Neutral Citation Number: [2018] EWCA Crim 140

Case No: 201702190 C4 and 201704183 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT SITTING AT SOUTHWARK
HHJ PITTS
T20097647, T20087584 & T20107446

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2018

Before :

LORD JUSTICE GROSS
MR JUSTICE WILLIAM DAVIS
and
MR JUSTICE GARNHAM

- -

Between :

R	**Respondent**
- and -	
BHADRESH BABULAL GOHIL	**Applicants**
- and –	
R	
- and –	
ELLIAS NIMOH PREKO	

- -
- -

Jonathan Kinnear QC, Tom Payne and Michael Newbold (instructed by the **Crown Prosecution Service**) for the **Crown** in the matter of **Gohil**
Stephen Kamlish QC and Catherine Oborne (instructed by **ITN Solicitors**) for the **Applicant Gohil**
Jonathan Kinnear QC (instructed by the **Crown Prosecution Service**) for the **Crown** in the matter of **Preko**
Tom Wainwright (instructed by Simon Natas, ITN Solicitors) for the **Applicant Preko**
John McGuinness (instructed by Attorney General's Office) for the **Advocate to the Court**

Hearing dates : 27 and 30 November and 01 December, 2017

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Approved Judgment

Lord Justice Gross :

INTRODUCTION

1. This is the judgment of the Court to which each member of the Court has contributed.

2. As will be seen, this case is concerned, albeit on its own very particular facts, with the width of the jurisdiction to re-open final determinations of this Court. Further, the case illuminates the importance of the Crown getting disclosure right first time. Still further, it underlines the essential need for coordination between investigators, prosecutors and independent counsel – with their separate roles – in our institutionally "split" prosecution system.

3. On the 25th April, 2016, the applicant Mr Gohil ("Gohil") applied to re-open the final determination of this Court of his applications for leave to appeal. On the 23rd June, 2017, this Court ruled that Gohil's application to re-open should be heard as an oral application and gave directions for the hearing.

4. On the 15th September, 2017, the applicant Mr Preko ("Preko") applied to re-open the final determination of this Court of his appeal against conviction. On the 20th October, 2017, this Court directed that Preko's application should be heard together with Gohil's application and set a timetable for the hearing.

THE PROCEDURAL HISTORY

5. The procedural history can be relatively briefly summarised. Mr James Ibori ("Ibori") was the Governor of the Delta State of the Federal Republic of Nigeria from 1999 – 2007, during which time it was alleged that he defrauded the State of some US$89 million and that he intended to secrete the proceeds of this political corruption in offshore accounts and trust funds. On the 27th February, 2012, before HHJ Pitts at Southwark Crown Court, Ibori pleaded Guilty to 10 counts of fraud and money laundering (the "money laundering" and "V mobile" indictments). On the 17th April, 2012, Ibori was sentenced to a total of 13 years' imprisonment. An appeal against sentence was dismissed. Ibori did not at the time appeal against his conviction.

6. Gohil was a solicitor and a partner in the firm of Arlingtons Sharma ("Arlingtons"). From 2005, the firm acted for Ibori. It was the Crown's case (*inter alia*) that Gohil provided a client account for Ibori, through which Ibori laundered money. On the 22nd November, 2010, following a trial before HHJ Hardy and a jury at Southwark Crown Court, Gohil was convicted of 4 offences of money laundering and 1 of prejudicing a money laundering investigation (the "Tureen" indictment). On the 6th December, 2010, before the same Judge, Gohil pleaded Guilty to a further 8 offences (the "Augen" indictment), involving a conspiracy together with Ibori and others to defraud two states in Nigeria regarding the sale of shares in a mobile telephone company (V Mobile) and allegations that Gohil had forged documents and laundered funds in relation to that fraud. The Augen fraud was said to involve some US$37 million. On the 8th April, 2011, Gohil was sentenced to a total of 10 years' imprisonment, comprised of 3 years on Tureen and 7 years consecutive on Augen.

7. On the 17th June, 2014, a different constitution of the full Court dismissed Gohil's renewed applications for leave to appeal his convictions on the Tureen and Augen

indictments. The judgment of the Court, given by Davis LJ, was handed down on the 9th July, 2014 ("the July 2014 judgment").

8. Preko, previously an investment banker who had worked at Goldman Sachs for 10 years, was alleged to have assisted in placing over US$5 million of the Ibori funds in foreign accounts. On the 9th December, 2013, Preko was convicted of two counts of money laundering after a re-trial and was sentenced to a total of 4 years 6 months' imprisonment.

9. On the 3rd February, 2015, a different constitution of the full Court handed down a judgment, given by Rafferty LJ, dismissing Preko's appeal against conviction ("the February 2015 judgment").

10. As already foreshadowed, Gohil and Preko have now applied to re-open the final determinations of the full Court in their cases. If their applications to re-open are successful, they wish then to join in the applications by Ibori and others (Lambertus De Boer, Christine Ibori-Ibie, Daniel McCann and Udoamaka Onuigbo) for leave to appeal and for Extensions of Time ("EOTs") to do so.

