Neutral Citation Number: [2017] EWHC 2140 (QB)

Case No: HQ13X02240

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/08/2017

Before:

MR JUSTICE STUART-SMITH

- -

Between:

MICHAEL CIARAN PARKER	**Claimant**
- and -	
THE CHIEF CONSTABLE OF ESSEX POLICE	**Defendant**

- -
- -

Mr Hugh Tomlinson QC and Ms Lorna Skinner (instructed by **McAlinneys Solicitors**) for the **Claimant**
Mr John Beggs QC and Ms Cecily White (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 22nd , 23rd, 24th, 25th May 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 STUART-SMITH

Mr Justice Stuart-Smith :

Introduction

1. The Claimant is best known by his stage name, Michael Barrymore. In the later years of the last century and the early years of this, he was extremely well known as a celebrity entertainer who appeared widely on television and elsewhere. At one stage he was married, but by the turn of the century he had come out as gay. He had a lifestyle which meant that he was staple fare for tabloid reporting. Early in the morning of 31 March 2001, after a night on the town in Harlow, he returned to his home at Roydon in Essex at about 2.47 am. Eight other people ended up at his home, including Stuart Lubbock. Mr Lubbock was a 31-year-old man who was heavily intoxicated but otherwise in good health. At 5.45 am he was found in the swimming pool, unconscious and not breathing. Attempts to resuscitate him were unsuccessful. Initially his death was not treated as suspicious, but the post-mortem examination carried out on the same day revealed severe anal injuries. In June 2001 two of the guests who had been at the house were arrested on suspicion of murdering Mr Lubbock. They were not charged because there was insufficient evidence to do so. The Claimant was arrested for drug offences and subsequently received a caution. He was not arrested and was not then treated by the police as a suspect in relation to the death of Mr Lubbock. An inquest into Mr Lubbock's death in 2002 returned an open verdict.

2. On 14 June 2007 the Claimant was arrested by officers of Essex Police on suspicion of raping and murdering Mr Lubbock. He was detained until the next day before being released on bail. He answered his bail on two occasions. On 10 September 2007 he was detained and interviewed again. That same day the CPS decided that there was insufficient evidence to justify charging him (or anyone else) with any offences. Neither he nor anyone else has been charged with any offences relating to the anal injuries that Mr Lubbock suffered or his death.

3. In 2013 the Claimant started the present proceedings against the Chief Constable of Essex Police alleging unlawful arrest and false imprisonment. Although the Defendant initially contended that the arrest had been lawful, an application to amend the Defence in October 2016 resulted in judgment being entered for the Claimant on liability because his arrest was unlawful. The Claimant claims that the unlawful arrest has caused him damage and pursues a claim for damages alleging very substantial financial losses. The Defendant's case now is that the Claimant is entitled to recover only nominal damages. Accordingly, on 21 December 2016 Master Eastman ordered that there be a trial of the preliminary issue "as to whether the Defendant has established:

    i) The Claimant could and would have been lawfully arrested but for the delay in attendance of the designated arresting officer; and

    ii) That, as a result, the Claimant is entitled only to nominal damages for false imprisonment."

4. The trial of the preliminary issue took place on and from 22 May 2017. This is my judgment on the preliminary issue. For the reasons set out below, I find that:

i) The Claimant could have been lawfully arrested by the designated arresting officer, DC Jenkins, but not by any other officer relevantly engaged in the operation;

ii) In the enforced absence of Ms Jenkins, who was delayed in traffic, if the Claimant had not been unlawfully arrested by PC Cootes he would have been unlawfully arrested by another officer. He would not have been lawfully arrested;

iii) As a result of (i) and (ii) the Defendant has failed to establish that the Claimant could and would have been lawfully arrested so as to bring the Defendant within the scope of what has been called the *Lumba* principle; and accordingly

iv) The Claimant is not restricted to recovering nominal damages only.

The Legal Principles

5. There is substantial agreement about the applicable legal framework. The starting point is that, in order to perform a lawful arrest, the arresting police constable must have in his or her mind reasonable grounds for (i) suspecting that the person being arrested is guilty of committing the offence for which he is arrested and (ii) believing it is necessary to arrest that person.

6. A number of authorities refer to the balance that must be maintained between the need to protect the public and bring criminals to justice on the one hand and the right of an individual not to be arrested on inadequate grounds. The need for the police not to be unduly hindered in the pursuit of criminals is often referred to in the authorities. As a timely reminder of the importance of striking the correct balance there is no need to go further than [219] of the judgment of Lord Collins JSC in *Lumba* (of which more later) where he said, in the context of an action for false imprisonment:

> "Fundamental rights are in play. Chapter 39 of Magna Carta (1215) (9 Hen 3) said that "no free man shall be seized, or imprisoned … except … by the law of the land" and the Statute of Westminster (1354) (28 Edw 3, c 3) provided that "no man of what state or condition he be, shall be … imprisoned … without being brought in answer by due process of the law". That the liberty of the subject is a fundamental constitutional principle hardly needs the great authority of Sir Thomas Bingham MR (see *In re S-C (Mental Patient: Habeas Corpus) [1996] QB 599*, 603) to support it, but it is worth recalling what he said in his book *The Rule of Law* (2010), at p 10, about the fundamental provisions of Magna Carta: "These are words which should be inscribed on the stationery of the … Home Office." "

7. In *O'Hara v Chief Constable of RUC* [1997] AC 286 at 291H, Lord Steyn succinctly described this balance as "the compromise between the values of individual liberty and public order". Striking the balance will be acutely fact sensitive in each case. Thus, for example, the need to bring a serial killer to justice is not the same as the need to bring the perpetrator of a minor assault resulting in no injury, though both are

criminal and there is a public interest that may be served in each case. On the other side of the scales, the impact upon a person who is arrested may be very great, as the Claimant alleges it was for him in this case. It is obvious that the impact of an arrest may be influenced by the personal circumstances of the person being arrested, the circumstances of the arrest and the offence for which the person is arrested. Without in any way prejudging the facts of the present case, it is also readily foreseeable that the fact of an arrest may have lasting adverse consequences for the person who is arrested, whether or not they are subsequently found guilty of, or even charged with, with any offence. Equally, the balance may be affected by circumstances such as whether the arrest is proposed to be made in the heat of a chase in the immediate aftermath of a crime or after the cool reflection of a prolonged review of evidence.

8. Parliament has provided the criteria for the striking of the balance between the public and private interests by setting them out in ss. 24(2), (4) and (5) of the Police and Criminal Evidence Act 1984. The statutory regime under which the police were operating when they arrested the Claimant, and the test to be applied by the Court, is as follows:

> "(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
>
> (4) But the power of summary arrest conferred by subsection … (2) … is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
>
> (5) The reasons are—
>
> […]
>
> (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;"

9. S. 24(4) was introduced by amendment from 1 January 2006. Before that date questions relating to a belief in the need to effect an arrest in order to progress an investigation typically arose in a public law context: the arrested person might raise a challenge to the lawfulness of the discretionary decision to arrest him on *Wednesbury* unreasonableness grounds based on the motivation of the police. There are many examples of such cases: see, for example, *Holgate-Mohammed v Duke* [1984] 1 AC 437, 445E-446D per Lord Diplock, *Castorina v Chief Constable of Surrey* Local Govt Review Reports, 30 March 1996 241 and *Cumming & Others v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 at [16], [26] and [42] per Latham LJ.

10. It is important to remember that the necessity test introduced in 2006 by s.24(4) is in addition to the pre-existing possibility of a public law challenge and differs from it in material respects. A number of points arise. First, under the statute it is an essential pre-requisite to a lawful arrest that the arresting constable has reasonable grounds for believing that it is "necessary" (as opposed to merely desirable or convenient) to arrest the person in question for one of the reasons specified in s. 24(5). Second, the

questions to be asked under s. 24(4) differ from those that arise when considering questions of *Wednesbury* unlawfulness. The questions to be asked under s. 24(4) are (i) did the arresting constable believe that it was necessary to arrest the person in question for one of the reasons specified in s. 24(5) and, if he or she did so believe, did she or he have reasonable grounds for that belief? The question to be asked in a *Wednesbury* challenge is whether an officer exercising a discretion whether or not to arrest a person either took into account material that should not have been taken into account or failed to take into account material that should have been taken into account so as to render unlawful the discretionary decision to arrest the person concerned. Third, unless the arresting officer satisfies the requirements of ss. 24(2) and 24(4), the arrest is unlawful and no question of a *Wednesbury* challenge arises because the arresting officer has no discretion that could allow him or her lawfully to arrest the person concerned. Fourth, the burden of proving that the requirements of s. 24 of PACE have been complied with rests on the arresting officer; the burden of proving *Wednesbury* unreasonableness (if it arises) rests on the arrested person. For these reasons, although the parties have cited pre-2006 cases on the lawful exercise of the discretion, they need to be treated with caution when the Court is addressing the different questions that arise under s. 24(4) of PACE.

Reasonable grounds for suspicion: the requirements of s. 24(2) of PACE

11. It is plain from the words of s. 24(2) that the constable must have reasonable grounds (a) for suspecting that an offence has been committed and (b) to suspect the person who is to be arrested of being guilty of the offence that the constable suspects has been committed. It is equally plain that she or he needs only have reasonable grounds for *suspecting* that an offence has been committed and (separately) for *suspecting* the person who is to be arrested to be guilty of it.

12. It is conventional when considering the issue of reasonable belief to adopt the questions to be asked by the Court as set out in the judgment of Woolf LJ in *Castorina v Chief Constable of Surrey* at 249. The original *Castorina* questions were:

> "(1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (2) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury.
>
> (3) If the answer to the two previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with the principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223."

13. The original *Castorina* questions are logically preceded by two more, though they may not take long to answer. The two prior questions are:

    i) Did the arresting officer suspect that an offence had been committed? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.

    ii) Assuming the officer had the necessary suspicion, was there reasonable cause for that suspicion? This is a purely objective requirement to be determined by the Court.

14. In addition, because the decision in *Castorina* pre-dated the addition of the necessity requirement under s. 24(4) of PACE from 1 January 2006, the *Castorina* questions could not and did not address that requirement: see [9]-[10] above. For these reasons I amplify the original *Castorina* questions for the purposes of the present action by adding the two prior questions set out above and two further questions to reflect the terms of s. 24(4). I also modify them slightly to reflect the change in language between the terms of s. 2(4) of the Criminal Law Act 1967 (which referred to "reasonable cause") and of s. 24 of PACE (which refers to having "reasonable grounds"). As amplified and adjusted, the relevant questions are now:

> (A1) Did the arresting officer suspect that an offence had been committed? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (A2) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the Court.
>
> (1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (2) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury.
>
> (2A) Did the arresting officer believe that for any of the reasons mentioned in subsection (5) it was necessary to arrest the person in question? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (2B) Assuming the officer had the necessary belief, were there reasonable grounds for that belief? This is a purely objective requirement to be determined by the judge, if necessary on facts found by a jury.

> (3) If the answer to the previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with the principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223."

The last question is not in issue and does not arise in this case.

15. Whether concentrating on the words of the statute or the *Castorina* questions, the first point to be noted is that the statute requires suspicion that an offence "has been" committed. In the light of the first of the *Castorina* questions, it is also established that the second requisite suspicion must be that the person who was arrested "was" guilty of the offence. These requirements are expressed in plain English. It seems obvious that the words "an offence *has been* committed" are not the same and do not have the same meaning as "an offence *may have been* committed" or "an offence *might have been* committed". Similarly, the words (as interpreted by *Castorina*) "the person who was arrested *was* guilty of the offence" are not the same and do not have the same meaning as "the person who was arrested *may have been* guilty of the offence" or "the person who was arrested *might have been* guilty of the offence." These words, however, are not to be taken in isolation; and the meaning of the statute depends upon the whole of the relevant provisions, which include that the arresting constable must "suspect" on reasonable grounds that (a) an offence has been committed and (b) the person to be arrested was guilty of it.

16. "Suspicion" and "suspects" are themselves ordinary English words. Some guidance on their meaning was provided by Lord Devlin in *Hussien v Chong Fook Kam* [1970] AC 942, 948B-C:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove." Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if an arrest before that were forbidden, it could seriously hamper the police."

17. The ability to arrest once a constable has reasonable grounds for suspicion that a person is guilty of the offence is here recognised and expressed by Lord Devlin as an exception to the general rule at that time that an arrest should not be made until the case was complete and that the exception was necessary to avoid seriously hampering the police. As elsewhere, it is implicit that the power to arrest on reasonable suspicion of guilt represents a compromise that necessarily involves making inroads on the individual's right to freedom: hence the availability of a tortious remedy in damages in addition to any public law remedies that might be available.

18. The authorities that address the lawfulness of an arrest are typically concerned with three questions. First, whose mind must reasonably have the requisite suspicion?

Second, what material can and cannot be taken into account in forming the requisite suspicion? And, third, what is the threshold test or what are the criteria that are to be applied when deciding whether there are reasonable grounds for the requisite suspicion? The questions may be inter-related, but I touch on them in turn.

19. The question "whose mind must reasonably have the requisite suspicion?" admits of an apparently straightforward answer: it must be the mind of the arresting officer. *O'Hara* was directly concerned with s.12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 which was in materially the same terms as s. 24(2) of PACE. It establishes that the Court examining the question of reasonable belief should focus on the mind of the arresting officer at the time of the arrest. At 298A Lord Hope said:

> "My Lords, the test which section 12(1) of the Act … has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised."

And at 302G:

> "… the reasonable suspicion has to be in the mind of the arresting officer. So it is the facts known by or the information given to the officer who effects the arrest or detention to which the mind of the independent observer must be applied. It is this objective test, applying the criterion of what may be regarded as reasonable, which provides the safeguard against arbitrary arrest and detention. The arrest and detention will be unlawful unless this criterion is satisfied."

Lord Steyn put the matter equally clearly at 293B: "the only relevant matters are those present in the mind of the arresting officer."

20. Despite the apparent clarity of these statements of high principle, an enquiry into the reasonableness of the arresting officer's suspicion often concentrates on the information that was available to the police more generally as well as scrutinising what was in the mind of the arresting officer. Such evidence is necessary in many such cases to enable the Court to answer the questions (a) whether the suspicion held by the officer who arrested the Claimant was reasonably grounded and (b) whether another officer could and would have arrested the Claimant lawfully. In the present case, the first of these questions has been decided by the judgment on liability.

However, evidence in the present trial was given by the Senior Investigating Officer in charge of the operation at the time and by the officer who had been briefed to arrest the Claimant as well as by the officer who in fact arrested him. Their witness statements were prepared and signed in June 2015 (as were those of the other police witnesses from whom the Court has heard) at a time when the Defendant was maintaining the line that the actual arrest of the Claimant was lawful. For the purposes of the present preliminary issue, however, they are pressed into service without amendment or addition as the evidence on which the Defendant relies to establish that the Claimant could and would have been lawfully arrested but for the delay in the attendance of the designated arresting officer. The difficulties that flow from this reliance on the original witness statements will become apparent later.

