

> "With regard to the murder inquiry I wish to disclose that "the brothers" are involved. I do not wish today to go into any more details as I feel very unwell and traumatised…
>
> I do not feel fit enough to be interviewed on tape about this today."

Payton produced the statement to Moore at 12.20 pm. At 6.30 pm there was a further meeting between Eaton and Cook. Cook's note of the meeting was that its purpose was to reassure Eaton that everything was being done for his and his family's security. Eaton was noted to have explained that he did not want to let anybody down or to confuse issues by forgetting important facts. (4/3476 - 77). Cook made no note, beyond that retrospective note, of that meeting.

74. On the following day, arrangements were made for Eaton to be seen by a consultant psychotherapist and the Force forensic medical examiner. The latter's opinion was that he was fit for interview, but needed an appropriate adult. Then and thereafter, he invariably declined, sometimes angrily, to have one.

75. Debriefing resumed on 12 September 2006. Eaton explained that on the night of the murder he had gone to a pub in Sydenham (later identified as the Golden Lion) with a criminal associate, Tony Airey. While there he spotted Rees in the company of a female. Jimmy Cook came in later and had a brief conversation with him and Airey. Morgan then joined Rees. At some stage Cook left. The next thing he remembered is,

> "Someone came in and asked me to wanted a quick chat in the toilet…
>
> Yes I'm trying to remember his fucking name, I am trying."

He went to the toilet with the man.

> "He just said can I pop out to the car park and have a quick chat with Jimmy, "Do you want to go for a chat?" and…you know what I mean?"

The two then went out into the pub car park and saw Jimmy and someone else sitting in a car. When asked by the debriefers and by his solicitor what he had seen, he became upset and said,

> "I am trying to remember but I don't want to say his name because (pause) he had an axe in his head."

The one who had seen him in the toilet then got into the car. Jimmy winked at him and then drove off. (5/4002 – 4038).

76. On the second tape, Phillips asked him whether he knew the other man (the one who had spoken to him in the toilet). His answer was,

> "I, I was I know them as like "the brothers", two brothers that's what I knew them as…
>
> Yeah I knew him as "the brothers" the two brothers. I am trying to think of their fucking names."

Despite that, he did not name them. (5/4039 -4053).

77. The second tape concluded at 3.09 pm. At 4.20 pm, Cook telephoned Eaton in a call lasting 7 minutes and 21 seconds.

78. Debriefing about Eaton's knowledge about the murder (as opposed to other criminal activity) resumed on 13 September 2006. He was still unable to name the brothers. Phillips therefore proposed that the man who had asked him to come to the toilet should be called brother one and the other one brother two.

79. On 14 September 2006, Eaton's solicitor asked him if there was anything that he could remember about the names (of the brothers), to which he replied,

> "No, not at the moment."

Moore asked him if he would recognise them again, to which he said, "Yes".

80. On 15 and 16 September 2006 Cook made five telephone calls to Eaton. The first lasted 6 minutes and 55 seconds. The last took 23 minutes and 21 seconds. On 29 September 2006 Cook made five short telephone calls to Eaton between 3.39 and 4.09 am. On the same day, in anticipation of a meeting to be held at 7.30 am on 30 September 2006, to be attended by Phillips, Beswick, Cook and CJPU officers, Meadows repeated his protest at the non-maintenance of the sterile corridor and Eaton's repeated calls to Cook, but did not mention, Cook's calls to Eaton – because he did not know about them. Agreement was reached between the debriefers, the CJPU and Cook about their respective functions. Cook accepted that he was party to an agreement that "Eaton would have no contact with Cook…except through the CJPU".

81. Recorded contact did then cease until 14 October 2006.

82. On 3 October Eaton demonstrated to the debriefers that he had seen the body of Morgan lying supine with an axe in his head and his eyes open (6/4409 – 4459)

83. On 18 October 2006 arrangements were made for the transfer of responsibility for Eaton's safety and welfare to the DPS Witness Protection Unit (DPSWPU). In an exchange of emails on 19 October 2006 between a DPSWPU officer, "Keith" and Cook, Cook confirmed that unless there was a critical change to the debrief he would not make any contact with Eaton and should Eaton try to contact him, he would

inform Keith or Phillips. Should he do so on more than two occasions he would replace his mobile telephone number.

84. The next debriefing session was on 19 October 2006. Nineteen minutes into the first taped session, one of the debriefers DC Peter Cox asked Eaton whether there was anything more about the brothers that he could remember, to which Eaton replied,

> "You're on about Glenn and Scott aren't you?"

Cox asked if he knew their family name, to which he replied,

> "That's what they're known to me, as Glenn and Scott. No I've tried to remember. I do know the surname. I was saying to Keima, I do know the surname."

The following exchange then occurred.

> Cox: "…Which brother one, brother one who came into the pub, what do you know him as?"
>
> Eaton: "Glenn"
>
> Cox: "Glenn. And brother, following on from that, brother two you know as Scott?"
>
> Eaton: "Scott."

85. In paragraph 109 of his judgment, Maddison J was unable to make any finding as to the number or length of calls between Cook and Eaton on 14 October 2006. There were no recorded calls between then and 22 November 2006. There is, accordingly, no specific proof of significant calls from Cook to Eaton from which a secure inference can be drawn that his revelations on 19 October 2006 were prompted by Cook. Further, there is force in Beswick's wry observation that, if Cook did prompt Eaton, he did not make a very good job of it. Maddison J made no express finding about this specific issue.

86. On 24 October 2006 responsibility for Eaton's welfare and security was handed over to the DPSWPU. They were concerned about the security of his family and asked about his father. Eaton said "No idea, think he's in the Brixham area, not seen him in years". This was the start of an extensive investigation at the voir dire into a lie later told by Eaton to the debriefing team on 21 February 2007: that he had lost his father 14 months ago. This lie became significant because of the actions of Cook and another investigating officer DI Doug Clarke when they discovered it.

87. On 15 November 2006, Eaton was taken by Cox to the Golden Lion public house at Sydenham. During the course of the visit, he was asked to describe the scene in the car park of the pub on the night of the murder. The visit was video recorded and has been played to me.

88. On 27 November 2006, further debriefing interviews occurred. During the course of them, Eaton drew a plan of the car park and of the significant features there on the night of the murder. The plan is broadly consistent with the description given by

word and gesture by him on the visit on 15 November 2006. (6/4913). His plan shows a car parked near to the entrance of the car park immediately to the south of a brick outbuilding extending from the northern wall of the car park. He drove past that and reversed his car, with its back to the north wall, parallel and near to the west wall of the outbuilding. When he emerged from the pub at the invitation of one of the brothers to go to speak to Jimmy Cook, he saw a parked car with its bonnet to the northern wall parallel to his, but with a space at least two car widths between them. In that space was Jimmy Cook's car, facing diagonally outwards towards the entrance. There was a body lying on the ground between the rear off-side of Cook's car and the front off-side of the parked car.

89. The scene as depicted by Eaton could not have occurred. On 10 March 1987, after the arrival of police at the scene of the murder, all cars parked in the car park and their owners were identified and drawn on a plan (1260:11). Morgan's car was approximately where Eaton drew the parked car with its bonnet to the north wall on his plan. There was a car where he had drawn it against the south wall of the outbuilding. There was also a blue Morris Marina Estate car UGW 1175 belonging to Dennis Frank Burrows, a security officer. He arrived at the pub at 5.40 pm and left at 7.20 – 30 pm, leaving his car behind. It was parked parallel to the north wall of the car park with its bonnet against the west wall of the outbuilding. It was in that position when the scene of the murder was photographed under floodlights by police. Eaton's car could not have been parked where Burrows's car was. There was another significant discrepancy. On his plan, Eaton showed the position of the body as being nearly parallel to the north wall. On the video, he shows it as being parallel. Yet when it was found, and photographed by the police, it was lying at right angles to the wall, parallel to Morgan's car. Any suggestion that the body may have been moved before it was found in that position would not explain the discrepancy. On Eaton's account, Cook drove off, leaving the body in place. If it had been moved, Eaton would have seen it being moved and could have said so.

90. To these discrepencies, can properly be added the unlikelihood of Eaton's claim that he could see Morgan's eyes open – both because the car park was dark and because, when photographed by the police, Morgan's eyes and eyelids were occluded by heavy bloodstains.

91. The fact that Eaton's description of the scene in the car park could not have been right was known to the investigating officers, as Beswick acknowledged. His recollection was that Eaton had given more than one account of the scene. His recollection may be wrong. Eaton had given an account, on more than one occasion, consistent with placing his car either where drawn on the 27 November 2006 plan or at the north-west corner of the car park. On 26 April 2007 DC Groombridge, a member of the investigation team, was tasked with clarifying, by reference to an aerial photograph of the car park, where Eaton said his car was parked. Someone put a yellow sticker with an outward facing arrow on the photograph at the north-west corner of the car park. It is unknown how this came to be put there: either there is an unminuted request by the debriefing team, or by Groombridge, in further breach of the sterile corridor, answered by Eaton, or Groombridge put the box and arrow on the photograph on his own initiative in the light of what he had read in the debrief summaries or transcripts. I cannot tell which. In any event it would have been

obvious to the experienced team of investigating officers that there was something seriously amiss with Eaton's description.

92. There were further reasons to doubt his account. Alone of all claimed eyewitnesses of what had taken place in the pub, he said that Morgan was in the company of a well dressed woman. There are other discrepencies between his account and those of genuine eyewitnesses which could plausibly have been taken to be due to the passage of time. However, the stark discrepencies about the scene in the car park could not. They must have arisen either because Eaton was embellishing an imperfectly remembered true account or because he had not been there.

93. Thirty-eight minutes into the first taped debriefing interview on 27 November 2006, Cox asked Eaton about the "brother" who had asked him for a chat in the toilet,

> "The next thing which we do know happened is one of the, brother one, which we're, I'm trying to remember this one, is this Scott?...
>
> Tapped you on the shoulder, gone to the toilet."

Eaton gave a detailed description of his movements, but did not query the reference to "Scott". (He had earlier identified this person as Glenn, not Scott). I have no reason to believe that this was anything other than an innocent mistake by Cox. It was later repeated as a fact in the draft statement then being prepared for Eaton and was adopted by him, without relevant qualification in his witness statement.