THE GOHIL APPLICATION TO RE-OPEN

11. *(1) Overview:* To explain the background, it is necessary to begin by stepping back in time. In about 2006, as the Metropolitan Police Service ("MPS") investigation into Ibori progressed, he hired private investigators Risc Management Limited ("Risc"), through solicitors Speechly Bircham ("SB"), as part of his defence team. Gohil was either involved in obtaining this assistance from Risc or, on any view, very soon became aware of Risc's involvement. Risc employees included a number of former MPS officers; one such – and holding a senior position at Risc - was a Mr Cliff Knuckey ("Knuckey"), previously a MPS Detective Inspector. One MPS officer then engaged on the Ibori investigation was a Detective Constable John McDonald ("JMD"), who looms large in the story. Knuckey and JMD knew each other; before Knuckey's retirement from the MPS, JMD had worked with him.

12. The Ibori investigation was conducted by MPS officers from the Proceeds of Corruption Unit ("POCU"), part of what was then the SCD6 Fraud Squad. JMD was an officer in SCD6.

13. In 2007, the MPS Directorate of Professional Standards ("DPS") conducted a covert investigation (operation "Limonium") into allegations of a corrupt relationship between Risc and serving police officers, in the event, JMD in particular. In the circumstances described below, no arrests were made, no charges were brought and Limonium was closed.

14. Following his convictions and sentence, Gohil launched a campaign alleging that MPS officers engaged on Tureen and Augen were corrupt – they had received corrupt payments from Risc and Risc had passed confidential information to them. Initially, Gohil suggested that the origins of his complaint lay with material which had reached him post-trial from an anonymous source. It subsequently became clear that the source of his allegations came from invoices in the possession of SB and which were available to him from a time pre-dating his trials.

15. In 2013/2014, following a further MPS investigation (operation "Tarbes"), the file was referred to the CPS, who took the decision that there was insufficient evidence to charge JMD. However, in June 2014 and also as a strand of Tarbes, the CPS took the decision to charge Gohil for attempting to pervert the course of justice, and Knuckey with false accounting (relating to inflated payments and invoices appearing to record payments to "sources" but which Knuckey now averred had been simply bills to cover his own losses in missing a holiday). The essence of the Crown's case against Gohil, from June 2014 until January 2016, was that the suggestion of corrupt payments from Risc to MPS officers was false; as expressed in a Crown skeleton argument (dated 26th May, 2015) resisting dismissal and severance of the Tarbes proceedings, "DC McDonald has been thoroughly investigated and exonerated and is actually free from blame". The Court of Appeal had previously been told (see further below) that "nothing untoward" had been found at all.

16. On the 21st January, 2016, the Crown offered no evidence in relation to the Tarbes indictment, the day after the trial had been due to start. Leading counsel, Ms Wass QC ("SWQC"), said this to HHJ Testar, sitting at the Southwark Crown Court:

> " Your Honour, on Tuesday when this matter came before the court I explained that a matter had been brought to my attention for the first time on 13 January of this year. This has been the subject of careful scrutiny at senior level of the Crown Prosecution Service and as a result of this consideration it has been decided that the Crown will no longer proceed with these allegations and we formally offer no evidence against both defendants."

The Judge invited the Crown to give reasons for this late and previously unforeshadowed development but leading counsel was not in a position to do so.

17. As a result of offering no evidence and the serious nature of the allegations made against MPS officers and – by this stage – the CPS and counsel, the Crown took a number of important steps. First, leading, junior and disclosure counsel were replaced. Secondly, a review was launched in respect of a number of aspects of disclosure in the Ibori series of cases (project "Phoenix"). As we understand it, Phoenix has resulted in the disclosure of nearly 10,000 pages of new material, an exercise, in our judgment, wholly dwarfing the scale of the disclosure task that would have been required had it been properly undertaken in the first place.

18. Subsequently and as reflected in its Response to the Grounds to re-open appeal against conviction, the Crown has conceded that there was a failure of disclosure. A Note dated 14th April, 2014, entitled "Note of Voluntary Information provided by the Crown to the Applicant for Leave to Appeal" ("the April 2014 Note"), provided both to Gohil and to the Court of Appeal in advance of Gohil's renewed application for leave to appeal his convictions, was "inaccurate, incomplete and misleading". The Crown contends, however, that this was:

> " …. the result of a combination of errors, contributed to by a number of different people, but there was no intention to deliberately mislead the Court."