21. The answer to the question "what material can and cannot be taken into account in forming the requisite intention?" is not as simple as might at first appear. The reasonable grounds for a suspicion do not have to be or be based on the officer's own observations or on material that is in a form that would be admissible evidence at a trial: see *O'Hara* at 293C per Lord Steyn. Thus the arresting officer may in appropriate cases rely on what he has been told by other officers (typically, though not necessarily, in a briefing), hearsay evidence, intelligence that would not be admissible in evidence, or a mixture of any and all of these. But, as Lord Hope made clear in *O'Hara* at 301H:

> "For obvious practical reasons police officers must be able to rely upon each other in taking decisions as to whom to arrest or where to search and in what circumstances. The statutory power does not require that the constable who exercises the power must be in possession of all the information which has led to a decision, perhaps taken by others, that the time has come for it to be exercised. What it does require is that the constable who exercises the power must first have equipped himself with sufficient information so that he has reasonable cause to suspect before the power is exercised."

In summary, the arresting officer may rely on information received from others; but he may not simply obey orders.

22. A principle which necessarily allows the arresting officer to rely upon what he is told by others carries obvious risks. The first is that the information provided to the arresting officer may prove to be false. Lord Hope dealt with this risk in the next passage of his speech, at 298C-E:

> "This means that the point does not depend on whether the arresting officer himself thought at that time that [the grounds in his mind] were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His

> reasonable suspicion may be based on information which has been given to him anonymously or *it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong.* As it is the information which is in his mind alone which is relevant however, *it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances*." [Emphasis added]

In other words, although considerable latitude is given to the arresting officer, because it is not necessary to prove that the facts on which he relied were true, what matters is whether the source of the information is one on which he may reasonably rely. If it is not, he may be held to have no reasonable grounds for his suspicion, whether the information on which he relied later proves to be true or false.

23. The second material risk is that the arresting officer may be provided with a partial account which, taken at face value, provides reasonable grounds for suspicion but which, if taken in the context of the additional information available to others but not provided to the arresting officer, would not do so. This risk was addressed by the Court of Appeal in *Alford v Chief Constable of Cambridgeshire Police* [2009] EWCA Civ 100. The Court held that the matters known to the arresting officer (who was not the Senior Investigating Officer) provided reasonable grounds for his suspicion that the appellant had committed the offence: see [36]. It was submitted on behalf of the Claimant that a report which was known to the senior officers involved with the case but not provided to the arresting officer vitiated the lawfulness of the arrest. The failure to provide the report to the arresting officer was not deliberate and would not found an action for misfeasance in public office. The response of Richards LJ (with whom Rimer LJ and the President of the Queen's Bench Division agreed) was unequivocal, at [38]-[39]:

> "38 The lawfulness of an arrest depends, as I have said, on whether the *arresting* officer has a genuine suspicion and there are reasonable grounds for that suspicion. If, …, the arresting officer has such a suspicion and the briefing provides reasonable grounds for the suspicion, the arrest will be lawful. In those circumstances the omission of relevant material from the briefing cannot possibly render the briefing officer liable for wrongful arrest, since there is no wrongful arrest for which he can be liable, whether as sole or joint tortfeasor. …
>
> 39 I therefore take the view that the knowledge of [the report in question] by [the senior officer], as the briefing officer, is incapable in law of affecting the lawfulness of the arrest effected by [the arresting officer]. …"

For the reasons explained by Lord Hope in the passage set out above, it is implicit in this statement of principle that the arresting officer acted reasonably in relying upon the (partial) briefing he was given because of its source.

24. These passages from *O'Hara* and *Alford*, which are binding, have very wide implications for the liberty of the subject but must be taken as forming part of the balance struck and the compromise that exists between the rights of the public and the rights of the individual. For the purposes of the present preliminary issue, I also take them to establish that the Court must consider whether, if some other officer would have arrested the Claimant, the information available to that other officer would have given her or him reasonable grounds to hold the necessary suspicions pursuant to s. 24 of PACE; and, in considering that question, the fact (if it were fact) that "the police" had additional relevant information that would have affected the reliability or balance of that other officer's grounds for suspicion is incapable in law of affecting the lawfulness of the hypothetical arrest by that officer.

25. Whatever the nature of the material that is said to provide the basis for the reasonable suspicion, the weight that may reasonably be attached to it will depend upon its quality and apparent reliability. Assessment of the quality and reliability of the material is an essential part of any reasonable process of arriving at a basis for suspicion; and, which is different, assessment of the quality and reliability of the material is an essential part of the process of arriving at a reasonable basis for suspicion.

26. As already indicated, the time available for assessment will vary from case to case; but without assessment that is appropriate to the facts and circumstances of the individual case, the compromise between private and public interests is liable to be distorted unreasonably against the individual who may be arrested. Not only will the time available for assessment vary from case to case but, as Mustill LJ said in *Mulvaney v The Chief Constable of Cheshire* 1990 WL 10631329, "circumstances alter cases."

27. In *Dumbell v Roberts* [1944] 1 All ER 326, 329 Scott LJ said obiter that "the duty [on the police] of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut our eyes to the obvious is not to act reasonably." The existence of such a duty has been authoritatively rejected in subsequent decisions. The Defendant in the present case goes further and submits that "further inquiries which might or might not have enhanced the grounds for suspicion have no bearing on the second *Castorina* question". I am unable to accept that more extreme submission.

28. The Defendant's submission receives support from *Castorina* at 13B per Purchas LJ:

> "There is ample authority for the proposition that courses of inquiry which may or may not be taken by the investigating police officer before arrest are not relevant to the consideration whether, on the information available to him at the time of the arrest, he had reasonable cause for suspicion. Of course, failure to follow an obvious course in exceptional circumstances may well be grounds for attacking the executive exercise of that power under the Wednesbury principle."

Woolf LJ at 23A put the principle rather differently:

> "The learned judge was of the view that the police could have questioned the plaintiff before they arrested her and could have made further inquiries and come back later if they were not satisfied with her answers. However, while this was a possible course which the police could have taken, in my view it was not a course they were required to take; not because the plaintiff might have disappeared but because there was already sufficient material to provide reasonable cause for the police's suspicion".

Lawton LJ said:

> "whether more inquiries should have been made was within the ambit of [the officer's] executive discretion which cannot be questioned except on *Wednesbury* principles."

29. However, later authority has recognised that, just as circumstances alter cases, so circumstances may dictate that it is not reasonable to rely upon information without further enquiry: see *O'Hara* at 298C-E set out above. I accept and adopt what was said by Hallett LJ in *Armstrong v Chief Constable of West Yorkshire Police* [2008] EWCA Civ 1582 at [14]:

> "For my part, I accept the proposition that the thoroughness of an investigation may well be relevant as part of the whole surrounding circumstances as described by Lord Hope in *O'Hara*. There may be circumstances, provided there is no urgency, which makes it incumbent upon an officer to make further enquiries before "suspicion could properly crystallise" (for which see paragraph 17 of the judgment of the then Simon Brown LJ in *Hough v Chief Constable of the Staffordshire Constabulary [2001] EWCA Civ 39*). However, it is important to remember, in my view, that an arrest may be effected very early on in an investigation, and it is nonetheless lawful for that. It will not always be possible or indeed desirable to carry out further enquiries before making an arrest; …"

30. *Alford* is also authority for the propositions that the Court should look at the whole of the surrounding circumstances and should not adopt an over-compartmentalised approach: see Hallett LJ at [16] and [19] and Arden LJ at [32]. In *Buckley v Chief Officer of the Thames Valley Police* [2009] EWCA Civ 356, Hughes LJ (with whom Moore-Bick and Pill LJJ agreed) said at [16] that:

> "… the correct approach to judgment upon the lawfulness of arrest is not to separate out each of the six elements of the constable's state of mind and ask individually of them whether that creates reasonable grounds for suspicion; it is to look at them cumulatively, as of course the arresting officer has to at the time."

31. Turning to the third question, the threshold for having reasonable grounds for suspicion may fall well short of having materials that would amount to a prima facie case for conviction, or that would justify charging the individual on arrest:

> "The protection of the public is safeguarded by the requirement … that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a prima facie case for conviction …" *Dumbell v Roberts* [1944] 1 All ER 326, 329A per Scott LJ; and see *O'Hara* at 293 per Lord Steyn.

To similar effect, Woolf LJ in *Castorina* said at 21D:

> "… it is critical to note that [the equivalent section] only requires suspicion of guilt, not belief or even prima facie proof of guilt."

32. A number of authorities have attempted to describe where the threshold for what constitutes "reasonable grounds for suspicion" should stand. The test was stated by Sir Anthony Clarke MR in *Commissioner of the Police of the Metropolis v Mohamed Raissi* [2008] EWCA Civ 1237, [2009] QB 564:

> "On the other hand it is important to have in mind that, as the judge held, at para 47, the threshold for the existence of reasonable grounds for suspicion is low: see eg Dumbell v Roberts [1944] 1 All ER 326 , 329 A-B , per Scott LJ, where he said: "That requirement is very limited"; the *Hussein* case [1970] AC 942, 948G-949A, per Lord Devlin; and the *O'Hara* case [1997] AC 286, at p 293C per Lord Steyn, and p 296D-E per Lord Hope."

33. That the threshold is "low" is not in doubt; but that expression is descriptive and does not provide any principled guidance on where it should be placed in any particular case. Guidance must therefore be obtained from previously decided cases where it has been held that the threshold test was satisfied. Three of the authorities to which I have been referred are illustrative.

34. In *Mulvaney* (supra) the arresting officer was held to have reasonable cause to suspect the Claimant of robbery where a motorcycle that was known to have been associated with a robbery nearly two weeks earlier was found with two helmets in a lockup garage. The owner of the lockup was an elderly lady who suggested to the police that they should enquire next door at the Claimant's home and the Claimant appeared to be the same shape and size as fitted a description of the robbers. The evidence of reasonable cause for suspicion was described by the Court of Appeal as "thin" but held to be sufficient.

35. In *Parker v Chief Constable of the Hampshire Constabulary* (CA 25 June 1999 Unreported) the police were looking for two men called Allen and Muat in connection with a serious firearms incident that had happened on Merseyside on 26 October 1993. On 5 November 1993 a car linked to Allen and Muat was seen in Hampshire.

The arresting officer gave evidence that he thought the car was still "linked to" Allen and Muat, though neither of the two occupants, one of whom was the Claimant, was thought to be Allen and the officer did not know what Muat looked like. Both occupants were arrested. Having said in evidence in chief that one of the two occupants "could possibly be" Allen in disguise and that the other "could possibly be" Muat, the arresting officer said that he arrested both men "thinking that one of them could possibly be [Muat]". In cross examination he confirmed that "the nearest we can go is that it is possible that one of those men was Muat." The terms in which the Court of Appeal upheld the lawfulness of the arrest are instructive. Judge LJ (with whom Schiemann and Peter Gibson LJJ agreed) said:

> "The information available to Hampshire Police suggested that Allen and Muat were, or might well still, be together. Therefore although it was plain by 16:22 that Allen was no longer driving the car the police would have been open to criticism if they had proceeded on the basis that Allen's connection with it, so obvious shortly before, was irrevocably severed, or that coincidentally with becoming aware that he was being followed by the police, he had finally disposed rapidly of any interest in it. Therefore it did not follow from the fact that Allen was no longer present at the car that his colleague Muat, too, was absent. DC Perry thought it possible that [the Claimant] was Muat. This state of mind reflected a degree of uncertainty, or to use Lord Devlin's words, a state of "conjecture or surmise". In my judgment this state of mind, suspicious but uncertain, was based on reasonable grounds."

36. In *Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 the police believed that a CCTV tape in the possession of a Borough Council, which should have contained footage relevant to the detection of a criminal offence, had been tampered with in order to pervert the course of justice. The police were informed that the Borough Council had carried out enquiries that had not borne fruit. The police arrested six people, each of whom, on the basis of the information available to the police, could have had the opportunity either to have been involved in the tampering or might have been present and therefore assisting when that happened. The judge concluded that the reason for arresting them, as opposed to taking any other form of action such as seeking to interview them voluntarily, was that the police wanted to exert maximum pressure to get the confession that had eluded management (n.b. this was before the introduction of the necessity requirement by amendment of PACE from 1 January 2006). On the question whether the police had reasonable grounds for suspecting the Claimant that justified her arrest, Latham LJ said:

> "In my view, there is nothing in principle which prevents opportunity from amounting to reasonable grounds for suspicion. Indeed in some circumstances opportunity may be sufficient to found a conviction. That would be the case where the prosecution can prove that no one else had the opportunity to commit the offence. The question in the present case is whether opportunity is sufficient to be reasonable grounds for suspecting six people when the likelihood is that it was only

> one or perhaps two of those six who were responsible. Again there can be nothing in principle wrong with arresting more than one person even if the crime can only have been committed by one person: see Hussein. Where a small number of people can be clearly identified as the only ones capable of having committed the offence, I see no reason why that cannot afford reasonable grounds for suspecting each of them of having committed that offence, in the absence of any information which could or should enable the police to reduce the number further. In this case, the only information short of interviewing the appellants and Mr Starbuck, which could have achieved that was the information enabling the police to determine the time at which the over-taping of the "spot" tape or the tampering with the "multiplex" tape had taken place. The judge concluded, and in my view he was entitled to, that the police were justified in doubting whether the "spot" tape was genuine. There was never any suggestion that the police could or should have been able to identify when the "multiplex" tape had been tampered with. In these circumstances, the judge could properly find, as he did, that there were reasonable grounds for suspecting all six of those arrested of having committed the offence."

37. Taken together, these three examples illustrate that the Courts have given the phrase "reasonable grounds for suspecting [the arrested person] to be guilty of the offence" a very broad interpretation. Specifically, in *Parker* the officer's thought that the person he was going to arrest "could possibly" be someone associated with the robbery was treated as being a level of suspicion that satisfied the statutory requirement of what had to be suspected. And, in *Cumming*, the only limitation imposed on lawfully arresting a number of people clearly identified as the only ones capable of having committed the offence was if the police had information which could or should have enabled them to reduce the number further. It has not been suggested that the slight change in the operative words effected by PACE makes a substantive difference. Nor, so far as I am aware, has it been suggested or held that the Human Rights Act 1998 (which post-dated the three illustrative cases to which I have referred above) makes a substantive difference to the threshold to be applied, though Code G to PACE expressly recognises that the power of arrest represents an obvious and significant interference with the right to liberty that is enshrined as a key principle of the Act: see [1.2].

38. Put more generally, if the arresting officer has reasonable grounds for his or her suspicion of guilt (for which the threshold is low, as illustrated above) and for her or his belief that the arrest is necessary, the arrest is lawful unless the Claimant can establish, on *Wednesbury* principles, that the arresting officer's exercise or non-exercise of his power of arrest was unreasonable. This does not detract from the obligation upon the police in general and the arresting officer in particular to assess as appropriate the reliability and relevance of the material in their possession in order for their grounds for suspicion to be reasonable; nor does it detract from the fact that the opportunity for assessment will vary from case to case. If the arresting officer holds the requisite suspicion and belief on objectively reasonable grounds, it is irrelevant

that the material upon which his suspicion was reasonably founded later turns out to be wrong.