94. On 12 February 2007 Eaton attended a video identification parade, at which he was invited to identify images of Jimmy Cook, Glenn and Scott. He mis-identified Jimmy Cook and did not identify either Glenn or Scott. Later, he told the debrief officers that he did think that the images, which were in fact of Glenn and Garry Vian, were the brothers, but did not want to make a mistake.

95. By 13 March 2007, draft witness statements about the Morgan murder were prepared. They were extensively put to Eaton by the debriefing officers. They were signed on 20 April 2007.

96. In his principal, 17 page, witness statement, Eaton repeated the account that he had given in interview and demonstrated in the car park. He said that the brother who had tapped him on the shoulder and asked for a chat in the toilets of the pub was, he believed, called Scott, and was the quieter of the two brothers. He followed him into the car park, saw Jimmy Cook in the driver's seat of the car and the other brother, Glenn, sitting in the front passenger seat. Scott then got into the rear passenger seat, at which point he saw Morgan's body on the ground with an axe embedded in his head. He described the handle – wooden, but with something wrapped around the top half. He referred to the drawing made by him on 27 November 2006 (6/4913) as describing the scene. He did not directly implicate Rees, save by stating what Rees has always admitted – that he was in the pub on the night of the murder. He did say that Jimmy Cook had spoken briefly to him in the pub. He did implicate Fillery. He said that soon after the murder, Fillery said directly to him that if he did not keep his mouth shut he or his family might get the same. He also said that Rees, Jimmy Cook

and Fillery were engaged in large-scale drug trafficking and money laundering and that he had, on two occasions, seen Jimmy Cook hand holdalls of cash to Rees.

97. After the claimants and Jimmy Cook were charged (on 23 April 2008), on 17 June 2008, Jimmy Cook said that Eaton's father was not dead. Between 3 and 7 July 2008, Clarke and Cook learnt that Jimmy Cook's wife was said to be in possession of a witness statement made by Eaton's father. Cook told Maddison J that, if true, this would inevitably impact upon Eaton's credibility. If he had told a serious lie, the CPS would have to be informed. A member of the DPSWPU, "Anita", whose evidence Maddison J accepted as true, said that on 8 July 2008, Clarke told her that he wanted Eaton to know that Jimmy Cook was out to rubbish him. Maddison J's conclusion, in paragraph 274 of his judgment, was that the purpose of this approach was to tip Eaton off about the fact that he had been caught lying about his father, so as to give him time to think of an explanation when challenged about it later. In the event, he did not need it, because he told Anita that his father, though alive, was dead to him.

98. Eaton was clearly a problematic man and witness. It is not necessary to set out the detailed history, recited by Maddison J, about the difficulty which the witness protection teams had in handling Eaton. There was a further problem, which impacted upon his worth as a witness. Maddison J found that it was obvious from the first meeting between Cook, Dalby and Eaton on 26 July 2006 that there were potential mental health problems, which became obvious to the debriefing team on 5 September 2006. (Paragraph 209 of his judgment). It is not necessary to set out the detailed analysis which Maddison J conducted about Eaton's psychiatric condition. All I need do is to set out his conclusions at paragraphs 189 and 290 of his judgment. Throughout his adult life, Eaton had suffered from a personality disorder, encompassing anti-social personality disorder and borderline personality disorder which deteriorated, from time to time, into frank mental illness in the form of depression. His personality disorder rendered him prone to telling lies, sometimes for no apparent reason. He had demonstrated irresponsible difficult and truculent behaviour during his debriefing.

99. Cook was, therefore, as he knew or should have known dealing with a professional criminal with a personality disorder which rendered him prone to telling lies. He was precisely the type of witness for whom the sterile corridor was devised; and it was imperative that its provisions were fulfilled. Yet they were not.

100. I summarise, and adopt, Maddison J's findings about what he did in paragraphs 164 – 166 of his judgment. During his first meeting with Eaton on 26 July 2006, by saying "Give me the name of the brothers" twice in quick succession, Cook did that which he said he would not do to a potential witness, give him a "head start". Cook was aware of the sterile corridor system and its purpose, but contacted Eaton repeatedly, in telephone calls some of which were of substantial length, and continued to do so even after receiving directions and giving undertakings not to do so. He did not make any note of what he said or texted. The timing of the telephone calls, was significant, in particular those of 28 and 29 August 2006, three and four days before Eaton said, on 1 September 2006, for the first time that he had been at the pub on the occasion of the murder. When Eaton produced the prepared statement mentioning "the brothers" on 5 September 2006, soon after receiving an unrecorded text from Cook, saying that he needed further reassurance as to the safety of his family before going into further detail, he received that reassurance from Cook, in clear breach of the sterile corridor

system. The evolution of his account about the brothers in debriefing interviews on 12 and 13 September 2006, was interposed by a telephone call from Cook to Eaton. There were a large number of unrecorded calls by Cook to Eaton before the latter arrived at his final version of events on 19 October 2006.

101. Maddison J's stark overall conclusion was set out in paragraph 167 of his judgment.

> "I conclude that DCS Cook probably did prompt Mr Eaton to implicate the Vian brothers. I am not in a position to find whether the prompting was to name two defendants to whom Mr Eaton would not otherwise referred to at all, or whether it was as to details of his final account to which he would not otherwise have referred; but I am satisfied that there was improper prompting of some kind. I have considered whether DCS Cook may have prompted Mr Eaton also in relation to other defendants. I am concerned that he may have done so, given the number of times he contacted Mr Eaton when he should not have done, frequent absence of any records of what was said, and the understatement of the numbers of contacts to which I have recently referred. Despite these anxieties, I am not able on the evidence available to me to find on the balance of probabilities that such further prompting did take place. However, the fact that any prompting occurred, that it occurred in breach of the sterile corridor system, and that the person prompted, Mr Eaton, had personality disorders which included a tendency to lie, sometimes for no apparent reason, are obviously extremely concerning."

He excluded the evidence of Eaton under s78 Police and Criminal Evidence Act, principally for those reasons.

102. On 4 April 2008, Eaton pleaded guilty to a schedule of the offences admitted by him during his debrief. On 17 October 2008, he was sentenced to three years imprisonment under s73 Serious Organised Crime and Police Act 2005, in place of the 28 years imprisonment which HH Judge Gordon would have imposed on conviction after a trial.

103. One further judicial finding in relation to Eaton must be cited. Eaton was to be the key prosecution witness in another trial of other individuals conducted by HH Judge Hone QC. He, too, conducted a voir dire into the admissibility of Eaton's evidence under s78. His conclusion was,

> "Gary Eaton is a person who is capable of inventing detailed accounts of events which never happened and shows either blatant untruthfulness or alternatively is a component of his personality disorder typified by folie de grandeur and self aggrandisement. Whichever the case, the evidence is not just unreliable, it is false and highly dangerous." (24/21041:11)

He excluded his evidence.

104. For the purpose of these proceedings, Eaton's evidence, if true and if it had not been excluded under s78 by Maddison J, implicated Jimmy Cook and Glenn and Garry Vian of murder and Fillery of doing an act tending and intending to pervert the course of justice. It provided some evidence of motive for Rees and placed Jimmy Cook in the pub, talking briefly to Rees, on the night of the murder.

**Andrew Docherty**

105. On 2 August 2002, at the Central Criminal Court, Docherty, then aged 58 years, was convicted of manslaughter and offences of robbery and sentenced to 18 years imprisonment. He had 16 previous convictions, including two for robbery, for which he was sentenced to seven years imprisonment in 1974 and six years in 1986. (1/493). According to him, he started living with Patricia Vian, the mother of Glenn and Garry Vian in 1988. In the same year, he started to work for Rees at Southern Investigations.

106. As a serving prisoner, he provided a statement on 8 February 1989 to the team then investigating the Morgan murder. He said he had not learned anything since the murder which may assist the police. (1/477 – 8). On 5 November 2002 an unnamed police officer interviewed Docherty in prison about the Morgan murder. Docherty said that he knew the victim, whom he disliked intensely, and had worked for him. (1/496). An indirect approach was made to him in HMP Belmarsh in August 2003 to see if he had any information which could assist the inquiry team. His reply, in colourful language, was that he was unwilling to assist the inquiry in any way. (1/500).

107. He was approached again by acting DS Nick Atherton and DC Andy Henry at HMP Shotts on 30 January 2008. They explained that they were revisiting persons already seen in previous investigations to ascertain if there was anything they could add or remember. On this occasion, Docherty was forthcoming. He said he knew who had been involved in the murder: Glenn Vian had killed Morgan with the axe and was accompanied by Jimmy Cook. He knew this, because Glenn Vian had told him himself. Docherty also said that Glenn Vian had told him that Rees had instigated the murder, but not because of his affair with Harrison. He said that he was present when the final instalment of £8,000 was paid by Rees to Glenn Vian and saw Rees hand over £8,000 to him. There was no doubt about what the money was for, because he heard the conversation between them. He maintained that Garry Vian had not been present at the murder. (8/6618 – 6622).

108. Docherty was visited again on 4 February 2008 by Atherton and Henry and then by Beswick as well. The possibility of entering into a s74 agreement was explained to him, but he was not interested, because he believed he had only just over a year left to serve before he would be released on licence by the Parole Board. He was, however, interested in a share in the reward money of £50,000. He again emphasised that Garry Vian had not been involved in the murder and that Glenn Vian had specifically stated that his brother was not there.

109. On 19 February 2008, Docherty signed a witness statement in which he repeated what he had told Atherton and Henry. He said that, while he was working at Southern Investigations, after the release of Rees and Goodridge (on 11 May 1989 – see paragraph 16 above) Glenn Vian, who was really angry and looking for Rees, told

him that Rees had instigated the murder. Glenn Vian said that he and Cook were paid by Rees to do it. He was still owed £8,000 by Rees as the final payment for the job. He said that Cook had been the getaway driver, but that he had swung the axe and killed Morgan.

110. Docherty said that a few weeks later he saw Rees counting money out of or into a brown envelope on his desk. Glenn Vian came into the office and went in to see Rees. Docherty saw the brown envelope he'd seen on Rees's desk, sticking outside of Glenn Vian's inside jacket pocket. Glenn Vian said that Rees had just paid him the £8,000 owing from Morgan's murder.