19. In a nutshell, the central ground sought to be advanced by Gohil on any appeal to this Court (should he be permitted to re-open the final determination against him) is that the Crown's conduct in Tureen, Augen and Tarbes amounted to a bad faith abuse of the process of this Court, such that the convictions offend against the integrity of the criminal justice system ("the corruption ground"). As the foundation for the application to re-open, it is contended on Gohil's behalf that the Court of Appeal (on the renewed application for leave to appeal conviction) was materially misled as to the disclosure which existed to support the corruption ground; in this way, Gohil was denied effective consideration of his putative grounds of appeal, especially the corruption ground. Moreover, it is submitted that the prosecution of Gohil for attempting to pervert the course of justice was made on a knowingly false basis, so as to protect the reputation of the MPS, the convictions achieved under Tureen and Augen and to undermine the appeal for which Gohil was seeking leave. With regard to non-disclosure of the material available to support the corruption ground, the submission advanced by Mr Kamlish QC for Gohil, in its final form, was that the Prosecution errors were "egregious" and that one or more of those in the Prosecution camp had acted in bad faith; it was unnecessary for Gohil to say who that was.

20. The Crown's position is that it is neutral on the question of whether the Court has jurisdiction to re-open an appeal in circumstances where there has been a disclosure failure. The Crown, however, vigorously resists the contention that there has been an abuse of the process of either the Crown Court or this Court. Mr Kinnear QC, for the Crown, has gone on to resist the Gohil application to re-open the appeal on a number of grounds, all of which we have considered.

21. In the light of the Crown's neutrality on the jurisdiction question, the Court sought from the Attorney General the assistance of counsel as an Advocate to the Court ("the *amicus*"). We record at once our gratitude to Mr McGuinness QC, acting as the *amicus*, for his excellent submissions.

22. *(2) The factual history: (A) Information passed from Risc to the MPS:* With regard to information allegedly passing *from* Risc *to* the MPS, the only item supporting this contention is an "Information Report", dated 16th February, 2007. It records a telephone call from a Mr Thompson, an associate of Risc, to JMD, as follows:

> " Phone call received by DC McDonald Friday 16/02/2007 from Dave Thompson associate prior to the Interview Thursday 15/02/2007 of Christine Ibie-Ibori and Udomaka OKORONKWO both defendants were briefed and de-briefed before and after interview by Roland Baker ex SCD6 officer and Dan Quade ex Customs officer on the instructions of their employer Cliff Knuckey ex Detective Inspector SCD6 (MLIT).
>
> Enquiries in Switzerland re air craft you are on the right track.
>
> A house appears to be on sale in Hampstead on the same estate where James Ibori owns property. "

23. *(B) Limonium:* MPS decisions in connection with operation Limonium were recorded in a number of decision logs ("D/Ls"). It appears that the entries were made by acting Detective Inspector Tunn.

24. As it transpires, D/L 3, dated 13th September, 2007, was of the first importance, including the following passages:

> " Intelligence from a non-attributable source was received on 10th Sept 2007 that indicates that KNUCKEY is currently in contact with officers working on the IBORI investigation and has recently met with DC John McDONALD and paid McDONALD money for information, whilst also attempting to meet with other officers namely DS RADFORD
>
> …….
>
> Further non-attributable intelligence has suggested that KNUCKEY intends to meet with DC John McDONALD in a central London public house on Monday 17th September 2007. If correct, then this new intelligence clearly indicates that KNUCKEY is currently engaged in an ongoing and corrupt relationship with DC John McDONALD and that this presents a potential risk to the IBORI investigation overall. That said, there is no evidence to corroborate that any such meeting did in fact take place or that DC John McDONALD was actually paid money for passing over any information whatsoever. It cannot be discounted that this intelligence may be wrong or even false."

25. D/L 6 was dated 16th October, 2007 and records the following views:

> " So far as SCD6 are concerned, there has been a concentration of efforts on the relationship that exists between Cliff KNUCKEY and DC John McDONALD. The enquiries conducted into their relationship has been sparked by the fact that KNUCKEY is an ex-colleague of McDONALD, and both are considered to be long-term friends……The complication and inappropriateness of this relationship stems from the fact that KNUCKEY is representing a client called James IBORI who is being investigated for fraud matters by SCD6, and DC McDONALD is one of the investigating officers. What has been essential in investigating this particular relationship is establishing whether or not KNUCKEY has been passed confidential and important information, whether or not McDONALD has been paid for such information, and also whether or not the IBORI case has been damaged or otherwise compromised……
>
> Other intelligence sources have indicated that KNUCKEY has told third parties that he has met with McDONALD and paid for information, but there is no evidence or other intelligence to corroborate this, and I have to bear in mind the possibility that KNUCKEY may be lying in order to increase his own fees. Other intelligence indicates that McDONALD himself does not believe that KNUCKEY is not corrupt. Recent intelligence also indicates that KNUCKEY has resigned, and will be leaving

> RISC within a four-week period to start up his own company. At this stage, I have no corroborative intelligence or evidence that DC McDONALD has passed any sensitive intelligence on the IBORI case, or that the case itself has been damaged or compromised. With the departure of KNUCKEY, any possible threat to that case will also be lessened….."

The decision was taken not to notify JMD's superiors in SCD6 and, in the event, as already noted, no arrests were made or charges brought.

26. As ever, the distinction between *intelligence* and *evidence* is one of real significance – and is highlighted in both D/L 3 and D/L 6.