Necessity: the requirements of s. 24(4) of PACE

39. I have set out the terms of s. 24(4) at [8] above. The word "necessary" is a normal English word which should be applied without paraphrase. I respectfully agree with the observation of Slade J in *Richardson v Chief Constable of West Midlands Police* [2011] EWHC 773 (QB), [2011] 2 Cr. App R. 1 at [62] that the meaning ascribed to "necessity" by the distinguished court in Northern Ireland in *Alexander and ors: Applications for judicial review* [2009] NIQB 20 of "the practical and sensible option" may be useful in some circumstances but should not be used instead of the statutory language.

40. The Court of Appeal in *Hayes v Chief Constable of Merseyside Police* [2011] EWCA Civ 911 rejected the submission that an arresting officer must actively consider all possible courses of action alternative to arrest and must have taken into account all relevant considerations and have excluded all irrelevant ones. Instead, it endorsed a two stage test, albeit one which made clear that an officer is obliged at least to turn his mind to alternatives short of arrest, even if only briefly or cursorily. At [34] Hughes LJ (with whom Ward and Richards LJJ agreed) said:

> "The relevance of the thought process is not that a self-direction on all material matters and all possible alternatives is a precondition to legality of arrest. Rather it is that the officer who has given no thought to alternatives to arrest is exposed to the plain risk of being found by a court to have had, objectively, no reasonable grounds for his belief that arrest was necessary."

At [40], having referred to the limited need for the officer to apply his mind to alternatives to arrest lest he be open to challenge, Hughes LJ continued:

> "That also seems to me to be clearly the conclusion which best represents the balance which the law must strike in this area between practicable policing and the preservation of the liberty of the subject. The circumstances of the present arrest were comparatively relaxed. It is by no means always so. To require of a policeman that he pass through particular thought processes each time he considers an arrest, and in all circumstances no matter what urgency or danger may attend the decision, and to subject that decision to the test of whether he has considered every material matter and excluded every immaterial matter, is to impose an unrealistic and unattainable burden. Nor is it necessary. The liberty of the subject is amply safeguarded if the rule is as Mr Beer contends, namely: (1) the policeman must honestly believe that arrest is necessary, for one or more identified section 24(5) reasons; and (2) his decision must be one which, objectively reviewed afterwards according to the information known to him at the time, is held to have been made on reasonable grounds."

41. And at [41] he said:

> "I should add that we have not been concerned in the present case with the position of an arresting officer who, often in a complex inquiry, receives an order to arrest a particular suspect. Such an officer will often not have access to all the material which the officers directing the inquiry will have. The decision to arrest, and to do so at a particular time, will often be part of a closely co-ordinated plan for the inquiry. I pause only to say that it is clear from the O'Hara case that this common situation is readily accommodated within the rules as I have set them out to be. The arresting officer must himself have reasonable grounds for believing that the suspect has committed an offence, and likewise reasonable grounds for believing that it is necessary, for a section 24(5) reason or reasons, to arrest him. But information given by others, attached to orders issued by them, can be and usually will be part of the information which goes to his grounds for belief of one or both matters, and thus to the reasonableness of the belief. That that is the law provides another reason why section 24(4) ought to be interpreted in the manner stated, rather than as requiring comprehensive consideration by the officer of all matters capable of being relevant to the decision, which would require him to have access to, and time to digest, a much fuller picture of the overall investigation than is realistic."

42. In the present case, the only reason mentioned in s. 24(5) on which the Defendant relies is that set out in s. 24(5)(e). It is therefore for the Defendant to show that the arresting officer had reasonable grounds (determined in the manner identified in *Hayes*) for believing that it was necessary to arrest the Claimant "to allow the prompt and effective investigation of the offence or the conduct of the person in question." Self-evidently, it would not be necessary to arrest the Claimant for that reason if in fact the investigation of the offence or the Claimant's conduct could be achieved promptly and effectively without arresting him. But that is not the test: what matters is the arresting officer's belief and whether it was held on reasonable grounds, as explained above, even if the belief was in fact wrong.

43. Code G to PACE is a Code of Practice for the Statutory Power of Arrest by Police Officers, issued pursuant to s. 66 of PACE. It refers to the reasons set out in s. 24(5) as "criteria for what may constitute necessity." Paragraph 2.9 of Code G sets out some examples of the circumstances that may satisfy the criteria. The examples listed in Paragraph 2.9 are not a substitute for the reasons set out in s. 24(5), which are what must be satisfied; nor does the fact that the circumstances of a case may be said to include or fall within one of the examples mean that the underlying statutory reason is necessarily satisfied. That said, Paragraph 2.9 says that the reason under s. 29(5)(e) may include cases such as (i) where there are reasonable grounds to believe that the person may make contact with co-suspects or conspirators; may intimidate or threaten or make contact with witnesses; or where it is necessary to obtain evidence by questioning; or (ii) when considering arrest in connection with an indictable offence,

there is a need to prevent contact with others. The logic underlying these examples is clear.

The Lumba Principle

44. The Defendant founds its submission that the Claimant is entitled to nominal damages only on the decision of the Supreme Court in *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245. *Lumba* has been considered and applied by the Supreme Court in *R (Kambadzi) v SSHD* [2011] UKSC 23, [2011] 1 WLR 1299 and by the Court of Appeal in *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79. The Defendant relies upon *Kambadzi* and *Bostridge* as well as *Lumba*.

45. It is appropriate to start with the basic proposition about the function of the law of compensatory damages in tort. It has been restated on countless occasions including, conveniently, by Vos LJ in *Bostridge* at [20] and [23] as follows:

> "20. … The tort of false imprisonment is compensated in the same way as other torts such as to put the claimant in the position he would have been in had the tort not been committed. Thus if the position is that, had the tort not been committed, the claimant would in fact have been in exactly the same position, he will not normally be entitled to anything more than nominal damages….
>
> …
>
> 23 As I have said, the principle dictates that the court, in assessing damages for the tort of false imprisonment, will seek to put the claimant in the position he would have been in had the tort not been committed. To do that, the court must ask what would have happened in fact if the tort had not been committed."

46. It is convenient to note at this stage, and to bear in mind at all times, that the tort committed by the arresting officer, for which the Defendant is responsible in law, was that he unlawfully arrested the Claimant: it was not that another officer got stuck in traffic. This is relevant when considering the formulation of the Preliminary Issue in this case in the light of the principles that I outline in this section.

47. *Lumba* was a decision of nine Justices of the Supreme Court and is very long. I gratefully adopt the concise summary of the relevant part of the decision provided by Vos LJ at [13]-[15] of *Bostridge*:

> "13 It is important to understand precisely what was decided by the majority of the Supreme Court in *Lumba*. The appellants were detained by the Secretary of State on conclusion of their terms of imprisonment pending the making of deportation orders against them. Their detention arose as a result of the application of an unpublished policy. But it was held by the judge at first instance that, even if the Secretary of State had

> applied her published policy, she would anyway have detained them pending deportation.
>
> 14 The majority of the Supreme Court (6 out of the 9 Justices) decided that false imprisonment was a trespassory tort that was actionable *per se* whether or not the victim had suffered harm. Once direct and intentional imprisonment by the defendant had been established, the burden passed to the defendant to show a lawful justification. If that justification was by a public authority with power to detain, that authority had to show the power had been lawfully exercised. If the power were not lawfully exercised, then the claim would succeed if the breach of public law bore on and was relevant to the decision to detain. It was not a defence to show that a lawful decision to detain could and would have been made. Accordingly, the Secretary of State was liable for the tort of false imprisonment.
>
> 15 In addition, a majority of the Justices in *Lumba* decided that the claimants had suffered no loss as a result of the unlawful exercise of the power to detain, because it was inevitable that they would anyway have been detained had the published policy and the correct principles been applied. Accordingly, there was no justification for either exemplary or vindicatory damages, and the claimants were entitled to no more than nominal damages."

48. Applying the basic principles of compensatory damages in tort, the counterfactual (i.e. what would have happened if the tort had not been committed) in *Lumba* was that the Secretary of State would have detained the claimants lawfully pursuant to the published policy. That this was the essential finding is clear from numerous references. At [195] Lord Walker said that "each claimant had a very bad record and would undoubtedly have been kept in custody under the Secretary of State's published policies": and see [71] per Lord Dyson, [208] & [211] per Baroness Hale, [240] & [256] per Lord Kerr, [301], [314] and, by inference, [333] per Lord Phillips.

49. In *Bostridge* the finding of the trial judge was that the appellant would have been detained as and when he was if his illness had been correctly addressed via section 3 of the Mental Health Act, as it should have been; and that he would then have received precisely the same treatment and been discharged when he was. The Court of Appeal held that the fact that this counterfactual necessarily included steps being taken by persons other than the Defendant did not prevent the application of the principles set out in *Lumba*. The appellant therefore recovered only nominal damages.

50. It is not enough for a Defendant in the position of the Secretary of State in *Lumba* or the Defendant in the present case to show that the counterfactual *could* have resulted in the same outcome as had been caused by the tort: the Defendant must go on to show that it *would* have done so. This is the basis of the decision in *Lumba*, is accepted by the Defendant in its formulation of the issue in its pleaded case, is incorporated in the formulation of the present preliminary issue and explains the result in *Kambadzi*: in *Kambadzi* the necessary findings of fact had not been made in the

court below and so the Supreme Court remitted the case for an inquiry as to the quantum of damages: see [54]-[57] per Lord Hope, [74] & [77] per Baroness Hale, and [89] per Lord Kerr. It follows that I reject the Defendant's submission that the principles set out in *Lumba* are applicable if the unlawfully arrested Claimant was "arrestable", meaning that he *could* have been lawfully arrested: it is necessary for the Defendant also to show that he *would* have been lawfully arrested.

51. The principles set out in *Lumba* lead to an award of nominal damages if no loss has been suffered because the results of the counterfactual are the same as the events that happened. If and to the extent that they diverge (e.g. because a lawful arrest would not have occurred at the time but would have occurred later) the Court will have to decide on normal tortious compensatory principles whether and to what extent a substantial award of damages is merited for the divergence in outcome.

52. What is the appropriate counterfactual in a given case will be acutely fact-sensitive. Where, as in *Lumba* and *Kambadzi* respectively, what makes the Defendant's actions tortious is failure to act in accordance with a published policy or failure to conduct reviews, it may be relatively easy to conclude that the counterfactual includes acting in accordance with the published policy or conducting the reviews. Even in such a case however, the necessary finding must be made and is not necessarily self-evident – as is shown by the remission of the case in *Kambadzi*. Where the tortious conduct is the arrest of an individual by a police officer whose state of mind does not satisfy the requirements of s. 24 of PACE, the counterfactuals can in theory include (a) that the individual would not be arrested, or (b) that the individual would be arrested (either at the same time as the actual arrest or at some other time) by an arresting officer whose state of mind satisfies the requirements of s. 24 of PACE or (c) that the individual would be arrested (either at the same time as the actual arrest or at some other time) by another officer whose state of mind does not satisfy the requirements of s. 24 of PACE. Which of these alternatives applies will be the subject of a finding of fact on the basis of the evidence before the Court in the individual case.

The Issue in the Present Case

53. The issue before the Court was raised by [47] and [57(c)] of the Amended Defence. [47] pleads:

> "On 14 June 2007 there were … reasonable grounds to suspect the Claimant of the two offences for which he was arrested.
>
> a. Detective Superintendent Wilson and DC Jenkins (amongst other officers) were fully aware of the grounds for arrest set out in paragraph 44 herein and the grounds for necessity set out in paragraph 45 herein;
>
> b. The Claimant would have been arrested by the designated arresting officer DC Jenkins, but for the fact that she was delayed when the Claimant was spotted by surveillance officers including PC Cootes;
>
> c. The arrest of the Claimant was unlawful only by reason of the fact that the arresting officer, PC Cootes, was not fully

> aware of the grounds for arrest, see *O'Hara v. RUC* [1997] AC 286 and not by reason of a lack of (i) reasonable grounds to suspect the Claimant of the offences for which he was arrested; and/or (ii) necessity to effect the arrest.
>
> d. Since the Claimant would have been lawfully arrested but for the said delay, he is entitled only to nominal damages for false imprisonment.

[57(c)] pleads:

> "For the avoidance of doubt, it is the Defendant's case that:
>
> (i) Since the Claimant could and would have been lawfully arrested but for the delay in attendance of the designated arresting officer, the Claimant is entitled only to nominal damages for his false imprisonment, pursuant to the principles set out by the Supreme Court in *Lumba* [2011] UKSC 12;
>
> (ii) The Claimant suffered no losses as a result of his arrest in June 2007; …"

54. The Defendant's written opening at [183]-[196] provided submissions on the principles to be derived from *Lumba* but provided no further detail on the counterfactual, merely saying at [194] that "if the Court concludes that the Claimant could and would have been lawfully arrested in any event, but for the commission of the tort, he will be entitled only to nominal damages … ."

55. The Defendant was invited to explain its case on the counterfactuals at the opening of the trial of the issue and did so: see Transcript 1/77.8-80.1. While reserving his position about what he might submit in closing, Mr Beggs QC, submitted that those who were at the scene at the time of the actual arrest did not appreciate "the *O'Hara* point" (i.e. the need for the arresting officer to have reasonable grounds for the requisite suspicion). He suggested "two most likely scenarios, both of which are subsumed under the important observation that [the Claimant] was going to be arrested, come what may." Those scenarios, in outline, were (a) that Mr Cootes would have appreciated that he was inadequately briefed and would have rung Ms Jenkins, Mr Wilson or his deputy in order to furnish himself with the necessary grounds for suspicion by telephone; or (b) that a decision would have been made to wait for the arrival of Ms Jenkins.

56. The Defendant's written closing submissions at [65]-[85] included the following (with paragraph numbers removed):

> "The Defendant's case is that had ex-PC Cootes or his supervisor ex-PS Smith appreciated the *O'Hara* point (plainly neither did) and decided not to arrest the Claimant without having the grounds for suspicion in mind, the Claimant would have been arrested lawfully in any event because there were reasonable grounds both for suspecting him of the offences of rape and murder <u>and</u> for believing that it was necessary to

> arrest him. In other words, but for the tort, he could and would have been arrested lawfully.
>
> There is no (and no need for) evidence of counterfactuals: … The Court will have to consider the likely scenarios on the balance of probabilities, having regard to all the available evidence.
>
> Wilson's evidence is important. As his witness statement makes clear …, he was determined to ensure the arrest of the Claimant and co-suspects concurrently. … As Wilson said … (which was unchallenged) the Claimant was, on being sighted, going to be arrested on 14 June 2007, "*come what may*".
>
> The Defendant suggests that only two counterfactuals appear realistic, had PS Smith or PC Cootes appreciated that they lacked reasonable suspicion (though they both plainly knew the outline reasons for arrest): **Either** they would have called DC Jenkins so as to have been sufficiently briefed by her **or** they would have kept the Clamant under surveillance and awaited her arrival. Given the dual imperatives of (i) not losing the Claimant and (ii) effecting simultaneous arrests, the former scenario seems, on balance, the more likely."

57. In oral closing, Mr Beggs QC submitted that the former scenario was the most likely situation by far and that Ms Jenkins would have given a sufficient briefing to enable Mr Cootes to arrest the Claimant lawfully immediately after the briefing. He accepted that, in this scenario, Ms Jenkins would probably have told Mr Cootes what she had described in her evidence as the essentials, to which I will return later. Mr Beggs QC was invited by the Court to review matters and to confirm whether what he had submitted accurately sets out the Defendant's position. He did so shortly after the hearing and confirmed reliance upon the matters to which I have referred at [53] to [57] above.