111. Docherty repeated that Glenn Vian had said that his brother Garry was not involved.

112. Docherty's statement implicated Glenn Vian. The counting out of money and putting it into an envelope given to Glen Vian was consistent with Rees's complicity, but only probative of it if what Glenn Vian said as he departed Rees's office was admissible evidence against Rees. That would have depended on a ruling by the trial judge that it was in the interests of justice to admit it as hearsay under s114(1)(d) Criminal Justice Act 2003.

**Arrests and charging**

113. On 13 June 2007 a 327 page report about Operation Abelard II, prepared by Beswick, but signed by Cook, was sent to the CPS. The purpose, or, possibly, principal purpose of the report was stated in paragraph 3,

> "This report seeks to outline the full events surrounding this murder and is submitted in order to seek legal advice with regard to whether Glenn Vian, Garry Vian, James Cook….Rees and…Fillery should face criminal charges in respect of Morgan's death."

Beswick said in evidence that a purpose was also to seek advice from the CPS and Treasury Counsel about whether or not it was worth while to continue the investigation and, if so, what lines of enquiry should be followed. I accept that it had that purpose, but it was a subsidiary one. The primary purpose was that stated in paragraph 3.

114. The report contained a number of specific statements about the new evidence which Operation Abelard II had uncovered, which it described as "new and compelling". The new evidence was primarily that which had been obtained from Ward and Eaton, as paragraph 1775 made clear,

> "The new evidence is primarily from two resident informants and it is appreciated that many difficulties exist when relying on such persons at trial. However a great deal of effort has been directed at verifying their accounts and their criminal history, the majority of their respective accounts has been corroborated and significant extra charges have been preferred against them…Ward was subject to a lengthy prison sentence before deciding to give evidence in this case, and it would

> undoubtedly be difficult to mount a prosecution on his evidence if given in isolation…Eaton on the other hand was not in custody and by giving evidence to this inquiry has admitted serious offences for which a custodial sentence is highly likely. He freely chose to place himself in such jeopardy in order to give evidence."

The significance of Eaton's evidence was emphasised in the first sentence of paragraph 1779.

115. Although the prospect of new evidence from Ward was the catalyst for Operation Abelard II, it was accepted from inception that,

> "Evidence from Ward in isolation was unlikely to be sufficient to prosecute this case." (Paragraph 873).

Ward's evidence was accurately summarised in paragraphs 1065 – 1142.

Nothing was, however, said about the course of the confiscation proceedings. There was no need to: Sampson, the CPS lawyer overseeing the case had been fully involved in it, as I have explained.

116. The evidence of Eaton was summarised in paragraphs 1144 – 1212. The summary was generally accurate; but it was either inaccurate or incomplete or both in one critical respect. In paragraph 1178, relying on a general statement on page 8 of Eaton's main witness statement, the following is stated,

> "Eaton states he parked his Daimler car in the furthest right hand corner of the car park as you look out from the back of the public house…the position of his vehicle would be parallel with…Morgan's BMW…Both vehicles were shrouded behind the stable building that forms the entrance to the car park."

117. As described in paragraph 86 above, that was not where Eaton had described the position of his car by gesture and voice on 15 November 2006 or on the plan drawn by him on 27 November 2006 or on page 11 of his witness statement. This is a glaring omission. Beswick's explanation was that Eaton had, on one occasion, indicated that his car was at the far north western corner of the car park on the aerial photograph described in paragraph 88. Even if he had indicated that his car was parked there, that is not the position which he reached finally in his witness statement. The report should have noted the account which he gave and pointed out its inherent discrepencies. I do not doubt Beswick's good faith in drafting these passages of the report; but it is hard to resist the conclusion that they display an element of wishful thinking.

118. A more significant omission was the absence of any reference to the repeated telephone calls by Cook to Eaton and, as Maddison J found, the fact that he prompted him to name, with only partial accuracy, the brothers Scott and Glenn. Beswick denies all knowledge of Cook's contact with Eaton other than for welfare purposes. I accept his denial; but Cook knew and this report went out under his name.

119. The upshot was that the uncritical picture painted of the evidence of Eaton was not a true reflection of its worth. The report laid heavy emphasis on the new evidence of Eaton without exposing or analysing its deep flaws.

120. The evidence of Jones and Lennon including, in his case, a factor which undermined his credibility, is fairly summarised in paragraphs 1214 – 1260 of the report. The evidence of Docherty was supplied to the CPS and Treasury Counsel later but before charge; see pages 5 and 6 of 213 of the master schedule of material served on the CPS.

121. The evidence submitted to the CPS and Treasury Counsel before the decisions to arrest and charge were made, in respect of the claimants only, can be summarised as follows

**Glenn Vian** (paragraphs 1785 – 1802 of the report). Ward's evidence of Glenn Vian's admission to him; the product of the probe on 19 October 2002 (paragraph 26 above); Eaton's eyewitness evidence; and Docherty's evidence about Glenn Vian's admission to him and his receipt of money from Rees.

**Garry Vian** (paragraphs 1802 – 1812 of the report). Garry Vian's admissions to Ward and Jones that he was present at the scene of the murder; Eaton's evidence; and the product of the probe on 19 October 2002.

**Rees** (paragraphs 1825 – 1837 of the report). Eaton's evidence about drug trafficking and money laundering; the undisputed fact that Rees was responsible for bringing Morgan to the Golden Lion, a public house which neither of them normally frequented; Eaton's evidence that Jimmy Cook spoke to him there; Lennon's statement that Rees had sought to have Morgan killed long before the murder; Rees's lies about telephone calls on the night of the murder, in particular the 12 minute call at 9.04 pm and his lies about his journey after leaving the Golden Lion; and, potentially, Docherty's evidence about counting out the money for Glenn Vian. The report, however, contained one accurate significant statement about the case against Rees in paragraph 48,

> "The new witnesses identified by Operation Abelard II do not confirm whether or not Rees commissioned the murder."

**Fillery** (paragraphs 1838 -1852 of the report). Eaton's statement that he was threatened by Fillery not to speak about the murder or he would be killed like Morgan.

122. The claimants and Jimmy Cook were arrested on suspicion of murder on 21 April 2008 and taken to Charing Cross Police Station. Their detention was authorised by an appropriate police officer and, on 22 and 23 April 2008, by a district judge at City of Westminster Magistrates Court. Each was charged on the evening of 23 April 2008. I only have full custody records for Rees, Glenn Vian and Fillery. Rees was charged by DC Caroline Linfoot with murder at 7.09 pm. Glenn Vian was charged by Beswick with murder at 8.56 pm. Fillery was charged with doing an act tending and intended to pervert the course of justice at 9.15 pm by DC Christopher Winks, who

had on 22 April 2008, at 7.10 pm, rearrested him for that offence, before questioning him about it. I do not know the precise times at which Garry Vian and Jimmy Cook were charged with murder. A note in Beswick's handwriting, however reveals that at 3.35 pm on 23 April 2008, he told Garry Vian and Jimmy Cook that they would be charged with murder and Fillery that he would be charged with doing an act tending and intended to pervert the course of justice. (9/7437). The custody records of Rees, Glenn Vian and Fillery do not reveal that they were told that they were being detained under s37(7)(a) Police and Criminal Evidence Act 1984, for the purpose of enabling the Director of Public Prosecutions to make a decision under s37B, whether or not to charge them, as required by s37(8)(b). It can therefore be inferred that the procedure set out in s37(7)(a)(ii) was not formally adopted. However, in undisputed evidence, both DC Linfoot and Beswick state that the decision to charge Rees, Glenn and Garry Vian and Jimmy Cook with murder and Fillery with an act tending and intended to pervert the course of justice was taken by the CPS. That has not been disputed and I accept that it was.

123. Although privilege has not been waived on the advice given to the Metropolitan Police Service by the CPS and Treasury Counsel and although the documents, which must exist, which record their charging decisions and the basis upon which they were made have not been disclosed, I have no doubt that it was the CPS, advised at all stages by Treasury Counsel, who decided that there was sufficient evidence to charge each of the claimants with the offence of which each was charged.

**The Criminal Proceedings**

124. On 24 April 2008 the claimants and Jimmy Cook were remanded in custody by the Magistrates Court. The case was transferred to the Central Criminal Court. On 31 July 2008 a plea and case management hearing was held. On 6 August 2008 Fillery was granted bail. He was arraigned on 7 October 2008. Glenn and Garry Vian and Rees were arraigned on 21 October 2008. On 26 November 2008 Rees's application for bail was refused. On 21 April 2009, the custody time limits were extended. They were further extended on 18 December 2009.

125. Meanwhile, further evidence, most of it not relied on at the stage of charging, was obtained. The arrest of the claimants was reported by the press on 22 April 2008, together with the availability of a £50,000 reward. On that day, Guy Blackall was interviewed and made a written statement. In his statement he said that in January or February 1987 he had overheard Rees and Glenn Vian talking about getting rid of Daniel Morgan in the Harp public house. He did not think they were talking about murdering him. In June 1987, he had overheard Glenn Vian boasting about killing Morgan with an axe to the head and that Rees had paid him £15,000 as a first instalment for the killing. Blackall had begun a relationship with Rees's ex-wife and Glenn and Garry Vian's sister, Samantha. The date which he gave for its commencement did not tally with his span of dates for the first conversation. His evidence was capable of implicating Glenn Vian but it seems unlikely that it would have withstood forensic scrutiny. The interviews on which the statement was based were concluded at 8.08 pm on 22 April 2008 and the gist of what he had said was referred to by Sampson when he presented the case to Magistrates on 24 April 2008. It is not known if they were taken into account by him when Rees and Glenn Vian were charged on 23 April 2008 at 7.09 pm and 8.56 pm respectively. It is known that prosecuting counsel were not informed until November 2008.