27. Pausing here, on the Crown's case, the significance of the intelligence in D/L 3 had not been appreciated by either the CPS or counsel until January 2016. It was only then that the link was made between the intelligence recorded in the first paragraph of D/L 3 (set out above) and what has become known as Source A – intelligence received by the DPS from HMRC. That linkage, once discovered, resulted in the Crown offering no evidence against Gohil and Knuckey - on the case as then sought to be put against them. It is plain that the linkage between Source A and the D/L3 material was known about by MPS officers from a much earlier time, certainly 2012 but perhaps dating back to 2007.

28. The intelligence from what has come to be described as Source B, recorded in the second paragraph of D/L 3 (set out above), was known about by the Prosecution as a whole from about February 2012. However, at the time, it was not clear that the CPS or counsel understood the nature or content of the Source A intelligence and their evidence is that they did not. The Source B intelligence did not take matters much further by itself – because it did not suggest that there had been a payment in return for information – but it provided some support for the Source A intelligence.

29. Neither the Source A nor the Source B intelligence was admissible in evidence.

30. *(C) Gohil's knowledge:* We move next from the suspicions of the MPS as to the relationship between Risc and JMD, to the knowledge of Gohil in this regard, keeping in mind the fact that it was Ibori who retained Risc as part of his defence team.

31. On the 30th November, 2006, Gohil forwarded an e-mail from Ibori (described in these messages as "HE" or "His Excellency") to Mr Timlin ("Timlin"), a partner of SB, complaining that he should not be supplied with information he already had or knew; he was "more interested in the 'inside stuff'". On the 24th April, 2007, an attendance note of Timlin recorded a conversation with Gohil: Ibori wished to know when JMD would next be in Nigeria and Timlin was to ascertain that from Knuckey. On the 25th April, Knuckey sent an e-mail to Gohil and Timlin, saying that JMD's investigation into Ibori "cannot be neutralised in the UK" but could be neutralised from Nigeria. Having spoken to JMD, Knuckey commented on the lack of evidence from Nigerian banks. He had agreed to meet JMD on the next day and would provide an update thereafter. An e-mail of 14th June, 2007 from Knuckey to Gohil and Timlin discussed the interview/s of Ibori by the Nigerian authorities; those authorities would provide some feedback to the MPS "…and by the middle of next week DCM [i.e., JMD] should know which means we will know….". On the 6th July, there was a further e-mail from

Knuckey to Gohil, copied to Timlin, as to JMD being the source of information as to the progress of the investigation. On the 7th August, there is an e-mail from Gohil to Timlin, saying that "HE pulled it off" – a reference to Ibori having influenced the Nigerian Attorney General sufficiently so that the latter would write a letter assisting Ibori in frustrating the investigation in this jurisdiction.

32. There are, further, a number of e-mails, concerning Gohil's involvement with Risc e-mails relating to payment for work done (or purportedly done). On the 2nd May, 2007, in an e-mail to Timlin, Gohil commented that the Risc invoice he had seen seemed exorbitant. On the 13th June, Timlin sent Gohil copies of two Risc invoices, which Timlin remarked appeared to be on the high side. On the 9th July, Timlin sent an e-mail to Knuckey saying that Gohil was due to be discussing overdue invoices with him. On the 17th July, there is a record of payment being made to SB, in respect of Risc invoices, under the signature of Gohil.

33. Matters do not end there. On the 11th September, 2007 (the day after the receipt of the intelligence referred to in DL/3), Gohil told Timlin that he and Knuckey would like a meeting as soon as possible "to review certain matters which they could not discuss over the telephone". They duly met (at 13.30) and SB's Meeting Note records Knuckey explaining that he had met with a senior officer on the 10th September. Knuckey then gave a number of details about the police investigation. Knuckey said that he had arranged to meet JMD "in the next couple of days and that he would endeavour to extract further information about the investigation from him that may assist". On the 12th September, the Risc invoice records a meeting with a "confidential source" on 10th September "to hand over source payment re information provided" in the amount of £5,000. A chronology document was recovered from Gohil's laptop which, it was ascertained, was last amended on 9th May, 2009 (well before his trial/s). An entry for 24th January, 2008 refers to a Risc sales invoice, beside which it states:

> "Cliff Knuckey would also provide intelligence as to the current state of the investigation from various meetings he had with the investigating officers. Interestingly, on the invoices…there are details of cash payments made to certain individuals for information. "

34. The plain suggestion is that (1) Knuckey was meeting with JMD to obtain sensitive information; and (2) that JMD was being paid for the provision of that information. At the very least, Gohil either saw or wrote the communications to which we have referred and was present at the related discussions with Knuckey, Timlin and (sometimes) Ibori (who joined the meeting/s by telephone).

35. In about January or February 2009, it appears that there was a chance meeting between Gohil and Mr Tarique Ghaffur, formerly an Assistant Commissioner of the MPS and then running a company called CSD, i.e., Community Safety Development. According to Mr Ghaffur's witness statement dated 18th June, 2014, the company dealt, *inter alia*, with "security solutions". Gohil explained that he was under investigation by the MPS and, thereafter, CSD undertook some work to assist Gohil with his defence strategy. At some time before Gohil's trial, Mr Ghaffur's witness statement records Gohil saying that he had a "nuclear defence". He showed Mr Ghaffur lists of payments. The inference drawn by Mr Ghaffur was that money had been paid to MPS officers by Risc.