The Factual Background

30/31 March 2001 and the early enquiries

58. Nine people made their way to the Claimant's house during the night of 30/31 March 2001. They included Mr Lubbock, Mr Merritt, the Claimant and Mr Kenney, with whom the Claimant had started a relationship in February. The Claimant's house had a pool and a jacuzzi, which were used by his guests; and there was evidence that the Claimant snorted cocaine and offered it to others including Mr Lubbock. There was evidence that the Claimant also smoked cannabis in one of the bedrooms with one or more of his guests.

59. Mr Lubbock's body was found in the pool at around 05.45, dressed only in boxer shorts. Attempts to resuscitate him failed. An ambulance was called and paramedics arrived at 05.56. Mr Lubbock was taken to the Princess Alexandra Hospital where he was pronounced dead at 08.23. Post-mortem analyses showed alcohol in a blood sample at a concentration of 223 milligrams of alcohol per 100 millilitres of blood,

nearly three times the drink drive limit. MDMA was found at a concentration of 0.92 micrograms per millilitre of blood, MDEA at a concentration of 0.10 micrograms per millilitre, and MDA at a concentration of 0.04 micrograms per millilitre. Taken together these findings suggested use towards the higher end of a wide range of values following Ecstasy abuse. Cocaine was found that was consistent with use within a few hours of death. An indication of the overall level of mixed drug intoxication was given by Professor Forrest at the subsequent inquest who said it was sufficient of itself to be the cause of death.

60. After Mr Lubbock had been found and before the police arrived the Claimant decided to leave his home and went to a nearby flat. The police arrived at 06.10. It is recorded in the Police Scene Log that his PA arrived at the Claimant's house at 07.03 and told the police where the Claimant was. As a result, police officers left at 07.49 to see him and duly interviewed and took a statement from him. There is no suggestion that he was asked to remain after he had been interviewed and, at 17.00 that afternoon, he and Mr Kenney were admitted to the Priory in Southampton. The Claimant stayed at the Priory until he was discharged on 11 May 2001. In his evidence Mr Wilson initially relied upon the Claimant's leaving the scene as evidence of him trying to manipulate matters. He was driven to accept that he had no reason to disbelieve the explanation that had been given, which was that the Claimant left at the suggestion of others in order to avoid the media storm that would inevitably break.

61. The initial post-mortem was undertaken by Dr Heath the same day and revealed serious anal injuries that appeared recent and consistent with penetration by a firm object. There was no evidence of natural disease and no other mark of violence on Mr Lubbock's body. There have never been any forensic findings to link the Claimant to the anal injuries or to the fact that Mr Lubbock was found in the pool. In the light of the post-mortem findings, the police began in the late afternoon to treat the death as suspicious and the Claimant's house as a potential crime scene. Until then people had relatively normal access to the scene and were permitted to move things about, although there is evidence that access was restricted from about 10.30 am.

62. On 6 June 2001 Mr Kenney and Mr Merritt were arrested on suspicion of murder. The Claimant was arrested on suspicion of possession and supply of drugs, in respect of which he accepted a caution for the possession of cannabis on 10 October 2001. A second post-mortem was conducted by Professor Milroy on 19 June 2001. By 11 December 2001 all lines of enquiry were considered to be exhausted after a meeting of pathologists, the coroner and Senior Investigating Officer ["the SIO"], and the investigation into Mr Lubbock's death was suspended. In March 2002 the CPS advised Essex Police that there was "no evidence upon which any criminal court could conclude any wrongful act by any person … in relation to [Mr Lubbock's] death or bodily injury." The CPS therefore advised that no further action be taken against either the Claimant or any of his guests, including Mr Merritt and Mr Kenney.

63. In July 2002 there was a review of the investigation, but the suspension was not lifted. The inquest into Mr Lubbock's death took place in September 2002 and resulted in an open verdict. During 2003 an investigation was carried out into the suggestion that was being put forward by the Claimant that Mr Lubbock' anal injuries could have been caused post-mortem. The investigation found no evidence to support the suggestion and what it considered to be strong evidence that the anal injuries were

sustained before the arrival of the emergency services at the Claimant's home on 31 March 2001.

64. Nothing further of relevance to these proceedings occurred until March 2006 when a further review of the police investigation led to 23 recommendations for its re-opening and progression. On the evidence available to the review it was concluded that if Mr Lubbock's anal injuries were inflicted by a person then Mr Kenney, on the balance of probabilities, was responsible for them but that it could not be resolved how they occurred.

The Wilson Investigation

65. In the light of the review's recommendations, a re-investigation commenced on 4 December 2006 with Mr Wilson as the SIO. It is the re-investigation that led to the arrest of the Claimant. The most important people for present purposes were Mr Wilson (who was then Director of Specialist Investigations within the Essex Crime Division), DC Susan Jenkins (who was the Exhibits Officer and was the intended Arresting Officer on 14 June 2007) and DC Thomas (who was appointed Case Officer/Officer in Charge and acting Detective Sergeant in charge of gathering evidence). In due course it was Mr Wilson who decided that the Claimant who should be arrested. Ms Jenkins' role was to review all the exhibits from the original investigation, identify whether there were any forensic opportunities to pursue and to ensure that the recommendations of the 2006 Review were implemented; she also performed the role of Document Reader and receiver, which involved reading any documents, reports or statements that came into the Major Investigations Room. Mr Thomas' role was to review the existing evidence, compile and analyse new evidence and to be in charge of the outside enquiry team who were pursuing lines of enquiry. Ms Jenkins and Mr Thomas were the detail people who scrutinised all of the material available to the re-investigation. Mr Wilson did not read everything but was more dependent upon summaries and selections that were presented to him. The precise extent of what he read or was told remains unclear.

66. The Claimant was working in the North of England when the re-investigation started. He was not then under investigation for an offence; nor was he a suspect. He had previously provided three statements voluntarily. In answer to a request to re-interview him, which was probably made on or after 7 December 2006, his solicitor replied promptly on 11 December saying that the Claimant was happy to talk to the police but requesting that it was done at the Claimant's convenience. Mr Wilson in his statement cited this as an instance of the Claimant trying to influence how the investigation was conducted and wanting "to be seen on his terms". Even with the natural scepticism that police officers need to retain in order to do their jobs properly, that was an unjustified inference. A request more than five years after the death of Mr Lubbock by a person who was not under investigation or a suspect and who was attempting to maintain a career that an appointment be made for the timing of the interview did not, as Mr Wilson conceded, amount to trying to influence the investigation and to manipulate. It was a reasonable and sensible request from which no adverse inference should have been drawn. As it was, the Claimant was interviewed as a "significant witness" on 20 December 2006 and answered all questions that he was asked. At the end of the interview the officers said that they would like to see him again to take a statement to provide a definitive account, to

which the Claimant responded that would be "absolutely fine". Mr Thomas described the interview as a good-humoured exchange which did not yield any new information.

67. There was no subsequent occasion when the Claimant acted in a way that could lead to a reasonable suspicion that he was evading contact with the police. To the contrary, as late as 5 June 2007 the police were contacted by a New Zealand QC who was in London, who said that he was looking after the Claimant's interests and that he wished to speak to a senior officer in charge of the enquiry as he wanted to make the Claimant available to assist. And on 8 June 2007, DC Paterson recorded that he had had a conversation with the person who had been the Claimant's PA in 2001, who was evidently in regular contact with the Claimant. He said that the Claimant was fed up with the time that the case was taking to progress and gave DC Paterson the Claimant's mobile phone number. A fair and reasonable assessment was given by Ms Jenkins, who agreed that the Claimant had never refused to co-operate with the police or refused to take part in an interview.

68. The re-investigation was very extensive and covered a wide range of forensic possibilities. In the course of it, further medical evidence was obtained from Dr Nathaniel Cary, witness statements were obtained and other intelligence was gathered without statements being taken. By 11 May 2007 the police were considering two suspects (Mr Kenney and Mr Merritt) and were proposing to arrest them. The Claimant was not then a suspect. Mr Wilson's evidence, which I accept on this point, was that two pieces of work in particular were critical in bringing the Claimant into the frame as a suspect, namely (a) Dr Cary's evidence and (b) a Windows of Opportunity analysis, which was produced in two reports.

69. The first Windows of Opportunity Report was dated 10 May 2007. It identified the Claimant as a possible suspect based upon suggestions that he might be sexually aggressive, had drunk significantly and was believed to have taken cannabis and cocaine, and because his version of events differed from that of others. It also identified a time when the Claimant left his bedroom to fetch swimming shorts as the last known opportunity before Mr Lubbock was found in the pool. There was no evidence at any stage of the Claimant being seen in the vicinity of the pool at any material time.

70. On 14/15 May 2007 Mr Wilson decided that a full arrest package should be prepared to examine Mr Merritt, Mr Kenney and Mr Parker. The purpose of the arrest packages was "to draw together all the evidence against each suspect so that [he] could determine whether there were sufficient grounds to arrest" any or all of the three men.

71. Dr Cary produced his first report on 18 May 2007. He concluded that any suggestion that the anal injuries to Mr Lubbock occurred post-mortem was "quite absurd" and that there was no possible benign or accidental explanation for the nature and extent of the injuries present. He said that the infliction of the injuries on a non-intoxicated person would cause severe pain but that the combination of alcohol and drugs "effectively rendered [Mr Lubbock] stuporose and unable to properly perceive or respond to pain." His opinion was that the anal injuries were "indicative of some form of blunt force insertion." Although he said that penile penetration without the use of lubricant could not be "absolutely excluded", his opinion was that the findings were more in keeping with the insertion of some form of object of a larger diameter

than the average penis with "fisting" being a "likely possibility". Dr Cary could not exclude the possibility that the anal injuries could have "contributed directly to death" because anal dilation is "capable of causing reflex cardiac arrest through the mechanism of vagal inhibition." He concluded that "the coincidence of death with severe injuries provides prima facie evidence that death occurred in circumstances of third party involvement, whether or not anal injuries directly contributed to death." Dr Cary was not able to exclude the possibility of partial asphyxia through the application of a neck lock during the course of a sexual assault and, while noting the absence of any forensic trace or evidence that this had occurred stated that "in such cases there may be little if any signs in the neck to indicate such compression had occurred." His view was that drowning remained a possibility as the final event and that it was not possible to confirm or refute it. He also noted that drugs and alcohol could be the sole cause of death in association with hypothermia. His medical opinion was that the cause of death was unascertained. He offered the non-medical view that "the facts speak for themselves in terms of the involvement of one or more parties in the circumstances leading up to death." His report did not identify any evidence linking the Claimant to the infliction of the anal injuries or to the immediate cause of death.

72. According to Mr Wilson's witness statement, his reaction to Dr Cary's report was that he had not excluded penile penetration and therefore the offence of rape "remained under consideration". He shifted his position to some extent in cross-examination. He accepted that, if the injuries were inflicted by a third party, it was likely that they were caused by some form of blunt force insertion by an object, or possibly fisting, or possibly rape. That was a permissible view for an investigating police officer to take even though Dr Cary's evidence was to the effect that penile penetration was not likely to be the cause of the injuries. Mr Wilson's oral evidence was that, taking into account all of the relevant medical evidence and the fact that the Claimant had said that he wanted to have sex that night, it was reasonable to arrest on suspicion of rape. I return to that question later.

73. The second Windows of Opportunity report was dated 23 May 2007. It identified four windows of opportunity, of which the last was said to be when the Claimant left the second bedroom to fetch swimming shorts. It identified the Claimant as a possible suspect for the same reasons as the first report. The report recorded evidence that the first three windows of opportunity had occurred before Mr Lubbock was last seen swimming in the pool, though it noted various reasons why that evidence may not be reliable. It concluded that, if the evidence about timing was correct, the first three windows were less likely.

74. Dr Cary's supplemental statement was made on 4 June 2007 and confirmed his view that the infliction of the anal injuries was temporally closely associated with the time of death.

75. It is evident, and was a recurring theme in his evidence, that Mr Wilson's view was materially influenced by his belief that the Claimant's decision to leave home after Mr Lubbock was found in the pool was a reason for suspicion. By early June, two further pieces of information had been obtained which influenced Mr Wilson's thinking:

    i) First, on 23 March 2007 a statement was provided by a witness who gave evidence of a conversation she had had in either 2003 or 2004 with the person

who was at some point the Claimant's boyfriend. Neither the witness who gave the statement nor the person with whom she said she had the conversation had been at the Claimant's house on the night of 30/31 March 2001. According to the witness, the other person had said (apparently referring to the injuries to Mr Lubbock) "Did you know it was a hairbrush?" or "It was a hairbrush." The weaknesses in this evidence are obvious, but I do not suggest that the police should have ignored the information altogether on that account. Taken at its highest it is suggestive of an unlawful assault. It gives no indication of who carried out any such assault.

ii) Second, the police had received information on 12 December 2006, which was also the subject of a statement dated 14 May 2007 from a police community support officer who said that between 2001 and 2006 he had been asked to take a statement from a female who worked at the Springfield Medical Centre in Chelmsford who had told him that, the day after the death of Mr Lubbock, the Claimant "had a medical procedure on his penis" at the centre. DC Paterson was instructed to pursue this line of enquiry; and on 17 May 2007 he reported having spoken to the female. She admitted having told the police that she had seen the Claimant at the medical centre; but she said that she could not remember saying anything about an injury to the Claimant's penis as she had not looked after him at any time during his visit. She refused to give a statement. Off the record she said that it was "at the time of the incident at [the Claimant's] address" that he attended the hospital but that she could not say what he was treated for.

76. Mr Wilson said in evidence that he thought the intelligence about a visit to the Springfield Medical Centre was an important piece of information, despite its obvious inherent flakiness and the need to fit it into what was known of the Claimant's movements on 31 March 2001. Mr Wilson did not follow it up and it was not followed up further. No attempt was made to get the Claimant's consent for release of any records relating to him from the Springfield Medical Centre despite the fact that, when the information was received, the Claimant was not a suspect. The original record of the receipt of the information was on 12 December 2006 and said that the interview team had been informed and would put the matter to the Claimant; and that they would also request a conditional consent to examine his medical records for the period in question at the medical centre. Neither of these actions were carried out. Yet Mr Wilson relied upon patient confidentiality as the reason for not following up the allegation further. His answers in relation to the weight he placed upon the information and his failure to follow up the information were not, in my view, convincing except for his answer that "… there was the initial revisit of witnesses. Then there was the building of the case. Then we progressed through to a stage where all the suspects were looked at and each individual team did a presentation. I think it's fair that we could have [had] a look at it at that stage." Taken in the context of the evidence as a whole, that is an accurate reflection of what was happening by May: the police had reached the stage of building a case and, in relation to this point, lost sight of the inherent weakness of the evidence and the need to pursue it further if any weight was to be attached to it at all.

77. It is possible that by 5 June 2007 Mr Wilson had come to the view (if he considered it at all at that stage) that there would be a forensic advantage in presenting this

allegation to the Claimant "cold" after an arrest; but that explanation cannot have applied in December 2006 or February 2007 when the Claimant was not a suspect and no strategy for his examination after an arrest was in being or contemplation. The extremely prejudicial and possibly highly probative nature of the allegation was such that it mattered whether it was reliable or not. There is, in my view, no good reason why this information was not properly investigated and consent to view medical records was not sought at an early stage. Had consent been refused, that would have cast a different light on the information: but that did not happen. By May 2007, with no attempt to investigate the reliability of the original assertions and the witness clearly going soft (to put it at its lowest) this was not, in my judgment, information upon which it was reasonable for Mr Wilson to rely as contributing to grounds for suspicion justifying arrest.