126. On 1 July 2009 Sally Ann Wood, then the girlfriend of Jimmy Cook, provided a detailed statement about what he had said to her about the Morgan murder. Jimmy Cook told her that Rees had arranged for Morgan to meet him at a pub in Croydon knowing that Glenn and Garry Vian and he, Jimmy Cook, were in the car park waiting for him. Jimmy Cook then described how the "nuttier" of the Vian brothers – she thought Garry Vian – smashed an axe into Morgan's head and hit him again, leaving the axe stuck there. She was extensively debriefed about the Morgan murder and other violent crimes. It was eventually discovered by the debriefing and investigative teams that she was a fantasist and had been making statements about crimes reported on the internet in the same terms as they were there reported. On 10 October 2010, Treasury Counsel decided that she no longer could be relied on as a witness. Her evidence, which, in any event, was only admissible against Jimmy Cook, was worthless.

127. On 16 July 2008, Dean Vian, the adopted son of Garry Vian, told the investigating team that Garry Vian had told him that Glenn Vian and Jimmy Cook had murdered Morgan. He made a statement to that effect on 17 July 2008. He provided no evidence against any of the claimants other, perhaps, and then only by inference, against Garry Vian. It would not have carried the prosecution against him any further.

128. A hair sample recovered from underneath one of the tapes binding the handle of the axe which killed Morgan was submitted for mitiochondrial DNA testing. This revealed a sequence which matched that of Glenn Vian's wife, Kim and Goodridge. It could have come from either of them or from any member of their family related to them in the maternal line. Subject to obvious caveats, this evidence was capable of implicating Glenn Vian.

129. On 41 days between October and December 2009, Maddison J heard evidence and submissions about a variety of issues, including an application by the defence to exclude the evidence of Eaton under s78. On 15 February 2010 he announced his decision that, should there be a trial, Eaton's evidence would be excluded. He also ruled that proceedings against Fillery should be stayed because the only evidence against him was that of Eaton and it would not be fair and in the interests of justice to permit reliance on it. He deferred giving detailed reasons for his decision to exclude the evidence of Eaton until what he anticipated would be a comprehensive judgment on the application to stay proceedings for abuse of process. In the event, because the Crown abandoned the prosecution later on, he gave his detailed reasons for excluding Eaton's evidence in a discrete judgment handed down on 25 March 2011.

130. On 3 March 2010, Maddison J ruled that custody time limits would not be extended further for Rees, Glenn and Garry Vian and Jimmy Cook. His reason for doing so was that there had been a lack of due diligence on the part of the Metropolitan Police Service in disclosing the contents of the 18 crates of documents referred to in paragraphs 54 and 55 above, which had been available for inspection by Beswick's team in July 2007, but had been returned to DPS storage unexamined. Maddison J found that there was material within the crates which would assist the defence. Although he made it clear that he had no reason to believe that he or the defence had been deliberately misled, he declined further to extend the custody time limit.

131. On 30 June 2010, Maddison J informed all parties by email of his conclusion that the proceedings should not be stayed and that the Crown would be permitted to adduce the evidence on which they sought to rely.

132. Evidence from the 18 crates proved damaging to the credibility of Ward. 63 pages of material relating to him under the sobriquet "Bert Roote" was disclosed on 7 October 2010.

133. On 18 November 2010, no further evidence was offered against Jimmy Cook.

134. Also in November 2010, further material was recovered from premises previously occupied by the DPS about Ward under the sobriquet, Jack Baker. It was provided to the inquiry team on 18 January 2011. It contained evidence that Ward had given an instruction that a drug dealer should be killed. In the view of Treasury Counsel, it so undermined the worth of the evidence of Ward as to cause them to withdraw his evidence on 24 January 2011.

135. Following a further hearing about the efficacy of disclosure and what had gone wrong with it, on 11 March 2011, Treasury Counsel announced their decision to Maddison J to discontinue the prosecution and offer no further evidence against Rees and Glenn and Garry Vian. They stated that their view and that of the CPS and the police was that the test for prosecuting in paragraph 3.5 of the 6th edition of the CPS Code was no longer satisfied. (Prosecutors must not allow a prosecution to continue where to do so would be seen by the Court as oppressive or unfair so as to amount to an abuse of the process of the Court.) Not guilty verdicts were entered.

**Malicious prosecution**

136. The claimant must prove the five elements essential to a successful action for malicious prosecution:

i) He was prosecuted by the defendant.

ii) The prosecution was determined in his favour.

iii) The prosecution was without reasonable and probable cause.

iv) It was malicious.

v) The claimant suffered actionable damage.

All but (ii) are in issue. It is admitted that Rees and Glenn and Garry Vian were acquitted. For the purpose of this claim only, the Commissioner accepts that Fillery is to be treated as having been acquitted, even though proceedings against him were formally only ordered to be stayed. For reasons explained later, this concession represents a conclusion that I would have reached in any event.

**Were the claimants prosecuted by Cook?**

137. Each claimant must prove that the law was set in motion against him on a criminal charge by Cook, with or without the knowing assistance of Beswick and/or other police officers. The means by which the law is set in motion on a criminal charge is

by laying a charge. (The alternative of laying an information before a magistrates' court is not relevant for present purposes). Since 1 January 1986, a person arrested on suspicion of having committed a criminal offence who is taken to a police station must be dealt with under s37 Police and Criminal Evidence Act 1984. At the time of the arrest and charging of the claimants in April 2008, s37 was in the form amended by Schedule 2 to the Criminal Justice Act 2003. S37(7) then read,

> "…If the custody officer determines that he has before him sufficient evidence to charge the person arrested with the offence for which he was arrested, the person arrested –
>
> a) shall be –
>
> i) released without charge and on bail, or
>
> ii) kept in police detention,
>
> for the purpose of enabling the Director of Public Prosecutions to make a decision under s37B below…
>
> d) shall be charged."

S37B provides that where a person is dealt with under s37(a),

> "(ii) The Director of Public Prosecutions shall decide whether there is sufficient evidence to charge the person with an offence…"

And if he does,

> "(3)…He shall decide
>
> (a) whether or not the person should be charged and, if so, the offence with which he should be charged…"

If this procedure is adopted, the DPP must give notice to the officer involved in the investigation, which may be oral, but must later be confirmed in writing: S37B(4) and (4A). A Crown Prosecutor, designated by the DPP – in effect any lawyer employed by the Crown Prosecution Service – has the same powers as the DPP to institute and conduct proceedings: Section 1(6) Prosecution of Offences Act 1985. At least since Schedule 2 to the 2003 Act came into force on 29 January 2004, if not before, it has been lawful for the DPP/CPS and police officers to apply the procedures in sections 37(7)(a) and 37(B) in substance, even if not in form. In a serious case, such as this, it was unsurprising that the decision to charge and the decision as to which offence to charge, was taken by the CPS, as I am satisfied that it was, on the advice of Treasury Counsel. The mechanism adopted does not alter the substance of what occurred.

138. It is settled law that,

> "The mere fact that an individual has given information to the police which leads to their bringing a prosecution does not make that individual the prosecutor."

Per Lord Keith in *Martin v Wilson* [1996] 1AC 74 at 86C. That rule was subject to a significant qualification,

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant."

Per Lord Keith *ibid* 86G – 87A.

On the facts, which involved an allegation by the plaintiff against the defendant, of otherwise un-witnessed indecent exposure, Lord Keith approved the reasoning of the trial judge,

> "In the circumstances of this particular case, therefore, I find that the defendant was indeed actively instrumental in setting the law in motion against the plaintiff. To hold otherwise would, I consider, be an affront to a proper sense of justice. She wanted the plaintiff to be arrested and dealt with from the start, and that is what she achieved in causing DC Haynes to obtain the warrant from the magistrate. She was, as I say, the only person who could testify about the alleged indecent exposure. I therefore find that the defendant is to be regarded as a prosecutor in setting the law in motion against the plaintiff."

87E – F.

139. The scope of Lord Keith's qualification has been considered on at least four occasions by the Court of Appeal. In two of them, the issue was whether or not a claim for malicious prosecution should be struck out. The first was *Moon v Kent County Council* 15 February 1996. The real issue in the appeal, identified by McCowan LJ was,

> "Whether it is reasonably arguable that the second defendant Mr Walters, on behalf of the first defendant, his employer the Kent County Council, was in effect the prosecutor of the plaintiff Mr Moon notwithstanding that the information was laid by the police."

The plaintiff was charged with four counts of falsifying returns to Kent County Council. The sole basis for the charges was the evidence and calculations of Mr Walters, who had special knowledge of the subsidy system under which the alleged

false claims had been made and himself made the complex, but erroneous, calculation of what had been claimed by the plaintiff. McCowan LJ, with whose judgment Neil LJ agreed, decided that the claim should not have been struck out because,

> "…It is properly arguable in this case that it was virtually impossible for the police officers to exercise an independent judgment and that the prosecution was procured by Mr Walters."

140. In *AH (unt) v AB* [2009] EWCA Civ 1092, the facts on the preliminary issue of who was the prosecutor were fully tried by Blake J. AB asserted that she had been raped by Hunt. She did not go to the police immediately. Some years later, a colleague in whom she had confided did so. The police persuaded AB to give evidence. She did so and Hunt was convicted, but his conviction was overturned on appeal. He sued AB for malicious prosecution. Blake J held that she was not the prosecutor. He appealed. His appeal failed, for two reasons: it had not been proved that she had the necessary desire and intention that Hunt should be prosecuted: per Sedley LJ at paragraph 3 and per Moore-Bick LJ at paragraph 84. The second reason was of wider application. Sedley LJ put it thus in the last sentence of paragraph 3 of his judgment,

> "The answer of principle is that, even if AB had gone straight to the police and made it clear that she wanted Mr H prosecuted, the independent intervention first of the police and then of the CPS would, in the absence of proof that the prosecution was in reality her doing and not theirs, have made the latter the prosecutor."

He observed in paragraph 39 that the issue was fact sensitive. In paragraph 47, he reiterated his conclusion,

> "Even if she had gone directly to the authorities, the professional responsibility for the case assumed first by the police and then by the CPS would prima facie have made the latter for all legal purposes the prosecutor. It would have been necessary to establish that she had deliberately manipulated them into taking a course which they would not otherwise had taken if, pursuant to *Martin v Watson*, she was to be regarded in law as the prosecutor."

Wall LJ, at paragraph 59, agreed,

> "In my judgment, provided the CPS makes an independent decision to prosecute, and its process is not overborne or perverted in some way by the complainant, the complainant is protected."