Asked for his advice, Mr Ghaffur told Gohil to go through his lawyer if he wanted to make a complaint.

36. This particular chapter does not rest with Mr Ghaffur's witness statement which, as such, may, for all we know, be contentious. On the 29th May, 2009, Gohil sent Mr Ghaffur an e-mail, saying this:

> " ….I am attaching here…a private and confidential document. It is the invoice of …[Risc]… It was a private inquiry company headed up by the former head of SCD6 and was recruited by Ibori's UK lawyers to advise on the Mets strategy.
>
> ….It seems that the investigating team may have been paid in cash terms for information. You will see further meeting taking place at NSY [New Scotland Yard] with the source.
>
> Do you feel there is mileage to be gained from this aspect. "

37. Furthermore, on 1st June, 2009, Gohil appears to have sent Mr Ghaffur a "Draft Strategy Plan". On any view, this is a remarkable document. Its "Objective" lists the following bullet points:

> " ….
>
> - Impacts Police credibility as witnesses
> - Officers begin to understand personal exposure
> - Forces an external review to be undertaken
> - Checks Units [i.e., SCD/6's] conduct and actions
> - Overwhelm them with actions as listed
> - They make mistakes and lose focus on matter and pre-occupy their minds
> - Creates wedge between officers and CPS/Counsel for Prosecution
> - CPS questions officers evidence and distances itself on conduct"

It then set out what appears to be a timetable for actions, including "John Macdonald – Corruption (week 4)".

38. None of this material, in Gohil's possession, was deployed by him at his trial/s.

39. *(D) Tarbes 2011-2013:* At all material times between 2011-2016, counsel for the Crown were SWQC, as leading counsel and Ms Esther Schutzer-Weissmann ("ESW"), as junior counsel. Ms Fiona Alexander acted as disclosure counsel for the short period, November 2015 – January 2016. The CPS reviewing lawyer was, for much of the time,

Mr David Williams ("DW"). Other members of the CPS who were or became involved in Tarbes will be mentioned in due course. From about July 2012, Detective Sergeant Wright ("DSW") of the MPS was appointed Officer in Charge of Tarbes.

40. As will be recollected, the Tarbes investigation had two strands: first, the investigation of JMD for corruption; secondly, the investigation of Gohil and Knuckey for perverting the course of justice and false accounting.

41. The apparently anonymous complaints about corruption, to which reference has already been made, had reached the prosecution team by December 2011 but were not regarded as giving rise to any obligation to give disclosure.

42. On the 7th February, 2012, ESW and DW were made aware of Limonium and some material concerning Source B.

43. By April 2012, the CPS had been notified that Gohil was intending to appeal his conviction on the basis that MPS officers in his case had been in receipt of corrupt payments. On the 22nd April, SWQC produced a draft letter for DW to send to the MPS, in effect asking them to consider, as part of the Tarbes investigation, whether Gohil had attempted to pervert the course of justice.

44. By July 2012, DSW was aware that the D/L 3 intelligence was from Source A.

45. In April 2013, a Note prepared by ESW recorded that the MPS had asked for an oral briefing to take place in relation to operation Limonium. Most unfortunately, for whatever reason, no such briefing ever took place, though the question of briefings (including a briefing from HMRC) was further discussed in May. SWQC saw the April Note but has stated that "Limonium" meant nothing to her; she also states that in May 2013 DPS officers gave a clear assurance that Limonium was not relevant. According to DW, the source of the D/L 3 intelligence remained non-attributable, so far as he was concerned.

46. By now, the CPS had sought to put in place "Chinese walls", so that the Gohil appeal was kept separate from the Tarbes investigation. Mr John Davies ("JD"), from the Birmingham CPS, who had no prior involvement with these matters whatever, was asked to give a pre-charge advice with regard to the prosecution of JMD. Following interim advice given on the 21st May, 2013, JD followed up with advice dated 20th June, 2013, in which he concluded that "currently there is insufficient evidence to provide a realistic prospect of conviction…." in respect of JMD.

47. On the 24th June, 2013, DSW sought and obtained approval from HMRC for a form of words summarising the D/L 3, Source A, intelligence, for disclosure to the CPS – whom, he observed, already knew of D/L 3 as such. The form of words was as follows:

> " Decision number 3 in the Op Limonium decision log dated 19/09/07 suggests there was intelligence that DC McDonald had been paid money by Cliff Knuckey for information.
>
> No material now exists that corroborates this Decision Log entry. This Decision Log entry is the only existing record of this information held by the MPS."

48. On the 1st July, 2013, this wording was duly passed on to JD, DW, SWQC and ESW. It appears that DSW thought that supplying this form of wording was easier than timetabling a meeting with all concerned. Unfortunately, if for a variety of mundane reasons, it seems that neither the CPS nor counsel appreciated the underlying significance of DSW's communication. According to DSW, the link between D/L 3 and Source A had been discussed with the CPS in April 2013.