78. On 5 June 2007 there was a briefing and forensic meeting attended by Mr Wilson, Ms Jenkins and others in the course of which Mr Wilson briefed others on the current state of play and detailed that the Claimant was now being treated as a suspect along with Mr Kenney and Mr Merritt. According to Mr Wilson's witness statement he was being considered a suspect "following the receipt of further information indicating he was actively seeking a sexual encounter during the party and may have approached the victim." This explanation does not appear in the Briefing Book that records the meeting.

The Decision to arrest and the Arrest Plan

79. Mr Wilson approved the arrest of the Claimant, Mr Kenney and Mr Merritt on 13 June 2007. His evidence is that he based his decision on an "Arrest Plan" produced by DC Lovett on 5 June 2007. The Arrest Plan itself was based upon earlier presentations and a report by DC Thomas dated 10 May 2007.

80. Section 1 of the Arrest Plan was entitled "Background Information" and provided a relatively brief account of the events from March 2001 up to the start of the re-investigation. Section 2 of the Arrest Plan was entitled "Arrest Justification" and then set out the Evidence in relation to each of the three suspects in turn. The section in relation to the Claimant was just over three pages long. It had two parts. The first was six paragraphs setting out information relating to the 30/31 March 2001. The second was entitled "Bad Character Evidence against [the Claimant]". Because of the central importance of this document as the basis of Mr Wilson's decision to authorise arrest, I shall consider its contents in some detail, dealing first with the six paragraphs of information.

81. Paragraph 1, after recording information that there were often drug fuelled parties at the Claimant's house said that "on the night of the incident [the Claimant] started pestering the man who died for sex. Kenney had told [the Claimant] that the man (Mr Lubbock) was straight and apparently had a fracas with [the Claimant] after this." It was pointed out that this information had not been mentioned previously in the enquiry. The following points may be noted at this stage:

    i) The presence and use of drugs at the Claimant's house on 30/31 March 2001 had been known since 2001. The Claimant had accepted a caution for possession of cannabis and no action had been taken against him in relation to

cocaine that was found at the house. Toxicology had revealed at an early stage that Mr Lubbock had taken cocaine;

ii) The information about the Claimant pestering Mr Lubbock for sex was derived from a witness statement from a Mr Kelleher taken on 26 January 2007 and was said to be based on a conversation with Mr Kenney a couple of days after the incident, which he said he could not remember exactly;

iii) Mr Wilson accepted in cross examination that it was hearsay given six years after the event and that he had to view its reliability very carefully, but he said that he regarded it as important because of the mention of the Claimant pestering Mr Lubbock for sex, which he took as being interested in a sexual encounter. He did not place weight on the reference to the Claimant having a fracas with Mr Kenney after he told the Claimant that Mr Lubbock was straight. He said, and I accept, that he placed weight on this information because it had not been volunteered by the Claimant at any stage, though he recognised that this could have been because it did not happen or because the Claimant did not remember it rather than because the Claimant might have concealed it.

82. The second paragraph recounted the mention of the hairbrush, to which I have referred at [75] above. It said "it is not unreasonable to assume that this information could only have come from [the Claimant]"; but Mr Wilson was right to accept that, quite apart from being double-hearsay, the information could have come either from the Claimant or from anyone else who had been present.

83. The third paragraph stated "It is evident that [the Claimant] was actively seeking a sexual encounter that night." There was ample evidence to support this assertion, including the information to which the Arrest Plan referred in the first, fifth and sixth paragraphs of this section.

84. The fourth paragraph is not relied on by the Defendant but formed part of the material relied on by Mr Wilson, as appears from his rehearsing it in his witness statement. At its highest, it was an account of the Claimant being seen in a compromising situation, but without any suggestion of violence or aggressive conduct.

85. The fifth paragraph recorded that the Claimant said in the taxi on the way back to his house. "I could do with a good fuck now, I'd be happy with that now." It was said to be "a significant comment to make considering the anal injuries later discovered with Mr Lubbock." There is no evidence that the Claimant pestered or showed any continuing interest in Mr Lubbock after Mr Kenney told him that Mr Lubbock was straight. The remark was known to the original enquiry; and the taxi driver had given evidence at the inquest in which he made clear that he was not able to say that the remark was indicating a wish for a sexual encounter with anyone in particular, or even with anyone of a particular gender.

86. The sixth paragraph recorded that in addition to the information about pestering Mr Lubbock until he was told he was straight, there was information that the Claimant had attempted to kiss another guest, Mr Futers, on the mouth. The guest was straight and repulsed his advances, with another guest saying "Don't worry, he's always doing that sort of thing." Mr Futers said that there was no big deal made of it. There was no

direct evidence of the Claimant making any further advances to or pestering anyone after Mr Kenney told him that Mr Lubbock was straight or after he was given the brush-off by Mr Futers. This information was known to the original enquiry, though it was not reduced to a witness statement until the re-investigation.

87. Mr Wilson accepted in cross-examination that there was no evidence available to him when he made his decision of actual aggressive conduct by the Claimant on the night of 30/31 March 2001. However, he referred in his witness statement to the second part of the Arrest Plan relating to the Claimant as being "suggestive of aggressive sexual behaviour on [the Claimant's] part, although the weight that could be attached to it depended on how reliable it was." And, at the commencement of his cross-examination about this section of the Arrest Plan he said that he agreed with the statement in the Defence that this "evidence tended to suggest that [the Claimant] was interested in and/or capable of violent sex and/or sexual assault."

88. On examination, what the Defence described as "a cohort of bad character evidence" proved to be much less substantial than suggested in the Arrest Document or Mr Wilson's initial evidence.

89. The first item was entitled "D….. W…. (Homosexual) - rape allegation." It provided details of an incident that was said to have occurred on 8 May 1998 at a night club in London. The complainant was said to have gone to sleep in the toilets. He had alleged that he woke to find himself restrained, being forcibly bent forward and having his lower clothes pulled down before a lubricated finger was inserted into his anus and he was anally raped. The complainant said that he turned round and saw that it was the Claimant who raped him. After providing these and further details over two paragraphs, the summary concluded with the words "The allegation was denied and no further action was taken." This account was misleading:

    i) The police had the CPS summary, which set out the allegation that had been made. Mr Wilson did not remember whether he had read it or was aware of it; but given the significance attached to the "bad character" evidence I would expect and infer that he would have either seen it or been made aware of it. Ms Jenkins would, on her evidence, have read it;

    ii) The incident had been thoroughly investigated by the Metropolitan Police. They interviewed the Claimant who denied the allegation. They took swabs and intimate samples from the complainant and tested for DNA but found no DNA from anyone other than the complainant himself;

    iii) Video evidence showed the complainant arriving at the night club at the same time as the Claimant at 21:00. It also showed him entering the upstairs toilet at 21:18 and leaving the same toilet one minute later "in a composed state." The video evidence confirmed that the Claimant did not join him. Two minutes later the complainant left the club by the front entrance. He was ejected from the club at 21:40 and was seen to make a phone call;

    iv) The Sun received a phone call from someone claiming to be the victim on the night of the (non) incident. The News of the World arrived before the police, and carried the story on 10 May 1998;

v) Unsurprisingly, the CPS advised against taking further steps;

vi) In cross-examination, Mr Wilson said that the allegation would be "at the lower end of what [he] would say is acceptable" – meaning at the lower end of what could properly be given any weight in assessing the case for arresting the Claimant – or, on a numerical scale "pretty close to 0";

vii) On any reasonable assessment, no weight at all could or should have been given to this item by Mr Wilson or anyone else. The allegation was demonstrably untrue and had been closely followed by an attempt to involve the media to the Claimant's disadvantage. Mr Wilson suggested that it had been included by an officer being open in his presentation of relevant material to his SIO. That is not an interpretation that I can accept. While accepting that the officer compiling the Arrest Plan was not bound to include all matters that might be favourable to the Claimant in order to present a balanced picture, the presentation of this item as evidence of bad character or a tendency to sexually aggressive behaviour was misleading and unjustifiable, as should have been realised by anyone with access to the underlying material. Mr Wilson eventually (and rightly) withdrew his evidence that this item was suggestive of aggressive sexual behaviour.

90. The second item of "bad character" was headed "J… W… aka C… H… - Prostitute". It recorded allegations of an incident on 3 August 2000 which was said to have happened at the Berkeley Hotel in London. The complainant was hired as a prostitute to attend the Claimant's room at the hotel. The Claimant was alleged to have supplied the money for the service but it was one of the other occupants of the room who had sex (oral and full) with the complainant. It was alleged that the man (not the Claimant) was rough with her and that she asked him to stop on several occasions. The complainant alleged that, at the end of the sexual activity, the money that she had been paid in advance had been removed from her coat. The concluding line of the Arrest Plan summary stated: "the allegation was denied and NFA taken. [The Claimant] played no part in the sexual activity." The following points arise:

i) There was no suggestion that the Claimant had taken part in any sexual activity. The incident did not provide evidence suggestive of aggressive behaviour (sexual or otherwise) on his part. There was no suggestion that he had taken part in any sexual or other assault;

ii) The Defendant asked me to read the entire file relating to the incident, and I have done so. It discloses that:

a) the Claimant accepted a caution for allowing the room he had hired to be used for cannabis to be smoked, contrary to s. 8 of the Misuse of Drugs Act 1971;

b) the Case Summary states that after paying the complainant her money, the Claimant left the room and indicates that he was not in the room again while she was there;

c) the complainant provided a witness statement in which she said that the Claimant was present until after the start of her sexual activity with the

other man and then got up and left, after which she did not see him again. On the account given in the witness statement the Claimant left before the other man started to get rough with her;

d) the complainant sold her story to the Sunday People. As reported in the press, she said that she did not see the Claimant after he paid her money and left. After the story broke, she did not contact the Officer in the case, nor could she be contacted;

iii) In cross-examination Mr Wilson said that this was not "at the upper end" though he would not grade it numerically as having 0 weight. He eventually conceded that there was no suggestion of aggressive behaviour by the Claimant but said that the incident concerned him, on the misconceived basis that the Claimant had been in the room when the other man was being rough and had not stopped when asked. In re-examination, he was led with the suggestion that this incident was indicative of "risky" behaviour. It need hardly be pointed out that this is a very long way from being behaviour that suggests aggressive sexual behaviour on the part of the Claimant.

91. The next item recounted an allegation that a fan had gone to see the Claimant in February 2001 in order to give the Claimant some flowers. The fan alleged that he had been offered drugs and alcohol and that the Claimant had put his hand down the fan's trousers and inserted his finger into his anus. It also recounted that the Claimant denied the allegation and that the fan, having admitted that the allegation was false, was subsequently convicted of attempting to pervert the course of justice. The only surprising things about this allegation are that (a) it was included in a section of the document designed to provide reasonable grounds for a decision to arrest (or not), and (b) that Mr Wilson referred to it in his witness statement without saying that he placed no weight on it. In his evidence, Mr Wilson attempted to justify its inclusion but rightly recognised that no weight should be attached to it. He said that he placed no weight on it.

92. The fourth item in this "cohort" was an allegation of rape made a year after the alleged event by a man who said that he had met the Claimant at a bar in October 2000, consumed alcohol and Class A drugs and gone to the Claimant's house where he fell asleep fully clothed, waking to find he only had on his underpants and had blood coming from his anus. This allegation was followed up on 27 April 2007 when the alleged victim refused to speak to the police because they had not believed his original allegation. An Essex Police press release prepared in December 2002 recorded that the complainant had gone to the News of the World and to the Sun and repeated his allegation to them. The re-investigation's analyst considered the press release in February 2007 and concluded that the allegation was not relevant to the re-investigation's enquiry. It therefore appears that this item appeared in the Arrest Plan despite the police who investigated the allegation having concluded that it should not be believed and the re-investigation's analyst concluding that it was not relevant.

93. Mr Wilson, when shown the underlying documents (including the reference to the complainant having gone to the press) answered the suggestion that this incident could not sensibly be said to be suggestive of aggressive sexual behaviour by the Claimant by saying that he could understand what was being suggested but that the officer who prepared the Arrest Plan had thought it right and proper to present the

document in the form he did. That begs two questions, neither of which has been satisfactorily answered. The first is why the relevant officer thought it right and proper to present the document in the form he did, even allowing for the fact that it was an Arrest Plan rather than an attempt to provide a full and balanced presentation of the available evidence. The second is the extent to which Mr Wilson read or knew of the underlying documents. His evidence is that he relied substantially upon the Arrest Plan. It was clear from his evidence as a whole that his knowledge was not simply limited to the Arrest Plan and that, because of the passage of time, he was at some disadvantage in remembering precisely what he knew of or saw. On occasions he gave evidence which suggested that at least the substance of the material underlying the Arrest Plan was presented to him. For example, at one point he said that his officers "would have done the research. That research would have been done and presented." On other occasions he became much less certain, saying that he could not remember precisely what was done and that he had not read everything generated by the re-investigation.

94. I return to his evidence in his witness statement that "the contents [of the Arrest Plan] were very familiar to [him] from [his] understanding and conduct of the investigation. [He] understood the details behind the written document, and [his] decision was informed by all the information which had been gathered during the re-investigation." Whilst I fully accept that Mr Wilson as SIO could not be expected to read everything generated by his team's re-investigation, I accept the general thrust of that evidence, which is consistent with the Defendant's submission that he conducted a thorough investigation. In my judgment it should have been clear to a person with such a degree of detailed knowledge that the "cohort of bad character evidence" was flimsy, one-sided and misleading to such an extent that he should have made further enquiries as to its reliability: see [25]-[29] above. If he had done so, he would have realised that the "cohort" should not be relied on as evidence supporting a propensity to aggressive sexual conduct or to commit either rape or murder.

95. Mr Wilson did not refer in his witness statement, but the Defendant's defence referred to and relied upon the last entry of this type in the Arrest Plan. It recorded the allegation by the Claimant's ex-chauffeur that the Claimant would make him drive around London in 2000 to engage the services of male prostitutes and to obtain Class A drugs. He also said that the Claimant was engaging in gay promiscuous relationships at work while in a relationship with someone else. The Arrest Plan said that the ex-chauffeur had sold his story to the newspapers. Mr Wilson said that he knew he had sold it to the Sunday People for £20,000 via Max Clifford. He said that it suggested gay promiscuity, which he regarded as relevant because of the suggestion that the Claimant was on 30/31 March 2001 showing a propensity to have promiscuous relationships while in a relationship with Mr Kenney. He did not rely upon the allegations of the ex-chauffeur in his evidence as suggestive of aggressive sexual conduct. There is no suggestion in the ex-chauffer's evidence of aggressive sexual conduct or that the Claimant had been interested in or capable of violent sexual conduct or sexual assault. A witness statement was taken from the chauffeur in February 2007 in which he set out these allegations. He described the Claimant as being abusive on occasions, but gave no description of violent behaviour.