Moore-Bick LJ agreed in these terms,

> "More importantly, however, I think he was right to hold that this was not a case in which the prosecuting authorities were deprived of the ability to exercise independent judgment.

> Unfortunately, cases of this kind, in which the complainant's word is pitted against that of the accused, are not uncommon, especially if there has been any significant lapse of time between the events in question and the investigation. However, that does not normally prevent the authorities from assessing the credibility of the complainant by reference to the inherent plausibility of the account and such circumstantial evidence as may be available. As to this, I entirely agree with the observations made by Sedley LJ in paragraph 47 of his judgment. In my view the Court should be very cautious before reaching the conclusion that the authorities were unable (or even, as Mr Warby emphasised, *virtually* unable) to exercise independent judgment."

141. In *Ministry of Justice v Scott* [2009] EWCA Civ 1215, five prison officers complained that they had been assaulted in HMP Long Lartin by the claimant. He was prosecuted and acquitted. He claimed damages for malicious prosecution against the Ministry of Justice as employers of the five prison officers. The Ministry of Justice applied, unsuccessfully, to strike out the claim on the basis that the prison officers were not the prosecutor. The Court of Appeal dismissed their appeal. Pill LJ, with whom Dyson LJ agreed, identified the issue in paragraph 40 of his judgment

> "This is an application to strike out and the facts in the particulars of claim must be assumed. On those facts, it is plainly arguable that the prison officers desired and intended that the respondent should be prosecuted. The question is whether, on the facts, it is arguable that the prosecution was procured by the prison officers and the circumstances were such that it was virtually impossible for the CPS to exercise any independent discretion or judgment."

He concluded that it was, even though, potentially, other evidence might have been available – for example from other prisoners. In paragraph 43 he stated the core of the reason for rejecting the appeal

> "The CPS received statements alleging assault from five prison officers who were eyewitnesses to an incident in the prison. Arguably, it was virtually, in practical terms, impossible for the CPS to exercise independent discretion in the face of such evidence."

Longmore LJ expressed the same conclusion in different language in paragraph 49

> "To my mind it is not plain that the circumstances of the present case were such as to enable Ms Rosamond (the CPS Prosecutor) to exercise an independent judgment on 19 December 2002 when she advised that Mr Scott should be prosecuted for assault and affray. She had little option but to accept the account given by the prison officers."

142. In *Copeland v Metropolitan Police Commissioner* [2015] 3 AER 391, the claimant was arrested by one police officer, PC Derbyshire, at Bromley Police Station for an assault on another police officer, PC Bains. She was charged three months later, by a third. Only PC Bains and the claimant knew what had happened. She was convicted by the Magistrates' Court, but her conviction was quashed on appeal and she was bound over for 12 months. At the trial of her claim for damages for false imprisonment and malicious prosecution, before Hickinbottom J and a jury, the jury found that Bains had lied to Derbyshire. One of the grounds of appeal was that a question left to the jury by Hickinbottom J was insufficient to establish that Bains was the prosecutor. Unfortunately, the report does not state what the question was. At paragraph 33 of his judgment, Moses LJ, with whom Patten LJ and Maurice Kay LJ agreed, stated the test which Hickinbottom J had applied to the question which he, not the jury, answered,

> "He asked himself whether DC Bains was "instrumental in the bringing of the prosecution" or was "in substance" the person, or at the very least, a person responsible for the prosecution being brought."

He said that in his view Hickinbottom J's test and approach to the facts could not be impugned. In paragraph 25 he observed that

> "The jurisprudence seeks to fix liability on the person who, in substance, is responsible for the prosecution having been brought whilst, at the same time, avoiding the danger of a chilling effect on any witness who might seek to avoid giving evidence for fear that they may be identified as the prosecutor, and thus liable for a malicious prosecution."

143. Each of the four cases was a simple case. In three of them, the basis of the prosecution was the word of one person. In one, it was the word of five colleagues, working in a closed environment. In none of them was it possible for the charging police officer or the CPS or both to exercise a judgment independent of the word of the person or persons making the allegation.

144. The case law establishes that an individual or group of individuals may be treated as the prosecutor where

i) they alone know the facts about the alleged offence.

ii) they deliberately misstate the facts to the person who makes the decision to lay the charge and so start the criminal process.

iii) they intend that there should be a prosecution.

iv) the person who decides that the charge should be laid and prosecution brought cannot be expected to and does not form an independent judgment on the question whether or not a charge should be laid and if so which.

145. These principles are not difficult to apply in simple cases. In more complex cases, the closest suggestion to an answer was given by Brooke LJ in *Mahon v Rahn (2)* [2000] 1 WLR 2150 at paragraphs 269 and 270.

> "269. In a simple case it may be possible to determine the issue quite easily by asking these questions. (1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?
>
> 270. In the more complex case it is likely to be more difficult to apply these tests, but I would adopt the approach suggested by Richardson J in *Commercial Union Assurance Co. of NZ Limited v Lamont* [1989] 3 NZLR 187, 199 when he said that the tests should be the same when the police had conducted an investigation and decided to prosecute, but that they should be cautiously applied. The reason, of course, is, as he also took into account, that prosecuting authorities are trained and accustomed to consider the evidence placed before them with an appropriately critical eye. Crown Prosecutors, for instance, have to be satisfied that there is enough evidence to provide a realistic prospect of conviction, and paragraph 5 of the current Code for Crown Prosecutors describes in clear terms the tests they have to apply before they can allow themselves to be so satisfied."

146. In this case, a vast amount of information and evidence was presented to the CPS for Sampson and Treasury Counsel to consider. With one significant exception – the case of Fillery – that material did not consist only or determinatively of the evidence of one flawed witness, Eaton. Eaton's evidence was important to the case as a whole. It had been contaminated by the actions of Cook which Cook deliberately withheld from the CPS and Treasury Counsel. However, I have no doubt that Sampson, advised by Treasury Counsel, reached the decision to charge three of the claimants with murder and Fillery with doing an act tending and intended to pervert the course of justice in the exercise of independent judgment on the basis of all of the material of which he was then aware. His information was necessarily incomplete, because of the actions of Cook. Nevertheless, for Cook to be treated as the prosecutor, the law requires to be stated in a manner not established by existing authority. For the claimants to succeed on this issue, the law must be that an investigator who, by his deliberate conduct in relation to an important element of a case, prevents the independent decision-maker from reaching a fully informed decision, is to be treated for that reason alone as the prosecutor. There is a difference between making it "in practical terms virtually impossible for the CPS to exercise independent discretion" and making the exercise of that discretion more difficult, because of the deliberate concealment of an important fact. In my judgment, the latter lies on the wrong side of the line for determining whether or not someone other than the CPS is to be treated as the prosecutor for the

purpose of the tort of malicious prosecution. Applying the principles derived from the authorities, Cook's conduct did not make it virtually impossible in practical terms for the CPS, advised by Treasury Counsel, to exercise their independent discretion. They were provided, 10 months before charges were laid, with a detailed and, with the qualifications expressed, reasonably accurate summary of the evidence gathered over 20 years about the murder and those believed to have been complicit in it. The raw material on which that summary was based was supplied to the CPS: they had discs of all of the debrief interviews with Ward and Eaton and Docherty. The only significant fact which they were not told was that Eaton's evidence had been improperly prompted by Cook. Further, not only were the CPS able to exercise an independent discretion, they did so. The advice proposed that all five claimants should be charged with conspiracy to murder and all five were arrested for murder on 21 April 2008. Only Rees, Glenn and Garry Vian and Jimmy Cook were charged with murder. Fillery was charged only with doing an act tending and intended to pervert the course of justice. The likelihood is that this decision was taken after arrest and before charge, but even if it had been made before arrest, it would still have been the independent decision of the CPS.

147. For those reasons, I have decided that Cook is not be treated as the prosecutor so that, for that reason, the claimants have failed to prove the first of the elements of the tort.

148. In reaching that conclusion, I have not followed or applied the observations of Cranston J in *Clifford v The Chief Constable of the Hertfordshire Constabulary* [2008] EWHC 3154 (QB) at paragraphs 49 – 50 of his judgment. The facts of the case were simple, as explained by McKay J in his judgment on the retrial of the claim at [2011] EWHC 815 (QB). On 30 October 2003 Clifford was arrested by PC Hopkins on suspicion of making or attempting to make or possessing or incitement to distribute indecent images of children. His arrest was part of Operation Ore. The ground for suspicion was that his credit card had been used on six occasions in 1999 to access pornography through the "Landslide" website in the United States. On the day of his arrest, a computer formerly belonging to him was seized at the premises of a former business associate, to whom he had sold the computer, and with whom he was on bad terms. An imaged copy of the hard drive of this computer was sent to a police expert, George Fouhey. On a date before 19 July 2004 Fouhey made a witness statement in which he said he had found "17 images of note" on the hard drive. On 19 July 2004, the claimant was rearrested and interviewed by Hopkins. Hopkins laid four charges before the custody sergeant, which he accepted – of incitement in 1999, of making indecent photographs of children on 21 January 2001 and of possession of indecent images of children on 30 October 2003. The latter three charges all arose out of the examination by Fouhey of the hard drive of the computer. The CPS did not advise on the charges. They later discontinued the incitement charge, but proceeded on the making and possession charges.

149. On 21 December 2004 Fouhey made a second witness statement. It was to the effect that the 17 images which he had found on the hard drive could have been unsolicited and there without the knowledge of the operator of the computer. His second statement was served on the defence on 29 January 2005. A computer expert instructed by the defence said that the images could not be viewed or recovered by an ordinarily skilled and equipped computer user. Fouhey agreed with that. No further evidence was offered, and Clifford was acquitted.

150. McKay J found, as a fact, that the 17 images which he had found were located in files which were of no use to support a possession charge before Clifford was charged on 19 July 2004. He went on to find that Hopkins knew that that was so and had an ulterior purpose in laying the three possession charges – to bolster the incitement charge (subsequently abandoned by the CPS) and to protect his own position.