49. On the 8th July, 2013, SWQC and ESW produced a "Briefing Note". In their view (at para. 34), any decision whether or not to charge Gohil with attempting to pervert the course of justice was likely to have significant ramifications for Gohil's appeal. That said, the "trial team" was of the firm view (at para. 39) that they should play no part in any decision as to whether Gohil should be charged. As they went on to observe (at para. 40), "it will be important that there can be no suggestion that the decision has been taken for any reasons other than the strength of the evidence and the public interest in prosecution."

50. This Briefing Note was plainly seen and considered by JD. Perhaps presciently – but unfortunately not apparently followed up more widely – his manuscript notes include the following observation: "What happens if we decide the intel is such that we cannot run Gohil?"

51. On the 17th July, 2013, ESW produced a Note on Disclosure of material, reviewed at the DPS, in connection with the Gohil appeal. The Note asserts that the review had been conducted in accordance with the relevant statutory and Guidelines' requirements. In reviewing the material, it is apparent that counsel adopted what Mr Kinnear characterised as "the context" test (see further below). Thus, the Note says that "…there is no doubt that when seen as a whole there is no material that would in fact support the appeal". Continuing, the Note states that a reading of the SB attendance notes and e-mails "..show that Badresh Gohil was at the centre of the instructions and involvement of Risc and…controlled the operation of this 'defence strategy'…". Nevertheless, the Note goes on to say that "certain documents have been identified for further detailed consideration, since despite what is set out above, when each document is considered individually and out of context, it is possible that individual phrases and the existence of some documents may assist the defence". Amongst the categories of such documents were e-mails and attendance notes in which Knuckey suggested that he had contact with JMD. In all, 38 items were thus identified, 12 emanating from SB; none were ultimately disclosed, though the Note concluded by advising that some 14 items should be disclosed.

52. In late August 2013, the decision was taken at a senior level in the CPS that SWQC and ESW would be retained to prosecute Gohil, should the decision be taken to proceed – but would play no part in the charging decision. Given various organisational decisions within the CPS as to which division would be handling the matter, it was further decided that DW would be replaced as reviewing lawyer to guard against any suggestion of bias. He was duly replaced in September 2013 by Mr Michael McCrone ("MM"), who had no previous involvement in the case.

53. MM met with officers of the DPS on the 23rd September, 2013. He was briefed in respect of Limonium and the contents of D/L 3 but not, he says, as to the source of that intelligence; so far as he was concerned, it remained non-attributable. DSW advances the contrary suggestion that it would be illogical if the provenance of D/L 3 had not

been discussed. On the 21st October, 2013, MM requested further information concerning D/L 3. DSW answered his queries and sent the D/Ls to him, stating that ADI Tunn had made the entries and that HMRC was the source of the intelligence.

54. *(E) Tarbes: 2014 – 2016:* On the 27th February, 2014, DSW sent MM the complete Limonium decision log and stated that HMRC was the source of the intelligence but "they now have no material on this at all".

55. April 2014 was an important month in this history. At the time, Gohil's renewed application for leave to appeal was due to be heard on the 15th. On the 9th, MM and Mr Andrew Penhale (Deputy Head of the CPS Central Fraud Division, "AP") decided that the intelligence in the Limonium decision logs was disclosable.

56. On the 10th, ESW, who says that she first saw D/L 3 on the 9th, sent DW an Advice on Disclosure dated 8th April, 2014 ("the April 2014 Advice"). ESW continued to apply the context test to disclosure:

> "4. The advice previously given outlined the balance to be struck between disclosing material taken out of context and without consideration of its provenance or reliability and disclosure within the parameters of a defined and focused case having taken into account the context of the material and its provenance. In this case the decision on disclosure would be different.
>
> a. If material was taken out of context there would be a need to disclose so that the information could be used to assist the argument of the Applicant before being rebutted by the Respondent by its context, i.e., by showing that the Applicant had fabricated the complaint of corruption.
>
> b. If material were put in context, it is unlikely much disclosure would be made."

57. ESW's reasoning was developed as follows:

> "9. While the fact of intelligence and even the fact of a prior investigation into RML [i.e., Risc] and a prior investigation into DC McDonald could be said to assist the Applicant in their application, when seen in context the full picture supports the Respondent. It shows that intelligence was not ignored but properly acted upon and investigated with rigour. It shows that systems remained in place to identify any possible future corruption. It shows that the intelligence was unfounded.
>
> With the caveat that counsel has not seen the source material or original intelligence summarised in these documents:
>
> …..
>
> b. Taken out of context only one item of intelligence could assist the Applicant or undermine the Respondent's case; and

> c. When seen in context the material does not pass the test for disclosure."

58. The Advice further referred to other complicating factors affecting the disclosure decision, namely, that Gohil "remains a suspect in an ongoing investigation so there is a sensitivity about information within the investigation".