96. The section of the Arrest Plan dealing specifically with the Claimant concluded with three further paragraphs:

i) The first referred to the Claimant having "fled the scene" and to evidence that he did so wearing different clothes from those he had been wearing at the club the previous evening and having a bundle of some sort under his arm: see [60] above;

ii) The second stated that it had previously been believed that the Claimant had never been to the nightclub in Harlow before 30 March 2001 but that there was now evidence that he had been there on about five previous occasions;

iii) The third referred to the suggestion that the Claimant had been admitted to the Springfield Medical Centre on 31 March 2001: see [75(ii)] above.

97. The Arrest Plan also set out the grounds for suspecting that Mr Kenney and Mr Merritt had committed the offences of raping and murdering Mr Lubbock. Mr Wilson relied upon those grounds as additional grounds for suspecting that the Claimant had committed the same offences because "[the Claimant] had been the partner of Kenney and friend of Merritt at the time of the incident. He had invited [Mr] Merritt and his sister … back to his home. As the Windows of Opportunity analysis had revealed, there were grounds for suspecting each of them may have been involved, either alone or together." When pressed about how being the partner of Kenney and friend of Merritt at the time of the incident added to any suspicion that might otherwise arise, Mr Wilson was unable to give any satisfactory answer. The most he could say was that, because of the close association between the three, he was not able to exclude the possibility that there had been communication between them and some form of joint enterprise, though he said that would not be his leading hypothesis.

98. Mr Wilson's evidence was that he did not think that his decision that there were reasonable grounds for suspicion was finely balanced or borderline. His evidence was that the information available "far exceeded what might reasonably have been required to found a suspicion to arrest." He summarised the basis for that view as follows:

> "[The Claimant] was a suspect with a history of sexual promiscuity, who was reported to have been actively looking for sex and who was one of only three individuals who had had the opportunity to act on his desires. His behaviour after the incident was suggestive of a "guilty mind". The fresh evidence gathered during the re-investigation pointed to someone who had never been open with the police about what he knew. …I carefully considered whether it was the right decision to arrest him. I needed to be sure that my actions were both legal and proportionate because I recognised the impact this would have on him as an individual. His celebrity status did not alter my decision, but it did mean I considered it with particular care."

99. Mr Wilson gave evidence about whether he considered that arresting the Claimant was necessary. In summary, he considered it essential that the three suspects should all be arrested at the same time so that there could be no collusion, to maintain an element of surprise, and to enable all to be interviewed separately but at the same time so that their responses could be compared. The police believed that the three suspects had not been in contact with each other for approximately six years and so it was

hoped and intended that placing a covert surveillance device in their cell block might capture incriminating information if and when they spoke to each other. Mr Wilson was also concerned that the Claimant might return to New Zealand, where he was now living, and by his perception that the Claimant had negotiated his contact with the investigation via third parties, principally his solicitors.

100. A slightly different perspective was given by Ms Jenkins who said that the police had gone as far as they could go with what they had. Her evidence on this point was correct. Despite the very extensive and wide-ranging enquiries that the re-investigation had undertaken, the only real chance of a breakthrough was if all three were got in at the same time under controlled circumstances that permitted simultaneous interviewing and the possibility of covert surveillance.

101. Once Mr Wilson had decided that the three suspects should be arrested, he delegated the organisation of the arrests to DI Mason. The organisation of the arrest was to be tightly controlled to avoid any inadvertent disclosure of information. Officers outside the designated arrest team were only given what information they needed to complete their roles. There was therefore no attempt to brief them to enable them to conduct a lawful arrest. Ms Jenkins was the only designated arresting officer. She was briefed by DC Lovett, who had prepared the Arrest Plan, on 11 June 2007, before Mr Wilson took his final and formal decision. Her evidence, which I accept, was that she was briefed on the basis that what was in the Arrest Plan was the grounds for the arrest, though her understanding of the grounds for suspicion and necessity for arrest did not derive solely from those documents because she had read others. From the point when Mr Wilson approved the Arrest Plan and confirmed the decision for the three suspects to be arrested, he had no direct involvement in the arrests.

102. There is no evidence that anyone gave any thought to the *O'Hara* requirement that the arresting officer herself or himself must have reasonable grounds for the requisite suspicion and belief for a lawful arrest or how it would be complied with if, for any reason, the sole designated and briefed Arresting Officer was not able to effect the arrest of the Claimant. This failure permeated the entire organisation, as Mr Wilson's evidence made clear:

> "I can confirm that [the Claimant] was, on being sighted, going to be arrested on 14 June 2007, whether by – as planned and as preferable – the designated arresting officer or by someone stepping into that breach in her absence. It is very unfortunate that the actual arresting officer, PC Cootes, had not been fully briefed on the grounds for arrest due to the tight control of information under investigation. However, in reality, once [the Claimant] had been located, he was going to be arrested come what may."

Put simply, there was no Plan B to ensure that the arrest of the Claimant could be lawful if Ms Jenkins was not available to effect it.

The Arrest

103. I deal with the circumstances of the arrest in greater detail below when considering whether the Claimant would have been lawfully arrested if he had not been unlawfully arrested by PC Cootes. Put shortly, a number of surveillance officers were in the vicinity of where the Claimant had stayed the night. When the Claimant left the premises in the morning, Ms Jenkins had not arrived. The surveillance officers were ordered to arrest the Claimant and it fell to Mr Cootes to do so because he was close to the Claimant at the time. Neither Mr Cootes nor anyone else in the surveillance team was briefed sufficiently to enable them to arrest the Claimant lawfully. No one appreciated the need for a further briefing either at the time of the arrest, or later that day, or at any time until the change in the Defendant's position during these proceedings when, belatedly, it was realised that the actual arrest had been unlawful.

104. In the event, and despite extensive further interviews and the placing of the covert surveillance device, the decision to arrest the three suspects did not yield any substantial further information. The Claimant was released on bail on 15 June 2007. He answered his bail on 10 September 2007 and was further interviewed. At 13.25 on the same day the police were advised by the CPS that there was insufficient evidence to justify charging any of the three suspects. The reasons given included that there was no forensic evidence that connected any person or object to any suspect and to Mr Lubbock; that the eyewitness evidence did not assist the task of piecing together what happened; that the Claimant had an alibi from three people in the period immediately prior to the discovery of Mr Lubbock in the pool; that there was no evidence of any sexual event with Mr Lubbock either around the house or outside in the vicinity of the jacuzzi or pool; and that the pathology indicated a very difficult position because the cause of Mr Lubbock's death was "unascertained".

105. At 14.25 on 10 September 2007 the Claimant was informed that no further action would be taken against him. He was released without being charged with any offence.

Has the Defendant established that the Claimant could have been arrested lawfully but for the delay in the attendance of the designated arresting officer?

106. The Defendant's case on reasonable grounds for suspicion and for belief that it was necessary to arrest the Claimant are set out at [44]-[45] of the Amended Defence, which are attached as Annexe A to this judgment.

107. I have concentrated thus far on Mr Wilson's evidence, and shall do so again. However, it is a cardinal feature of this case that, although it was Mr Wilson who took the decision that the Claimant should be arrested, he himself was never going to arrest the Claimant. Only one person was briefed to enable them to arrest the Claimant lawfully and that was Ms Jenkins. She was not the only officer with extensive knowledge of the material that had been gathered by the re-investigation. Mr Thomas was another, but his role was to supply evidence up the chain of command. He was not involved in deciding what the reasonable grounds for arresting the suspects were. During the arrest phase his job was preparing for interviews; and the Claimant was already in custody when Mr Thomas arrived for the first round of interviews on 14 June 2007.

108. The trial was conducted on the basis that Mr Wilson was the SIO and Ms Jenkins the designated arresting officer and, in addition, that they were the people who between them had the information on which any decision to arrest could be made. In keeping with this approach, the Defendant's closing submissions provided the following formulation of whether the Claimant could have been arrested lawfully but for the delay in the arrival of the arresting officer:

    i) Did Mr Wilson and Ms Jenkins have reasonable grounds to suspect the Claimant of murder and rape?

    ii) Did Mr Wilson and Ms Jenkins have reasonable grounds to believe that arrest was necessary for a prompt and effective investigation?

109. This formulation is convenient: but it must be remembered that the answer may not be the same for Mr Wilson and Ms Jenkins because (a) Ms Jenkins read and therefore knew virtually everything that came to the re-investigation team to an extent that Mr Wilson did not; and (b) Mr Wilson may (at least in theory) have been entitled to rely upon information passed to him by others (including Ms Jenkins) and Ms Jenkins may (at least in theory) have been entitled to rely upon information passed to her by others (including Mr Wilson) even if that information was in fact partial or wrong or both: see [21]-[29] above.

110. By the end of the trial, the Defendant had reworked the grounds upon which it says that an arresting officer (or an officer ordering an arrest) could have the necessary reasonable grounds for suspicion and belief. As set out in written closing submissions and developed orally, the Defendant submits that the grounds broadly encompassing those set out at [44 (a) to (m)] of the Amended Defence, together with the disappearance of a poolside thermometer whose dimensions were consistent with the dilation of Mr Lubbock's anus and the fact that no-one who had been present at the house had provided any explanation for Mr Lubbock's injuries, constituted reasonable grounds for suspecting (amongst others) the Claimant.

111. These grounds, which form the bedrock of the Defendant's case, were either all known or largely known to earlier investigations and had not previously led to the Claimant being identified as a suspect or to his being arrested. That is not the point, particularly when it is apparent that the earlier investigations were distinctly sub-optimal in a number of respects. What matters is whether the grounds amounted to reasonable grounds for suspicion so that the Claimant could have been lawfully arrested in June 2007. I also bear in mind the gulf between what may constitute reasonable grounds for suspicion and evidence justifying charging a person with an offence.

112. I accept without hesitation that the circumstances surrounding Mr Lubbock's death were suggestive of foul play. It was possible that he had died of drug intoxication alone, or that drug intoxication had caused him to fall into the pool and die, but it was impossible to ignore the anal injuries. Dr Cary's categoric opinion was that there was no possible accidental or benign explanation for them. They were, on the evidence, likely to have been caused by a blunt instrument that had not been found, though infliction by an erect penis could not be absolutely excluded. In the light of Dr Cary's evidence, no other realistic possibility existed. Mr Lubbock was straight. If, therefore, the injuries had been inflicted by an erect penis, it was unlikely to have

been in the course of consensual sexual activity, even with the level of intoxication that was present. Therefore, if the injuries had been caused by an erect penis, that would be strongly suggestive of a violent sexual assault amounting to rape. If, on the other hand, the injuries were inflicted by the insertion of a blunt instrument into his anus, it would still be necessary to consider the possibility that the insertion of the blunt instrument was accidental. On Dr Cary's evidence that possibility should be excluded. Even if it had been a possibility, a natural and reasonable inference to draw would have been that the injuries either were or may have been caused by a violent assault using a blunt instrument. As it was, the police were reasonably entitled, if not bound, to suspect that Mr Lubbock had been assaulted and that, if it was not a sexual assault involving anal penetration with an erect penis, it was an assault with a blunt instrument. They were also entitled to take into account that the poolside thermometer which, on the evidence, could have caused the injuries was present (and photographed) early in the day of 31 March 2001 but went missing later that day, for no obviously innocent reason.

113. An assault of such violence, however it was carried out, immediately suggests the prospect of an intent to cause the grievous bodily harm that resulted. The available evidence came nowhere near to establishing (for the purposes of charging an individual, if identifiable and identified, or securing a conviction) that the death of Mr Lubbock was caused by the anal injuries either directly or in conjunction with his immersion in the pool; but one possible cause of death was cardiac arrhythmia directly caused by the anal injuries, and other possible causes of death would have implicated the anal injuries as a contributing cause of death in the swimming pool. In either event, it could reasonably be inferred that Mr Lubbock's death had been caused by someone who had the requisite intent for murder, namely the intent to cause grievous bodily harm. It was not necessary for Mr Lubbock to have been put into or restrained in the pool or to have been held under water for him to have been murdered.

114. There was no evidence linking the Claimant with the infliction of the anal injuries or with Mr Lubbock being in the pool. There was no reason to disbelieve the explanation that the Claimant had left the scene in order to avoid the predictable media interest, and a fair review would take into account that, soon after he left, his PA told the police where he was to be found, that he was found there, and that he cooperated with the police on that occasion and thereafter by agreeing to be interviewed and providing statements whenever requested to do so. So, at most, the suspicious mind could conclude that he had put himself out of the way of the police for about 2 hours. There was evidence that he had removed something from the scene, but no evidence to indicate with any reliability what it was. Viewed objectively, his leaving the scene was regrettable from the perspective of the police and any enquiries that they might wish to make; and the fact of removing something from the scene which was not later identified or recovered left questions unanswered. More importantly for the purposes of deciding whether there were sufficient grounds to justify arresting him, there had been a closed group of people who could have inflicted the anal injuries on Mr Lubbock, of whom the Claimant was one. A police officer could reasonably infer that, if the injuries were caused by sexual activity, they were inflicted by a man. The Claimant is a gay man. That of itself does not mean that he is likely to commit either homosexual rape or murder; but a police officer could reasonably infer that, if they were injuries caused by sexual activity between

men, they were unlikely to have been caused by someone who was straight and more likely to have been caused by someone who was gay.

115. As a second level of evidence, the Defendant submits that the Claimant had the motive and opportunity to commit rape. The Defendant points to the evidence that the Claimant had declared and pursued sexual gratification by his reported comments in the car on the way to his home and his trying it on with Mr Lubbock and Mr Futers when they got there; and submits that the Claimant had the opportunity to inflict the anal injuries by a sexual assault. I have already referred to the evidence of the Claimant being motivated to have a sexual encounter: see [81], [85], [86] and [95] above. The evidence justifies the conclusion that the Claimant was interested in sexual encounters and gratification earlier in the evening. It is material that he backed off when told that Mr Lubbock and Mr Futers were straight and that there is no further evidence of him taking steps to achieve sexual gratification. The evidence does not provide any support for a suggestion that he was interested in violent non-consensual sexual activity; and the suggestion that he may have become frustrated to the point of being prepared to carry out anal rape on a man he knew to be straight is unsupported speculation, even for a naturally sceptical investigator with a reasonable tendency to suspicion. That was the importance, in Mr Wilson's mind, of the "cohort of bad character evidence" which, on examination, provided no evidence or grounds for reasonable suspicion of propensity to violent sexual behaviour. There might be some cases in which it could reasonably be said that there would not be smoke without fire; but, because of the Claimant's celebrity status and the ever-present risk of untrue allegations being made with a view to profiting by sale to the media, that could not reasonably be said in his case.

116. The re-investigation generally and the Windows of Opportunity reports in particular revealed a confused and confusing picture of limited opportunities for the Claimant and others. The confusion arose because of the absence of reliable or consistent evidence about the movements of the various people at the Claimant's house on the night. That in turn was at least in part a natural consequence of the circumstances and the intoxicated state of most of the people who were there. That said, however, the evidence that was available to Mr Wilson and Ms Jenkins justified the view that the Claimant was one of the closed group of people who appeared to have had an opportunity to inflict injury on Mr Lubbock. At its lowest, he could not be excluded.