151. On those findings, the facts fitted squarely within the circumstances identified by Lord Keith in *Martin v Watson.*

152. In findings of fact, which were overturned by the Court of Appeal, Cranston J found that Hopkins did not become aware of Fouhey's opinion until December 2004. By then, the prosecution was underway and in the hands of the CPS. Counsel for Clifford submitted that the police remained liable in tort for the prosecution. Cranston J agreed. The proposition and his acceptance of it were set out in paragraphs 49 and 50 of his judgment.

> "49. In advancing the claimant's case Mr Thomas contended that the police remain liable in tort for the prosecution. Having launched the prosecution they had a duty to inform the CPS of matters such as the implication of the images being found in temporary internet folders because that undermined the prosecution case. No authority on the point was cited. A standard treatise opines that when the CPS are involved, if the police are still to be regarded as prosecutor proof of the absence of reasonable and probable cause may be exceptionally difficult when the evidence has been reviewed by CPS lawyers. Effectively, it continues, the claimant will normally need to establish that the information supplied to the CPS was a tissue of lies: Clerk and Linsell on Torts 19th edition 2006 993.
>
> 50. In my view Mr Thomas is correct in his submissions. The police may still be regarded as prosecuting an offence for the purposes of tort liability even if, after charge, they transfer the prosecution to an independent prosecutor, or even if it is the prosecutor who lays the charges. That is because the independent prosecutor is reliant on the police for the collection of the evidence which grounds the charge. If the police fail to forward evidence to the independent prosecutor then he or she may well charge incorrectly, or may continue with a prosecution which has subsequently become baseless. None of this turns on whether what the police have told the independent prosecutor is a tissue of lies; the police are potentially liable for failure to forward information if this is instrumental in a prosecution. The crucial issue is whether the conduct of the police, in terms of what they have done or failed to do in relation to the independent prosecutor, satisfies the component of the tort."

153. Cranston J went on to reject the claim for damages for malicious prosecution, for the reasons which he gave in paragraph 60. They are not easy to follow, but I believe that the following is a fair summary. Although Hopkins was told by Fouhey in

December 2004 that the images were in temporary internet folders and stated the implications of that fact, the prosecution might have obtained further expert evidence which would demonstrate that Clifford had accessed the images. In consequence, in December 2004, Hopkins still had reasonable and probable cause not to recommend to the CPS that the charges be dropped. He went on to state in paragraph 70 that the continuation of the prosecution after charge was justified.

154. On one reading of what Cranston J said the police may be treated as a prosecutor if they fail to forward information to the CPS if it is instrumental in the prosecution. I doubt that Cranston J intended that that should be taken as his definitive analysis of the first element of the tort of malicious prosecution. If he did, I respectfully disagree with him, for the following reasons. First, no authority on the point was cited to him by either side. If the authorities cited above had been cited to him, he would surely have expressed himself more cautiously and confined his remark to situations in which the determinative facts were known only to the police – as was, in fact the case, as McKay J found. Secondly, it cannot be that the police become a prosecutor of a case when the charge has been laid by, or on the decision of, the CPS, merely because after charge they fail to forward some non-trivial information to the CPS relevant to the prosecution. I accept that a prosecutor who continues a prosecution after he knows that it has become baseless may be liable for the tort of malicious prosecution from that point on; and that it is arguable that a police officer, responsible for the investigation which has given rise to the charge, may be treated as a prosecutor if he deliberately suppresses information which would reveal to the CPS that the prosecution had become baseless. If and when such a situation arises, it would fall for decision. On the true facts in *Clifford* it did not. It does not arise in this case, because, despite the deliberate suppression by Cook of facts relevant to Eaton's evidence, that did not render the prosecution against any claimant other than Fillery baseless.

**Reasonable and probable cause**

155. If I had decided issue (1) in favour of the claimants, I would have to go on to answer questions (3) and (4). In the event that I am wrong about (1) I will do so.

156. The test for (3) is long established. The claimants must prove that there was not, objectively, reasonable and probable cause to prosecute and, subjectively, that the "prosecutor" did not believe that there was. As Lord Denning explained in *Glinski v McIver* [1962] AC 726 at 758, the prosecutor has to be,

> "Satisfied that there is a proper case to lay before the Court, or in the words of Lord Mansfield, that there is a probable cause "to bring the (accused) to a fair and impartial trial"."

Lord Devlin put it in different words, but the effect is the same,

> "First the question is a double one: did the prosecutor actually believe and did he reasonably believe that he had cause for prosecution?"

(p768).

The facts on which the question has to be answered,

> "are those, and only those known to the defendant at the material time." (*Ibid).*

In a case such as this, where the focus of attention is on the bringing, not the continuation, of a prosecution, that time is when the decision to charge is made.

157. The tests propounded by Lord Denning and Lord Devlin sit more comfortably with modern arrangements for the prosecution of serious offences than the observation of Hawkins J in *Hicks v Faulkner* [1878] 8 QBD 167 at 171, approved by the House of Lords in *Herniman v Smith* [1938] AC 305,

> "An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

That is for two reasons. First, prosecuting authorities are not required to assume that the facts asserted by them are true. They can, and routinely do, assess the credibility of witnesses by reference to the inherent plausibility of the account or other evidence, as Moore-Bick LJ noted in paragraph 84 in *Hunt v AB*. Secondly, the CPS were required, pursuant to s10 Prosecution of Offences Act 1985, to apply the test set out in paragraph 5.2 of the 5th edition of the Code for Crown Prosecutors, then applicable.

> "Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge."

As Lord Denning observed in *Glinski and McIver*, "Guilt or innocence is for the tribunal and not for him". (p758).

Similar considerations apply to a professional investigator.

158. When assessing both the objective and subjective elements of the test of reasonable and probable cause, the evidence of Eaton must be excluded. Cook knew that he had compromised the evidence by conduct which was certain, or at least highly likely, to cause the trial judge to rule it inadmissible. Because that was objectively certain or highly likely, it cannot feature in the objective assessment. Because Cook knew what he had done, he must be taken to have realised the consequence.

159. The question whether or not there was reasonable and probable cause to prosecute the claimants must be answered in relation to each claimant.

**Glenn Vian**

160. Ward's evidence, if true, directly implicated Glenn Vian. There were obvious weaknesses in his evidence. He was a manipulative professional criminal and was using the information provided to the police about the Morgan murder for his own ends, having previously denied having useful knowledge. Yet leading prosecuting

counsel, Nicholas Hilliard QC, stating the view of prosecuting counsel on 24 January 2011, when reliance on Ward's evidence was withdrawn, said that it had always been their position that the central allegations he made about the murder were capable of belief. (21/18474). Mr Bowen and Mr Simblet submitted that Ward's evidence, like that of Eaton, had been deliberately contaminated by Cook. They rely on the prompting in the interview on 2 February 2005 (cited in paragraph 37 above) and assert that, because Ward had Cook's mobile telephone number, Cook could readily have prompted Ward by telephone, as he did Eaton. Further, they submit that Ward was given improper incentives in the confiscation proceedings at the instigation of Cook. With the exception of the suggestion about telephone contact, I have already analysed and expressed my conclusions about these issues. On 2 February 2005, at the stage at which he prompted Ward, Cook was gathering intelligence not evidence. It is fanciful to suggest that a manipulative criminal like Ward would, when interviewed as a potential witness, 15 months later in May 2006, have remembered the detail of the prompt. In any event, he did not react to it, by accepting it, but by advancing a different version of events. The benefit which Ward derived from the compromise of the confiscation proceedings was patent. Like the benefit which he derived from the s74 agreement, it was a significant factor in assessing the worth of his evidence, but did not destroy its potential value. As to the suggestion that Cook may have prompted Ward in frequent telephone calls, it overlooks the fact that Ward was in prison so that the opportunity for unrestricted and unrecorded telephone calls either did not exist or was so diminished as to make the possibility highly unlikely. I am satisfied that, throughout, Ward was acting in a manner calculated to further his own interests. If he had been called to give evidence, it would have been for the jury to determine whether he had told the truth or had some other purpose to serve. Until his evidence was withdrawn on 24 January 2011, Ward's evidence provided evidence capable of supporting both the objective and subjective elements of the reasonable and probable cause test.

161. Docherty's evidence, if true, directly implicated Glenn Vian. Mr Bowen submits that, as in the case of Ward, his repeated earlier refusal to say anything and the apparent inconsistency between his statement in 2002 that he knew and disliked Morgan and his later account of joining Rees and Fillery at Southern Investigations only after the murder means that his account should be treated as worthless. There is no suggestion that his evidence was contaminated by Cook, who had nothing to do with him. His motive for giving evidence may have been mercenary – to claim a share of the £50,000 reward offered by the police for evidence – but, despite that, prosecuting counsel still proposed to rely on his evidence even after the loss of that of Ward. Modest support for the proposition that Docherty did know something was provided by the product of a probe on 10 October 2002, during which Garry Vian said to Glenn Vian,

> "They asked her (their mother) about Andy Docherty, that's about it. Even though he's got 15, he's dying. He don't want to die in there, you never know what he's coming up with. You know a deal, aah?"

To which Glenn Vian made no coherent reply.

162. The product of the probe on 19 October 2002 provided clear and compelling evidence of a propensity on the part of Glenn Vian to commit lethal violence. Although this

evidence could only ever have been supportive of the evidence of Ward and Docherty, it would probably have been admitted under sections 101(1) and 103 Criminal Justice Act 2003.

163. The product of a probe on 1 August 2006 at Glenn Vian's home was capable of providing some support for the case against him. In anticipation of an arranged visit to the police station in relation to the Morgan murder, he discussed with his daughter a likely request which would be made of him for his DNA. He told her not to worry,

> "It's only immaterial, right, they. I would have had to fuck up, big time, trust me. Unless someone puts my DNA there, well I don't think they're to clever to, I'm not there now. It's as simple as that…"

By itself, this evidence was of little value; but a jury could have concluded that it was a qualified admission of presence at the scene of the murder.

164. Taken together, this evidence, despite its weaknesses, satisfied the objective element of the reasonable and probable cause test when the decision to charge was made. It continued to do so until the evidence of Ward had to be abandoned. The matter then became finely balanced as Mr Hilliard acknowledged on 11 March 2011. (24/20912). There is no evidence and no basis upon which I could conclude that Cook (and Beswick) did not believe that it provided reasonable and probable grounds for prosecution, so that the subjective element of the test was satisfied too.