59. Counsel expressed the concern that neither she nor DW had seen the material now obtained in the course of their previous disclosure reviews. She advised that consideration be given to the information set out later in the Advice being provided to Gohil as "voluntary information (as opposed to disclosure)". That information included the material extracts from D/L 3 and D/L 6, set out above.

60. Counsel additionally called for the "original source intelligence" to be provided for review as soon as possible.

61. ESW's Advice had been discussed with SWQC, who agreed with its conclusions. SWQC appears to have thought that some of the intelligence set out came from Source B. Both SWQC and ESW appear to have thought that the source of D/L 3 was an anonymous tip-off; on their account of events, neither then made the linkage between D/L 3 and Source A.

62. On the 11th, there was a meeting between the CPS (DW and MM) and MPS officers (DSW and others). Counsel were not present. Having regard to the note of the meeting prepared by DSW, the CPS position was that the Limonium intelligence should be disclosed (building, it would seem on the April 2014 Advice but going beyond it – in that the Advice called for "voluntary" disclosure). The MPS resisted this suggestion; the DSW note says this:

> " After reading the proposed disclosure it was apparent to me that the vast majority of the quoted intelligence was sensitive and could not be disclosed in this format. This was clearly communicated to David Williams and Michael McCrone. It became clear that neither David Williams nor Andrew Penhale were aware of the sensitivity of the intelligence and had made their earlier judgment without this knowledge."

DSW avers that D/L 3 and its provenance must have been discussed at this meeting; DW demurs.

63. There followed a series of exchanges between DW and Counsel, as to the wording of what became the April 2014 Note. It would appear that the Note was originally drafted by DSW, who subsequently required a deletion (see below), in the event acquiesced in by the CPS and Counsel. It is convenient, first to set out the final version of the April 2014 Note, provided both to Gohil and to the Court, before recording the deletion. The Note, in its final form, read as follows:

> " <u>Note of Voluntary Information provided by the Crown to the Applicant for Leave to Appeal</u>

> A covert Metropolitan Police Directorate of Professional Standards investigation was conducted between May 2007 and October 2007 into the interaction between members of …[Risc]…and serving police officers. Intelligence existed that claimed officers from different departments were in a corrupt relationship with RISC staff.
>
> One officer subject to this investigation was DC John McDonald, who at that time was investigating James Ibori and his associates in an investigation known as Operation Tureen.
>
> Intelligence suggested that DC McDonald and RISC operative Cliff Knuckey (an ex Metropolitan Police Service (MPS) Detective Inspector) were known to each other.
>
> MPS records showed that DC McDonald had previously worked with Cliff Knuckey prior to the latter's retirement.
>
> Various covert tactics were utilised to assess that risk, and to prove or disprove the intelligence against the MPS officers.
>
> These tactics included……
>
> The investigation identified Cliff Knuckey contacting DC McDonald's office in an effort to speak to him and that DC McDonald's line manager was aware of this approach. The potential risk this approach highlighted was assessed and monitored accordingly.
>
> The investigation was closed after it found no evidence to corroborate any of the intelligence. The Crown Prosecution Service was not consulted, no breaches of Police Misconduct Regulations were identified, no arrests were made and no charges were brought.
>
> 14.4. 2014"

64. Reverting to the deletion, it goes to the paragraph beginning "Intelligence suggested". In its draft form, that paragraph of the April 2014 Note read as follows:

> " Intelligence suggested DC McDonald and RISC operative Cliff Knuckey (ex MPS Det Inspector) were known to each other. *Cliff Knuckey had bragged to others that he paid DC McDonald for information.*"

The italics are added. The deletion concerned the italicised words. ESW wanted the sentence on boasting or bragging in but the MPS successfully resisted its inclusion.

65. In the event, on the 15th, the Court of Appeal decided that it had been bombarded with so much additional material that the substantive leave application could not proceed and the hearing was used for the purpose of giving directions. In the course of exchanges with the Court, SWQC first maintained that the well-known test for

disclosure under the Criminal Procedure and Investigations Act 1996 ("the CPIA") had been carefully applied and "there has been nothing to disclose other than that what has been disclosed". Secondly, SWQC reminded the Court that Gohil remained a suspect in an ongoing investigation for perverting the course of justice; she submitted that what he was "in effect asking for is information so he can know the state of the investigation against him. He is not entitled to that at this stage." Thirdly, when asked about the April 2014 Note, SWQC said this:

> " That is not disclosure….That was a note voluntarily disclosed, because once one got the punch line, it became apparent that, having looked at the relationship between Mr Knuckey and Mr McDonald, there was nothing untoward found at all. What is of more interest is what the source of that intelligence was, because at the moment that has not come to light but is being looked at. This is not material – which is why we very particularly described it as 'voluntary disclosure', rather than disclosure which undermined our case. That note does not undermine the Crown's case at all. It shows that somebody made a phone call or planted information to say that there was a corrupt relationship. It was taken very seriously. It was looked at very thoroughly over a period of time. Nothing untoward was discovered. That material actually assists the respondents in this appeal."