117. The Defendant also relies on the absence of explanation from the Claimant and his behaviour in leaving the scene and going into the Priory for five weeks. These are insubstantial reasons for suspicion. The absence of an explanation is consistent with him not knowing what happened. In an interview with Piers Morgan he said he believed there were others who were hiding information and that he knew who they were. He did not suggest that he himself knew more about what had happened. He was subsequently interviewed about that by the police, and the Defendant does not rely upon the contents of what he said to Piers Morgan as a separate or additional ground for reasonable suspicion. I have already considered the evidence about him leaving his home: see [60]. There is no evidence or reason to believe that his admission to and stay at the Priory was not medically justified. He had otherwise cooperated with the police both on 31 March 2001 and during the re-investigation up to and including the time of his arrest.

118. Next in closing submissions, the Defendant submits that nine heads of "new evidence and new analyses now came into the frame which was corroborative of suspicion against the Claimant and built a case beyond that which was, as it happens, already sufficient." I deal with them in turn.

119. First, the "hairbrush". See [75(i)] and [82] above. This was evidence that was corroborative of an unlawful assault but did not contribute to a case that it was the Claimant who had carried out such an assault.

120. Second, the evidence of injury to the Claimant's penis. See [75(ii)] above. For the reasons given there, I do not consider that it was reasonable to rely upon this evidence. In the event the evidence proved to be wrong, but that is not the reason why it should have been discounted.

121. Third, Mr Futer's statement of 11 January 2007. See [86] above. The Defendant relies on this in support of its submission that the Claimant was seeking sexual satisfaction on 30/31 March 2001 which, as identified at [115] above, does little or nothing to corroborate or build on a case of rape or murder. The Defendant also relies upon Mr Futers' evidence that the Claimant had tried to place cocaine on Mr Lubbock's gums. That is evidence of illegal (and "risky") behaviour. It does not, either on its own or in context, contribute to a reasonable suspicion that the Claimant was guilty of rape or murder.

122. Fourth, Mr Kelleher's statement of 26 January 2007. This was the evidence that the Claimant had been pestering Mr Lubbock for sex and that, when Mr Kenney told him that Mr Lubbock was straight, there had been a fracas between the Claimant and Mr Kenney: see [81] above. A reasonable assessment of this evidence would have taken into account the weaknesses that I have previously identified, and the fact that there was no evidence that the Claimant continued to pester or show any inclination to further sexual contact with Mr Lubbock after he had been given the brush-off.

123. Fifth, the Windows of Opportunity reports. See [69] and [73] above. Mr Wilson was entitled to take these reports into account. They were detailed pieces of work by analysts who he knew and trusted; and they provided evidence that the Claimant could have had the opportunity to assault Mr Lubbock. There was other evidence to be considered, such as whether it was feasible that he might have done so without his presence being noticed or mentioned by anyone else, but in a case where the evidence was confused and confusing, the fact that he was not excluded by the Windows of Opportunities reports was significant material to be taken into account.

124. Sixth, the bad character evidence. See [89] to [95] above. For the reasons I have already set out, this part of the Arrest Plan was thoroughly misleading and I reject the suggestion that it was included because an officer was being "open". I do not suggest that the Arrest Plan was required to be a balanced document setting out the case for and against arrest in its entirety; but the process should be fair and reasonable. That is the essence of the requirements of s. 24 of PACE and is a reflection of the extreme seriousness of the decision to deprive someone of their liberty by arresting them. This was not a case or a decision to arrest that was under intense time pressure, as is shown by the fact that the Arrest Plan was prepared on 5 June 2007 and was itself based on an earlier presentation made on 10 May 2007; and that there were nine days between the preparation of the Arrest Plan and the arrest. With the level of detailed

knowledge that Mr Wilson and Ms Jenkins respectively had, each should have appreciated that the Arrest Plan "cohort of bad character evidence" was unreliable and could not reasonably be relied upon. If Mr Wilson's knowledge had not included the underlying information which demonstrated that this part of the Arrest Plan was unreliable, there was sufficient in what it said to put him on enquiry; and, had he enquired, he would have discovered the true position. As it is, it was clear from his evidence that he knew at least some of the underlying information. Taken overall, I conclude that his reliance on this part of the Arrest Plan was unreasonable and did not contribute to any reasonable grounds for suspecting that the Claimant had committed the crimes of either rape or murder. Ms Jenkins with her detailed knowledge of the documentation should also have appreciated that the "cohort" could not reasonably be relied upon to support a decision to arrest the Claimant.

125. Seventh, the evidence of the ex-chauffeur. See [95] above. The Defendant submits that "the witness speaks of sexually solicitous risky behaviour by the Claimant, again involving drugs: curb crawling for rent boys and buying a white drug (in context, likely to be cocaine) off the street. The witness also describes a person who was frequently drunk and abusive. The evidence … is of course to be read with the bad character evidence." This submission elides "risky" with "having a propensity to violent sexual conduct" which is impermissible on any reasonable analysis. Information that the Claimant took alcohol and cocaine was not new, and the absence of any suggestion of violent conduct despite taking drink and drugs contributes nothing to the case that the "cohort of bad character evidence" attempted (but failed) to build.

126. Eighth, Dr Cary's evidence. See [71], [74] and [112]. Dr Cary's opinion that accidental or benign infliction of the anal injuries could and should be excluded as possible explanations was important evidence and, on its own, would have provided reasonable grounds for suspicion that a serious criminal offence had been committed. There was nothing in the other medical evidence that should have caused Mr Wilson to discount or ignore Dr Cary's evidence. What his evidence did not do was to establish any medical or scientific link between the Claimant and the injuries.

127. Ninth, the Claimant's evidence. The Defendant submits that the Claimant's evidence in his various interviews and statements and at the inquest (where he refused to answer questions about cocaine) were incomplete and inconsistent. It is not necessary to analyse this submission in any detail. What is plain is that, over a period of six years, the Claimant did not make any material admissions.

128. Turning to the issue of necessity, the Defendant's pleaded case is at [45] of the Amended Defence, which is set out at Annexe 1; and I have summarised Mr Wilson's evidence at [99] above.

129. In written closing submissions the Defendant submits that Mr Wilson had reasonable grounds for believing that to arrest and interview the three suspects simultaneously would facilitate a prompt and effective investigation since it would permit his interview team to (a) isolate the suspects from each other and the other party-goers, (b) enable the interviewing teams to feed into each other any useful developments emerging from the concurrent interviews, (c) keep the suspects off balance, and (d) ensure that any inculpatory comments made in the cell block were captured by the investigating team. There can be no doubt that arresting them would facilitate these

objectives; but that is not the test. The test is whether there were reasonable grounds for believing that it was *necessary* to arrest the Claimant to allow the prompt and effective investigation of the offence or the Claimant's conduct.

130. The Defendant goes on to submit that it is not inappropriate or unreasonable for an officer to take into account the fact or belief that a suspect may be more likely to confess (or, by extension, to provide material information) under the greater pressure of being arrested, citing *Holgate-Mohammed v Duke* [1984] 1 AC 437, 444C-446D and *Cumming* at [42]-[44]. The passages relied upon were both addressing a question of *Wednesbury* unreasonableness, not the requirement of necessity under s. 24 of PACE. I agree with the submission as made but, not least because it derives from passages addressing *Wednesbury* unreasonableness, it does not of itself provide the answer to the question whether it is *necessary* to arrest a given suspect to allow the prompt and effective investigation of the offence: the existence of the statutory requirement itself indicates that there may be cases where, even though arresting may allow prompt and effective investigation, it is not necessary to arrest because prompt and effective investigation is possible without doing so.

131. I accept and find that Mr Wilson believed that arresting all three suspects would facilitate further investigation in the ways submitted by the Defendant. I think it unlikely that he considered any alternative short of arrest more than cursorily. I am satisfied that he considered that any alternative would be unsatisfactory because of his perception that coordination of the proposed interviewing and covert surveillance was desirable and that the Claimant was not to be trusted to cooperate. As outlined above, this perception came from Mr Wilson's interpretation of the Claimant having left his home on 31 March 2001 and the solicitor's communication on 11 December 2006 indicating that the Claimant was happy to talk to the police but requesting that it be done at his convenience. The lack of trust was probably increased by the fact that Mr Wilson now considered him to be a suspect.

132. As against that, a reasonable assessment would have taken into account the fact that the Claimant had in fact cooperated with the police by meeting them, being interviewed and giving statements whenever requested to do so, starting on 31 March 2001. And that there had been two contemporaneous indications of further co-operation, from the New Zealand QC and the Claimant's ex-PA. There was no indication that the Claimant was about to leave the country and, in any event, the police were able to (and in fact did) put an alert out to border control in case he attempted to do so. Although there was a theoretical risk of collusion between the suspects, or more widely between the suspects and other party-goers, the re-investigation had established that there had been no contact between the three suspects for approximately six years.

133. Both Mr Wilson and Ms Jenkins were cross-examined about the risk of collusion, and neither was able to identify a case-specific risk of collusion. However, it is clear that both took seriously the perceived need to prevent any risk of collusion in a case of such seriousness. In an important answer in cross-examination, Mr Wilson expressed with great clarity his perception of the need to arrest all three in order to ensure that the carefully co-ordinated interview plan was not disrupted and to ensure that there was prompt and effective investigation of the offence. He emphasised the need to be able to put questions to the suspects in a way that enabled the police to deal with all three at the same time and then ensure that any information was passed between the

three interview teams by the co-ordinator he had put in place. He also emphasised that, despite the absence of any known contact for years, there was a potential for contact and a risk of collusion if simultaneous arrests were not carried out.

134. There was one material difference between Mr Wilson and Ms Jenkins, which was that he knew, but she did not, that one of his purposes was to install the covert listening device. Covert surveillance therefore formed no part of Ms Jenkins' thinking. Subject to that, Ms Jenkins' evidence on grounds for suspicion and necessity for arrest was closely aligned to that of Mr Wilson. She had read the documents underlying the Arrest Plan. She was resolute in her reliance on the evidence of Dr Cary as indicating that serious offences had been committed and explained clearly how her thought processes led her to suspect that rape and murder had been committed based upon his evidence. And she maintained the need to avoid possible collusion and the benefits of simultaneous interviews as justifying the decision to arrest.

135. I return to the adjusted *Castorina* questions and answer them in turn, bearing in mind that the present question is whether the Claimant *could* have been arrested lawfully and the principles identified earlier in this judgment.

136. I find as a fact on the basis of their evidence that both Mr Wilson and Ms Jenkins suspected that offences had been committed. Specifically I find that both Mr Wilson and Ms Jenkins suspected that the offences of rape and murder had been committed. There was some debate in evidence about the legal requirements for both offences, but in my view the position is straightforward and is as set out at [112]-[113] above. The police had powerful evidence of a very serious assault on Mr Lubbock. There had been penetration of Mr Lubbock's anus. If that penetration had been by a penis, the rational inference of anal rape was strong. Whether it was penetration by a penis or a blunt instrument, the violence of the attack was sufficient to give rise to a powerful inference of intention to cause grievous bodily harm. Although Mr Lubbock's death might not have been caused either directly or indirectly by the anal injuries, the uncertainty as to the precise cause of death did not prevent reasonable suspicion that they had been either a direct or indirect and contributing cause of death. Though Mr Wilson and Ms Jenkins knew that the evidence they had accumulated could not prove to the standard needed either for charging or conviction that the assault *was* rape or that the assault on his anus *did* cause Mr Lubbock's death, that is not the test: see the citation from *Hussien* at [16] above. Applying the test for suspicion as identified earlier in this judgment, I conclude that both Mr Wilson and Ms Jenkins had reasonable grounds for their conjecture or surmise that rape and/or murder had been committed: they could suspect, but they could not prove.

137. I find as a fact on the basis of their evidence that both Mr Wilson and Ms Jenkins suspected that the Claimant was guilty of the offences of rape and/or murder. The decision whether they had reasonable grounds for their suspicion is more finely balanced. Simply by reference to the words of the statute, it would be arguable that, while they had reasonable grounds to suspect that he *might have* committed the offence they lacked reasonable grounds to suspect that he *had* committed the offence. But the words of the statute have been interpreted and illustrated by high authority. In particular:

i) Applying the *Hussien* approach, more than one person may be suspected of having committed a crime even if only one person in fact committed it;

ii) The threshold for the existence for suspicion is low: see *Mohamed Raissi*;

iii) Thinking that an occupant of a car could possibly be someone who was linked to a crime may been held to be sufficient: see *Parker v Chief Constable of the Hampshire Constabulary*; and

iv) Where a small number of people can be clearly identified as the only ones capable of having committed the offence, that can afford reasonable grounds for suspecting each of them of having committed the offence, in the absence of information which could or should enable the police to reduce the number further: see *Cumming*.

138. Applying this guidance, which demonstrates that the interpreted threshold is indeed very low, it is clear beyond argument to the contrary that the Claimant was one of a small number of people who could be clearly identified as the only ones capable of having committed the offences of rape and murder. As I have made clear, I consider that it was not reasonable for Mr Wilson and Ms Jenkins to rely upon some of the evidence, of which the "cohort of bad character evidence" and the information relating to the Springfield Medical Centre were the clearest examples; and I also consider that there were other aspects of the evidence that was either misinterpreted or overinterpreted, such as the evidence of the Claimant wanting sexual encounters earlier in the evening or Mr Wilson's perception that the Claimant had been attempting to manipulate the process since the time he left his home early on 31 March 2001. Yet even when one strips out or downgrades those aspects of which I am critical, one is left with the fact that there was clear evidence of a violent penetrating assault which may have been anal rape of a straight man, and that the Claimant was one of a small and closed group of people who could have committed the assault (whether or not it was rape) and who could not be excluded from that small and closed group by reference to any available evidence. Even in the absence of any evidence showing a propensity to violence or aggressive sexual behaviour, the illustrative interpretations provided by the higher courts indicate that to be sufficient to provide reasonable grounds for suspicion that the Claimant had committed the offences, within the meaning of s. 24(2) of PACE. I therefore conclude and hold that Mr Wilson and Ms Jenkins had reasonable grounds to suspect the Claimant of being guilty of the offences of rape or murder, while reiterating that the evidence available to them fell far short of proof to the standard required for charging or a conviction.

139. I find as a fact, relying upon their evidence, that both Mr Wilson and Ms Jenkins believed that it was necessary to arrest the Claimant to allow the prompt and effective investigation of the offences. There is considerable force in the Claimant's submission that he had cooperated with the police over years and that there was no reason to suppose that he would not have done so again if requested to attend voluntarily for further interview. It is also correct that, on my findings, if he had deviated from co-operation in a way that was liable to prejudice the prompt and effective investigation of the suspected offences, he could then have been arrested and would have had no grounds for complaint. However, I am persuaded that the operational complexities inherent in procuring the simultaneous attendance of all three suspects so that their interviews could be coordinated and analysed, and the

possibility of covert surveillance being implemented, meant that it was not feasible to take the risk that a voluntary approach would fail to achieve the legitimate objectives of prompt and effective investigation. Once the operation started, there would be a narrow window of time before the police would have to charge the suspects or let them go. It was reasonable to take the view that there was and would be no slack in a timetable for simultaneous interviewing, subsequent analysis and reaction, and the possibility of covert surveillance. In other words, there were reasonable grounds for believing that arresting each of the three suspects was an operational necessity. I therefore conclude and find that the statutory requirement laid down by s. 24(4) of PACE was satisfied. That finding applies both to Mr Wilson, who was aware of the intended covert surveillance, and to Ms Jenkins, who was not.