**Garry Vian**

165. The evidence of Ward and Jones implicated Garry Vian in participation in the murder. I have already dealt with Ward and with the likelihood that Jones would have given evidence. Mr Simblet suggested that his evidence was undermined by the admission which he made of storing cannabis on two occasions for Garry Vian, for which he received payment of £1,000. That would have been for the jury to assess. It would not, by itself, have so undermined his evidence as to make it worthless.

166. The product of the two probes on 10 and 19 October 2002, referred to in the case of Glenn Vian, were also capable of supporting the case against Garry Vian.

167. Taken together, all of this evidence satisfies the objective element of the reasonable and probable cause test; and because there is no reason to doubt that Cook believed in its worth, satisfied the subjective element as well.

**Rees**

168. The undisputed starting point for the case against Rees was that, as he admitted in his witness statement of 11 March 1987, he had arranged to meet Morgan at the Golden Lion, a pub not normally frequented by either of them, at 7.30 pm on 10 March 1987. The murder of Morgan was clearly planned. Those who carried it out must have known in advance that Morgan would be there.

169. The inconsistencies in Rees's accounts of his movements and telephone calls on the night of 10 March 1987 were evidence that Rees had something to conceal

immediately after the murder. A jury could infer that, given the coincidence of timing, it was connected to it.

170. Lennon's statement provided clear evidence of an intention on the part of Rees that Morgan should be killed; but for the reasons already explained, it was of such tenuous value as to be incapable of providing real support to the prosecution case.

171. The key evidence was that of Docherty. If true and if Docherty's evidence about what Glenn Vian had said to him as he left Rees's office with an envelope full of money was admissible, it provided clear evidence of Rees's complicity in murder. What Docherty said that Glenn Vian had said to him as he left Rees's office was, as against Rees, hearsay. It was not said in furtherance of a plan or conspiracy, but after it had been completed and so was not admissible at common law against Rees. The evidence could, therefore, only have been admitted against him under s114(1)(d) Criminal Justice Act 2003. The Courts are slow to admit the evidence of what one defendant says about the criminal activity of another, in particular in police interviews: *R v Y* [2008] 1 CAR 34 at paragraph 57. If the evidence of Docherty was capable of belief (as to which see the observations above), I can see no reason why a trial judge should have refused to admit this evidence against Rees. Although it was not admissible at common law, it fulfilled the basic reasons why evidence of something done during the course of a conspiracy to commit a crime is admissible. It was a statement made by someone who knew what he was talking about. It was made without reflection or the opportunity for concoction and served no interest of the person making the statement. It was made immediately after an act which Docherty had witnessed – the counting out of money – and was a spontaneous and contemporaneous statement of the reason for it.

172. That evidence satisfied the objective element of the reasonable and probable cause test; and because there is no reason to doubt that Cook believed that it did, the subjective element as well.

**Fillery**

173. The only evidence on which the Crown relied against Fillery of doing an act tending and intended to pervert the course of justice was that of Eaton. Given that no reliance can be placed upon his evidence, for the reasons explained, neither the objective nor the subjective elements of the reasonable and probable cause test were satisfied in his case.

**Malice**

174.

> "Malice it is agreed, covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice. "

Per Lord Devlin in *Glinski v McIver* p766.

175. This requires the state of mind of Cook to be determined. He has not provided a signed witness statement in this action and has not given evidence, despite having expressed, through his solicitors, a willingness to do so. I am satisfied that the reason

why he has not done so is not because of any reluctance on the part of the Commissioner to obtain a witness statement from him and to call him, but because of his unwillingness to cooperate with the Commissioner or to give oral evidence in these proceedings. This is unsurprising. As already noted, it would not be the first time in which he has declared a willingness to do something (to comply with the sterile corridor rules) and then deliberately done otherwise. He has been the subject of serious adverse findings by Maddison J. He has also been arrested for and publicly criticised (by the Independent Police Complaints Commission) on 10 November 2015 for supplying large quantities of confidential documents to a journalist between 2008 and 2011 relating to the investigation into the Morgan murder. (25/21274). Mr Bowen and Mr Simblet invite me to draw adverse inferences from these facts and from his absence from the witness box.

176. I decline to do so. There is clear contemporaneous evidence of his state of mind immediately before the start of Operation Abelard II, contained in two documents: the Chipperton note of the discussion with Ward on 2 February 2005 and the Yates report of 31 January 2006, drafted by Cook. He clearly believed that he knew who had commissioned and committed the murder. All that could not then be done was to prove it. I am satisfied that he shared the view expressed by Treasury Counsel, noted in paragraph 275 of the Yates report, already cited. I am satisfied that he believed that, in the evidence of Ward and Eaton and, later, of Docherty, he and his team had found the evidence by which his beliefs could be proved to the satisfaction of a jury. The fact that he overstepped the mark – even to the point of committing the criminal offence of doing an act tending and intended to pervert the course of justice – does not alter his state of mind which was, I am satisfied, to bring those he believed to be complicit in the murder to justice.

177. Mr Bowen submits that he went further than that – that he was determined to convict the claimants at all costs, irrespective of the evidence. He relies on the contents of the Yates report about Fillery to establish this proposition. I accept that the report does not make clear that which was clear when it was written: that the evidence against Fillery of complicity in the murder or in covering it up was not as strong as had originally been thought. The flaws in Lennon's evidence, which caused Hampshire Police to discount it, were not highlighted. The fact that Newby, the Southern Investigations office manager, said at the inquest that he was no longer sure that Fillery had taken away and suppressed the Belmont file was not mentioned. Nor was the fact that Fillery had asked to be taken off the investigation, because he knew Rees. Cook concluded that the investigation had been compromised by Fillery. This demonstrates that he had formed a settled view adverse to Fillery. It is, however, unsurprising that he expressed this view in the report, because the commissioning brief specifically required a report on

> "(ii) the first investigation of the murder carried out by the MPS – giving a comprehensive account of the investigation and its weakness including the possibility of the investigation being compromised and specifically covering
>
> (a) the role of ex-PS Sidney Fillery in that investigation…"

That part of the report dealing with Fillery reveals, at worst, a closed mind; but not one determined on anything other than bringing those he believed to be responsible for the Morgan murder to justice.

178. In Rees's case, the possibility that Cook was seeking revenge against him for causing him to be the subject of surveillance by the News of the World, as a result of a tip-off by Rees to them is raised. Beswick gave the factual answer to this thin suggestion, which I accept. The News of the World had caused two photographers to follow Cook, but did so after a telephone call to them from Fillery, while Rees was in prison. The notion that this could provide a motive for Cook to pursue Rees for a collateral purpose is fanciful. So, too, is the suggestion that Cook's motive in pursuing the investigation and prosecution was to provide raw material for a book that he intended to publish after his retirement.

179. I am satisfied that, even if Cook's methods are open to criticism, his motive was not: it was to bring those he believed to have been complicit in the Morgan murder and in covering it up to justice. Accordingly, none of the claimants, even Fillery, has established the fourth element of the tort.

**Misfeasance in public office**

180. The elements of the tort of misfeasance in public office were authoritatively laid down by Lord Steyn in *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)* [2003] 2 AC 1 at 191B – 194C.

The defendant must be a public officer.

> "The second requirement is the exercise of power as a public officer.
>
> This ingredient is also not in issue. The conduct of the named senior officials of the banking supervision department of the bank was in the exercise of public functions."

> "The third requirement concerns the state of mind of the defendant.
>
> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his act is lawful."

The fourth element is that the act or omission of the public officer must cause loss to the claimant.

181. Mr Johnson QC submits that, whatever Cook may have done, he was not exercising a public power, such as a constable's common law and statutory power of arrest or search. He relies on the observations of Lord Bridge in *Calveley v Chief Constable of the Merseyside Police* [1989] 1 AC 1228 at 1240D and 1240H – 1241B. The Chief Constable had applied to strike out a claim brought by a police officer subject to disciplinary proceedings about a report made by another police officer to his superior about his conduct which he claimed was false. The pleaded case was mostly about negligence, but there was also a residual claim for damages for misfeasance in public office. Lord Bridge said that he did not regard it as the occasion to attempt to define the precise limits of the tort of misfeasance in public office.

> "It suffices for present purposes to say that it must at least involve an act done in the exercise or purported exercise by the public officer of some power or authority with which he is clothed by virtue of the office he holds…."

He said that it was evident that a false report to a senior officer for the purpose of disciplinary proceedings which was defamatory of the subject of the report was actionable, but not for misfeasance in public office,

> "But the tort is defamation not misfeasance in public office, since the mere making of a report is not a relevant exercise of power or authority by the investigating officer."

182. I do not accept Mr Johnson's submission, for three reasons.

i) Neither Lord Steyn's formulation, nor that of Lord Bridge, confined the second requirement of the tort to the exercise of a common law or statutory power. Lord Bridge used the words "some power or authority with which he is clothed by virtue of the office he holds". Lord Steyn gave as an example of the exercise of power as a public officer, "the exercise of public functions" by the banking supervision department. A police officer is given authority to investigate by his chief constable; and it is one of the functions of an investigative police officer to investigate crimes and obtain witness statements for the purpose of criminal prosecutions.

ii) Case law establishes that misconduct in the performance of police functions is sufficient to found the tort. In *Cornelius v London Borough of Hackney* [2002] EWCA Civ 1073, Waller LJ cited with approval the unreported judgment of the Vice Chancellor in *Peter Elliot v Chief Constable of Wiltshire Constabulary* 20 November 1996, in which the point had been taken that when a police officer supplied details of convictions to the press, he did not do so, purporting to exercise a relevant public power. He held that the facts alleged would give rise to a claim.

> "Police officers have a status at common law, and perhaps statute as well, which is both a privilege and a source of powers and duties. If in the apparent performance of functions pertaining to their office police officers commit misconduct, then if the other ingredients of the tort of misfeasance in public office, and in particular the requisite intention to injure and

> resulting damage, are present the tort of misfeasance in public office is, in my opinion, made out."