140. For these reasons, I find that the Claimant could have been lawfully arrested by Ms Jenkins.

Would the Claimant have been arrested lawfully?

141. The Defendant's formulation of its case as outlined at [55] and [56] above contains a fundamental flaw in assuming as the starting point for the counterfactual that Mr Cootes or his supervising officer Mr Smith would have appreciated that they were inadequately briefed and were not in a position to arrest the Claimant lawfully. That is the wrong starting point both in principle and on the evidence. On principle, the starting point is simply that the tort was not committed i.e. that Mr Cootes did not arrest the Claimant unlawfully. The starting point does not require or permit the assumption that the tortfeasor did not commit the tort because he realised that if he acted in a given way it would be tortious and modified his conduct so as to act lawfully. The counterfactual may include consideration of what the actual tortfeasor might otherwise have done; but to start with the assumption that he would (on the facts of this case) have appreciated "the *O'Hara* point" assumes what the Defendant is obliged to prove if it is to be accepted by the Court.

142. For similar reasons, the incorporation of the words "but for the delay in the attendance of the designated arresting officer" in the formulation of the preliminary issue is inappropriate if it is intended to suggest that the Court is limited to what would have happened if Ms Jenkins had arrived in time to arrest the Claimant. The fact that Ms Jenkins was not there at the time when the tort was committed is material to be considered by the Court. But, because her delay is not the tort, referring to what would have happened "but for" her delay cannot be determinative of the question: what would have happened if the Claimant had not been unlawfully arrested?

143. Once these false assumptions are removed, the evidence is all one way. The Defendant's submission that the Claimant was going to be arrested on being sighted on 14 June 2007 "come what may" is fully supported by the evidence of Mr Wilson on which the Defendant relies. Mr Wilson himself had no direct involvement in the arrests after he approved the Arrest Plan and confirmed the policy decision for the three suspects to be arrested. He left it to DI Mason and DC Thomson to make the necessary arrangements to ensure that his decision was carried out swiftly and efficiently. His evidence, which I accept on this point, was that the Claimant was going to be arrested on being sighted whether by the designated officer or by someone stepping into that breach in her absence.

144. As I have said earlier, there is no evidence that anyone had the *O'Hara* point in mind either before, during or after the arrest. There was no Plan B either before or during the arrest period to ensure that the Claimant could be lawfully arrested by an officer with reasonable grounds for having the requisite suspicion; and no one appears to have appreciated that the arrest was unlawful until the change of the Defendant's case during the course of this litigation. This is most clearly evidenced by the fact that the Claimant was not lawfully re-arrested later in the day by an officer who was capable of effecting a lawful arrest. Speaking generically, it is clear that the *O'Hara* point was not in the mind of any relevant member of the police at the time.

145. Mr Phill Smith was the officer who was responsible for the team who were carrying out surveillance leading up to the arrest. He gave evidence, which I accept, that he had not received any detailed briefing regarding the grounds for arresting the Claimant and was not expecting a member of his surveillance team to arrest him. Had it fallen to him personally to effect the arrest, he would not have had sufficient information to give him reasonable grounds for suspecting the Claimant of being guilty of either rape or murder. His briefing to his team did not give them the detailed information that would enable them to arrest the Claimant lawfully. Taking his evidence at its highest, the briefing was to the effect that there were going to be coordinated arrests of a number of suspects taking place across the country, and that it was important to locate each of them at around the same time so that (unspecified) further evidence could be put to them simultaneously. It was a "hot brief", meaning that it took place very quickly.

146. Mr Smith's surveillance team located the Claimant's car sooner than was expected, whereupon he called either DI Mason or DC Thomson to report what had been found. He did not recall any conversation with that officer about the grounds for suspecting the Claimant of any offence or the necessity to arrest him and, given the role that he and his team had been expected to carry out, I find that there probably was no such conversation. I accept his recollection that DC Thomson told him to make his way to the location of the Claimant's car and that the arrest team were on their way there, travelling from Essex. Mr Smith asked what to do if the Claimant were to suddenly appear before the arrest team had arrived. He was told that his surveillance team would need to arrest the Claimant at the earliest opportunity if the arrest team were not there. It is evident from the absence of any pre-determined Plan B and the fact that no effective steps to brief the surveillance team were taken that neither DC Thomson nor Mr Smith had the *O'Hara* point in mind and that the Claimant was to be arrested on sight by whichever of Mr Smith's team were there. This was in accordance with Mr Wilson's intention and evidence that once the Claimant was sighted he was to be arrested come what may.

147. Within minutes of his arrival at Park Villas, where the Claimant had been seen, Mr Smith saw the Claimant pass in front of his car. He instructed Mr Cootes to move his vehicle towards the Claimant and to make the arrest. His evidence, based on his "standard practice", was that he would have told Mr Cootes that the Claimant was to be arrested for rape and murder, the date of the alleged offences and the alleged victim and that there was further evidence to put to the Claimant. That would have been heard by every vehicle in the surveillance team and, with the limited information they had been given earlier, would have represented the full extent of their briefing

and knowledge. It was not sufficient to enable any officer lawfully to arrest the Claimant.

148. Mr Cootes could not remember the briefing on the morning of 14 June 2007. He referred to an oral briefing from Mr Smith and a generic pack. His recollection was that the briefing would have covered what offences the Claimant was to be arrested for but would not have covered all the details of the evidence. His evidence, which is undoubtedly correct, was that there was lots of information the arrest team would need to know which would have been irrelevant to the surveillance team, and to which he and his colleagues in the surveillance team would not have had access. It is, of course, now accepted that the briefing was inadequate to enable Mr Cootes or his fellow surveillance officers to arrest the Claimant lawfully. I accept Mr Cootes' evidence that he was not aware of the *O'Hara* point. In the result he carried out his orders faithfully and no personal criticism should be or is levelled at him.

149. The first that Ms Jenkins knew of the arrest was when she arrived at the scene and was told that it had already taken place. She was therefore never in a position to contribute to a fuller briefing of the surveillance officers on the morning of 14 June 2007.

150. On this evidence I find as facts that no one on site when the Claimant was sighted was in a position to arrest him lawfully and no one on site either knew of or had in mind the *O'Hara* point. Because there was no Plan B and no one had in mind the *O'Hara* point, no one thought of contacting Ms Jenkins or Mr Wilson for a further briefing on the grounds for arrest. It would be completely unrealistic and contrary to all the evidence about what happened on site and the state of mind of all relevant officers to adopt as any part of the counterfactual that the officers on the ground would have contacted Ms Jenkins (or Mr Wilson or anyone else able to give a fuller briefing) after sighting the Claimant and before arresting him. It is equally unrealistic to adopt as part of the counterfactual that the officers would have waited for Ms Jenkins to arrive. Their orders, which emanated from Mr Wilson and were clearly understood by the supervisor Mr Smith after discussion with DC Thomson and/or DI Mason was that the Claimant was to be arrested on sight and without delay. It will be apparent from what I have said already that I accept Mr Wilson's evidence that "the Claimant was going to be arrested on being sighted whether by the designated officer or by someone stepping into that breach in her absence."

151. The overwhelming weight of the evidence leads me to find as a fact that, if the tort of unlawful arrest by Mr Cootes had not occurred, another of the officers present would have arrested the Claimant, also unlawfully. I reject the suggestion that another officer either could or would have arrested him lawfully at the scene of the actual arrest.

152. For completeness, I have considered whether the counterfactual should include the possibility of re-arresting him lawfully later. I reject that possibility because no one had in mind the *O'Hara* point and no one contemplated that the original arrest was unlawful until many years later. That would equally have been the case if the Claimant had been unlawfully arrested not by Mr Cootes but by another officer.

153. For these reasons I find that if the Claimant had not been unlawfully arrested by Mr Cootes, he would have been unlawfully arrested by another officer. I therefore reject

the submission that the Claimant would have been lawfully arrested, with the result that I reject the submission that he is entitled only to nominal damages for false imprisonment.

Annexe A
Amended Defence – Particulars of Grounds of Suspicion and Particulars of Necessity

44. Detective Superintendent Wilson and the designated arresting officer for the Claimant, DC Jenkins PC Cootes honestly and reasonably suspected that the Claimant was guilty of the said two offences.

PARTICULARS OF GROUNDS OF SUSPICION

a) Stuart Mr Lubbock was a young, healthy male. Young healthy men do not generally drown in domestic swimming pools in the presence of numerous other adults.
b) Mr Lubbock had been invited back to the Claimant's house for a party by the Claimant who had been drinking and was in possession of illegal drugs which he offered to the party goers.
c) By a statement dated 31 March 2001 it was reported to police by the taxi driver Keith Herrett, who had driven the Claimant and Mr Lubbock back from the Millennium Club, that on the way back to his house from the Millennium Club the Claimant had said to Mr Lubbock "I could do with a good fuck now, I'd be happy with that now".
d) Mr Lubbock had consumed alcohol, Ecstasy and Cocaine. There was evidence that the Cocaine had been provided by the Claimant.
e) At about 0546 hours on 31 March 2001 Mr Lubbock was found unconscious, hypothermic and virtually naked in the Claimant's swimming pool.
f) The Claimant was on 31 March 2001 of homosexual orientation.
g) Whilst others by the poolside offered assistance to the deceased, the Claimant was seen rummaging through drawers in his house.
h) Instead of waiting at the scene for the arrival of the police, the Claimant left his house, carrying something, and went to Futer's house, an act consistent with a guilty mind and / or a person who was seeking "thinking time" after committing a criminal offence.
i) Furthermore, from around 0930 until around 1700 hours on 31 March 2001 when Dr Heath identified the likelihood of sexual assault on Mr Lubbock, the Claimant's personal assistant, Mr Browne, attended the Claimant's house to "tidy up".
j) On the afternoon of 31 March 2001 the Claimant sought treatment at the Marchwood Priory Clinic in Southampton, thereby avoiding further police scrutiny. Prior to his arrest on 14 June 2007 Essex police received information that during an admission to the Springfield Medical Centre on or shortly after 31 March 2001 this admission the Claimant reported an injury to his penis to the Medical Centre. After his arrest it was discovered by Essex Police that the Claimant received treatment at the Springfield Medical Centre some time later and not immediately after Mr Lubbock's death.
k) The consensus of the pathology evidence:
    i. showed severe injuries to Mr Lubbock's anal canal which were consistent with the non-consensual insertion of a firm object;
    ii. excluded the possibility of the anal injuries being caused post mortem or by the insertion of a digital thermometer during attempts at resuscitation;
    iii. expressed no surprise that nursing clinicians at the Princess Alexandra Hospital had not noted the anal injuries during clinical care of the deceased since such clinicians would have had no cause to conduct a close examination of the anal canal.

l) Prior to the 14 June 2007 arrest, analysis by Essex Police revealed that:
   i. The Claimant had the motivation and opportunity to sexually assault Mr Lubbock on the night in question.
   ii. There were reasonable grounds also to suspect Justin Merritt and Jonathan Kenney of Mr Lubbock's rape and murder; those grounds contributed to the grounds of suspecting the Claimant for the same offences since he was then the partner of Kenney and the friend of Merritt.

m) In a statement dated 11 January 2007 James Futers confirmed that on the evening in question the Claimant tried to kiss him to "test the water" with him sexually but Futers declined any sexual activity since he was not heterosexual. In this statement Futers also confirmed that the Claimant rubbed his finger, with white powder on it, on the inside of his (Futer's) gums and mouth saying "here, try this".

n) It was reported to police on 26 January 2007 by Daniel Kelleher, a former work colleague of Jonathan Kenney (the Claimant's partner at the time of Mr Lubbock's death), that after the incident Kenney had told him that the Claimant had been pestering Mr Lubbock for sex but that Mr Lubbock was heterosexual and had got into a fracas with the Claimant about this pestering.

o) By statement to police dated 23 March 2007, Rachel Davis asserted that following a cremation service on 1 July 2002, Shaun Davis, the Claimant's former long term partner, told her that a "hairbrush" had been used on the Claimant on the night of his death. Shaun Davis was likely to have received that information from the Claimant.

p) By statements dated 18 May and 4 June 2007 Dr Nathaniel Cary, Home Office Accredited Consultant Forensic Pathologist, gave the opinion that Mr Lubbock's severe anal injuries occurred between Mr Lubbock taking off his clothes to swim and the attendance of the paramedics. In other words, that his injuries did not pre-date his attendance at the Claimant's house. Cary also considered that the anal dilation required for the anal injuries was capable of causing reflect cardiac arrest through the mechanism of vagal inhibition. Cary also gave the opinion that "the coincidence of death with severe injuries provides prima facie evidence that death occurred in circumstances of third party involvement, whether or not the anal injuries contributed to death".

q) By June 2007 Essex police had accumulated a cohort of "bad character" evidence against the Claimant in the context of circumstances where the Claimant had found himself the subject of allegations of sexual assault or being present during the same. These events occurred in May 1998 (allegation of rape from male), August 2000 (present when a male associate was violent towards a female prostitute), October 2000 (allegation of rape from male) and December 2001 (allegation of indecent assault from male). This evidence tended to suggest that the Claimant was interested in and / or capable of violent sex and / or sexual assault.

r) The ex chauffeur to the Claimant gave evidence to the police that in 2000 (the year before Mr Lubbock's death) he would drive the Claimant around London after his "Strike it Lucky" TV appearances so that the Claimant could engage in road-side encounters with male prostitutes and purchase Class A drugs from the road side.

s) In the premises of the totality of the evidence set out in subparagraphs (a) to (r) above, it was reasonable to suspect that the Claimant, either alone or in concert with Justin Merritt and / or Jonathon Kenney, had raped Mr Lubbock and caused his death by drowning, asphyxiation or otherwise.

45. Furthermore, Detective Superintendent Wilson, the designated arresting officer and PC Cootes honestly and reasonably believed that it was necessary to arrest the Claimant under s.24 of PACE to allow the prompt and effective investigation of the offence and the conduct of the Claimant.

PARTICULARS OF NECESSITY

a. The Claimant was one of three suspects being arrested on this date on suspicion of having participated in the same very serious offences.
b. New evidence (as particularised in subparagraphs (l) to (r) of paragraph 44 above) had come to light since the Claimant had last been interviewed in December 2006. Furthermore, the allegation at subparagraph (c) of paragraph 44 had not previously been put to the Claimant.
c. It was important to put the allegations arising from the new evidence to the Claimant and the other two suspects simultaneously before he or they had the opportunity to confer or collude upon the same or to interfere with potentially probative evidence or witnesses.
d. The Claimant had previously shown a reluctance to cooperate, including by leaving his house shortly after the finding of Mr Lubbock's body in the pool. Furthermore, when previously interviewed by police the Claimant had negotiated his attendance with the police via third parties.
e. It was important for the investigating officers to maximise their control over these three suspects so that during simultaneous interview they could maximise the forensic impact if any of the three suspects made inculpatory comments.

46. In addition, the Defendant conducted the arrests simultaneously in order to execute a covert surveillance strategy. This strategy involved monitoring the suspects covertly during their detention in custody, in order to gather any evidence which might emerge from their oral interactions (whether dissenting or colluding) with each other.