In *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, the issue was the scope of the immunity, if any, available to those investigating alleged crimes. The allegations were manifold and included several which were not concerned with the exercise by police of statutory or common law powers. The plaintiffs sued for damages for conspiracy to injure and misfeasance in public office. Lord Hope observed at p446F

> "The claims are based on allegations about things done by the police while they were engaged in the investigation of crime and during the process of preparing the case for the trial. If the allegations are true, the police would, but for the immunity, be liable to the plaintiffs in damages."

*Darker* was heard on 15 and 16 May 2000. Judgment was handed down on 27 July 2000. Lord Hope had been part of the panel hearing *Three Rivers*, in which judgment was handed down on 18 May 2000. He would hardly have expressed himself as he did in *Darker* if he had had any doubt about the availability of a claim for damages for misfeasance in public office.

iii) If Mr Johnson's proposition is correct, it would create unjustified anomalies, of which one illustration will suffice. If a police officer, in the exercise of a statutory power of entry and search of the home of an alleged burglar, plants an item stolen in the course of a burglary in the person's home, he has committed an act of misfeasance in public office, because he has done it in the exercise of a power. If he says that he saw the alleged burglar running down the street and dropped the item and he claims, falsely, to have picked it up, he would not be liable, because he would not have been exercising any police power. There is a limit on the tolerance of the law to anomaly and this would cross it.

183. Accordingly, for those reasons, I am satisfied that in prompting Eaton, Cook was acting in the exercise of his public functions as an investigating police officer.

184. The first way in which the tort can be committed – so called "targeted malice" – requires proof of an improper or ulterior motive. This is either identical to or so closely similar to the element of malice required to be proved in malicious prosecution as to be indistinguishable. For the reasons given before, it is not made out in this context too.

185. The second way in which the tort can be committed requires proof that the act is unlawful and that the public officer does not have an honest belief that it is lawful. Frequently, the act will be unlawful because it is in excess of powers; but that is not the only way in which a public official can commit an unlawful act. A police officer who discloses confidential data to a journalist, as was alleged in *Elliott* commits a civil wrong under the Data Protection Act 1998 and abuses the authority given to him by his chief constable to gain access to such data. A police officer who interferes improperly with the gathering of evidence for a criminal prosecution may also commit

the common law crime of doing an act tending and intended to pervert the course of justice. In any of these cases, the element of unlawful conduct will be made out.

186. On the facts of this case, I am satisfied that what Maddison J found that Cook did amounted to the crime of doing an act tending and intended to pervert the course of justice. The principal purpose of the sterile corridor system, even though it was non-statutory was as stated: to ensure the integrity of evidence to be given by an assisting offender. By prompting a potentially unreliable witness to implicate Glenn and Garry Vian in the Morgan murder and then to conceal the fact that he had done so from the CPS and prosecuting counsel, Cook did an act which tended to pervert the course of justice. In *Attorney General's Reference No. 1 of 2002* [2002] EWCA Crim 2392, the Court cited, without disapproval, the common ground between counsel for the Attorney General and the offender at paragraph 14,

> "The broad submission is made by Mr Perry that an intention to pervert the course of justice will nevertheless be made out, even though the motive is to achieve a just result. The offence is directed to protecting the source of justice and not just the end result….(He then identified three aspects of the woman police officer's conduct which were pertinent)…The fact that the motive for doing any of these things might not be to defeat the ends of justice does not, submits Mr Perry, provide a defence. He referred to a number of authorities. They can be dealt with quite shortly, because Mr Greaney, in the submissions which he made to this Court on behalf of WPC, does not differ from Mr Perry in his analysis of the law."

Thus, the fact that the police officer had made a false statement and persuaded a lay witness to do so and, in the course of interviewing a suspect, made a false statement to him, were each capable of giving rise to the inference that there was an intention to pervert the course of justice. (Paragraph 26).

187. The facts of this case are different from those in the Attorney General's Reference. However, it is inescapable that Cook did deliberately breach both guidelines and express instructions from his superiors which he knew would be likely to undermine the integrity of the evidence of the potential witness Eaton. Further, what he did put the admissibility of the evidence of Eaton at risk, as in fact happened. In the words of Mr Perry in the Attorney General's Reference, he contaminated the source of justice. He knew what he was doing and did it deliberately. He can therefore be taken to have intended to do it. The ingredients of the crime were present.

188. I reach that conclusion even though I am not persuaded that Cook intended that Eaton should give false evidence. Although no-one, other than Cook and Eaton can know for certain what he said to him, I believe it to be inconceivable that Cook gave Eaton a detailed account of what he believed had happened, knowing that Eaton had not witnessed it. My strong suspicion – it can be no more than that – is that he encouraged Eaton to say that he was present at the Golden Lion on 10 March 1987 and did witness the aftermath of the murder because he believed that Eaton had been there, but was reluctant to say so, because of fears for his and his family's safety and that inaccuracies in his account would be exposed. I strongly suspect that in the two lengthy calls on 28 and 29 August 2006 (referred to in paragraph 71) he encouraged

Eaton to say, at the next debriefing session on 1 September 2006, as he had not done before, that he was present at the scene. I strongly suspect that this was because Eaton had said something to Cook which prompted him to believe that Eaton may have been there. Once he began to tell his story, like Maddison J, I accept that Cook prompted him to name "the brothers" as Scott and Garry. The danger in this was that it encouraged an unstable individual with severe personality and psychiatric problems to say what he thought Cook wanted him to say, whether or not it was true. I am satisfied that something like that is what happened. I do not believe that Eaton was present in the Golden Lion on 10 March 1987 and so did not see what he claimed to have seen. If he had been allowed to give evidence of that before a jury, the course of justice would unquestionably have been perverted, whatever the outcome of the trial.

189. For the reasons given, I am satisfied that the second way in which the tort of misfeasance in public office can be committed was committed by Cook. The Commissioner accepts vicarious liability under s88 of the Police Act 1996.

190. The next element of the tort which each claimant must prove is that Cook realised that his conduct would probably injure the claimants. There is no difficulty about this issue. He intended that they should be arrested and hoped that the CPS would decide to charge them, with murder, and then bring them to trial. This would inevitably involve a period of loss of liberty. It is common ground that that would amount to injury or loss for the purpose of the tort.

191. The final question is whether or not his actions caused loss to the claimants. Again, this issue must be considered in relation to each claimant. The basic question which must be answered is whether or not the relevant claimant would have been charged, detained and sought to be brought to trial as a result of Cook's conduct in relation to Eaton. That must depend upon what would have happened if Eaton's evidence had never been thought to be available. I have no evidence from Sampson or any other CPS lawyer or from counsel who conducted the prosecution at the Central Criminal Court. Accordingly, I am asked to reach a conclusion about this issue without hearing evidence which could have been adduced from those who could have given it. I am invited by Mr Bowen and Mr Simblet to draw an inference adverse to the Commissioner from the absence of such evidence. I decline to do so. A deliberate decision was made to continue the prosecution after Maddison J ruled that on 15 February 2010 that the evidence of Eaton was inadmissible. Even after the loss of the evidence of Ward, Mr Hilliard stated on 24 January 2011 that it was still the intention of the Crown to proceed with the case against Rees and Glenn and Garry Vian on the evidence which remained. (21/18475). These are relevant, but not conclusive statements of intent because it may be more difficult to cease to prosecute a case than to decline to prosecute in the first place.

192. Nevertheless, I am satisfied on the balance of probabilities that prosecuting counsel and the CPS would have decided to prosecute Rees and Glenn and Garry Vian on the basis of the evidence available when they were charged other than that of Eaton. I have explained why there was reasonable and probable cause to prosecute the three of them on that evidence. The evidential test in paragraph 5.2 of the 5th edition of the CPS Code would have been easily satisfied in the case of Glenn and Garry Vian and satisfied, by a smaller margin, in the case of Rees. I am also satisfied that the CPS and Treasury Counsel would have concluded that it was in the public interest to prosecute, despite the age of the offence, given its seriousness, its impact upon

Morgan's family and the length and complexity of the investigation, all factors which under paragraphs 5.7 and 5.10(e) and 5.12 of the 5th edition of the CPS Code would have tended to support the bringing of a prosecution.

193. I have considered, but rejected, the possibility of applying a causation test different from that of the balance of probabilities or "but for" test. I reject, as inappropriate, the test often applied in cases in which medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened but can establish that the contribution of the negligent cause was substantial - i.e. more than negligible – in which event the claimant will succeed: see *Bailey v Ministry of Defence* [2009] 1 WLR 1052 at paragraph 46 per Waller LJ. The reason is simple: there is nothing unknown about the reasons for the prosecution of the claimants which I, as a Queen's Bench judge, cannot determine. No expertise equivalent to medical science is required to reach a conclusion. Nor am I required to assess the chance, in percentage terms, that prosecuting counsel and the CPS would have decided to charge and prosecute without the evidence of Eaton. The factors which would have influenced that decision are known and are capable of being assessed by me. It is not difficult to say what would probably have happened. It is far more difficult – to the point of being, in reality, impossible – to evaluate the chance of that decision being made in percentage terms; and faintly absurd to attempt to do so. If I were satisfied that there was an 80% chance that Rees and Glenn and Garry Vian would have been prosecuted, it would be strange to award them damages of 20% of the full award which would have been made for their loss of liberty. If I were to decide that, on the balance of probabilities, they would not have been charged, but there was a not insignificant chance – say, 30% - that they would be, it would be equally strange to award them only 70% of the damages which they would otherwise have received.

194. The claims of Rees and Glenn and Garry Vian for damages for misfeasance in public office, therefore fail.

195. Different considerations apply in the case of Fillery. In his case, the only evidence on which the prosecution proposed to rely was that of Eaton: see the judgment of Maddison J on 15 February 2010 at 19/16416 – 17. Maddison J only stayed the case against Fillery because he considered that he should consider a stay first. He considered that, to try Fillery on a single count which depended upon the evidence of a doubtful witness about what was said 22 or 23 years ago was not fair. (19/16417 – 18). Although there is nothing to prove that Cook prompted Eaton to accuse Fillery of making the threat against him on which the prosecution depended, the simple fact is that, but for Cook's conduct in relation to Eaton, Eaton's evidence would never have seen the light of day and Fillery would not have been prosecuted. It follows that his claim for damages for misfeasance in public office succeeds in full.