66. According to SWQC, she had been told about Limonium immediately prior to the hearing and had been told by DPS officers that the source of the intelligence was an anonymous tip-off.

67. Giving judgment ([2014] EWCA Crim 1098), Laws LJ (understandably) described the preparations of both parties for the hearing as "lamentable" (at [18]). He went on to say this (at [19]):

> " On the face of it – and we have not heard submissions about the merits of the case – any court would be extremely sceptical about this application. There is the applicant's plea of guilty to Indictment 2. There is the lack of any apparent connection between the suggestion of corruption, wide-ranging though they are, and the actual evidence on which the applicant was convicted on Indictment 1……There is the fact of Mr Ibori's pleas of guilty…. "

68. Gohil's application for leave to appeal was re-fixed for the 17th June, 2014. On the 13th June, MM and AP took the decision that Gohil and Knuckey would be charged with attempting to pervert the course of justice and false accounting. For our part, we have no reason to doubt that, as recorded by the CPS in a contemporaneous "Update Briefing" (dated 25th June, 2014) neither DW nor Counsel played any role in the charging decision.

69. The judgment of this Court (i.e., the July 2014 judgment) was given by Davis LJ on the 9th July, 2014 ([2014] EWCA Crim 1393). At the conclusion of the hearing, the Court

had indicated that the applications should be refused and the judgment contained the Court's summary reasons for doing so.

70. With respect, Davis LJ dealt carefully, on the material available to the Court, with the corruption ground advanced on behalf of Gohil (at [11] and following). He began with these observations:

> "11. ….such [a] case was not advanced at the trial. On the contrary, the strategy at trial was primarily to seek to challenge the Crown's case that the monies in question did indeed represent criminally acquired property and that the applicant knew or suspected that. The present strategy on behalf of the applicant – on the jury's verdict, and on his own subsequent pleas, a corrupt solicitor – is thus now to allege corruption on the part of the investigators."

The Court (at [14]) was wholly unpersuaded by it. The allegation was grave but the Court recognised that corruption can and does on occasion occur within the police force: [15]. The allegation had already in substance been investigated and rejected. At all events, the "evidence" did not make out, even arguably, a case which (as it was then accepted) had to be based on inference.

71. The "high water mark" of the case (at [16]) was found in the SB 2007 documents (set out above). As the Court then understood it, those documents had not been available to the defence at trial. Even so (*ibid*):

> " ….the applicant was himself recorded as present at the meeting which was the subject of the attendance note of 11 September 2007 and so would have known what was discussed at that meeting. We therefore note, in this regard, that notwithstanding this knowledge and notwithstanding the numerous other complaints made about the police investigation before the first trial, this particular complaint has only first been raised long after that trial……"

72. Having made further reference to the SB materials, the Court's conclusions on the corruption ground were expressed as follows:

> "18. We find it impossible to reconstruct from this material, or the other matters put forward an arguable case of corruption relating to the first trial of the kind Mr Khamisa [i.e., Mr Khamisa QC, then appearing for Gohil] would seek to propound. It would not be permissible inference; it would be complete speculation. It has no support from any evidence of RML itself. On the contrary, subsequent statements by the relevant employee of RML in interview would seem to tend to rebut it; and internal investigations (by the Directorate of Professional Standards) have found no evidence of wrongdoing….. As Miss Wass QC for the Crown recorded in a note of 14 April 2014, that investigation was concluded with no breaches of any Regulations identified or arrests made. There was found 'no

> evidence to corroborate any of the intelligence….'. The subsequent investigation has had a like result. More than that, there is simply no evidence that information was being supplied *from* RML *to* the unit; at their highest, the documents now relied upon purport to record the passing of information from the confidential source to RML. Moreover, it is in any event complete (and implausible) speculation that information, if any, was passed relating to the applicant's defence or having a causal connection with the prosecution against the applicant himself. There overall, in our judgment, simply is no sufficient material to justify an argument that the prosecution was so tainted as to amount to an abuse of the process or otherwise that the defence was prejudiced.
>
> 19. Mr Khamisa said that ….leave should be granted so that further disclosure could be sought and obtained. That would be speculative too. In any event…..Miss Wass for the Crown has previously stated, and stated again before us, that the prosecution were and are aware of nothing calling for disclosure in relation to these proposed appeals."

73. For completeness, the Court robustly rejected the 9th ground on which the application was based, namely, an application to permit Gohil to vacate his guilty plea (at [45] and following). This ground was "singularly devoid of merit". The Court went on to say this:

> "47. The applicant – we repeat, a solicitor – was free to instruct that the case on the second indictment be defended at trial. He elected not to. He may have been under the usual trial pressures, he may have been disheartened and depressed at the outcome of the first trial, he may have had a natural inclination to follow the legal advice he was being given. But the ultimate choice was his and his mind clearly went with his decision. Thereafter for mitigation purposes much was made of his plea, including expressions of remorse on his behalf; and there were certain other matters, which we do not need to set out here, which operate to reinforce the voluntary and informed nature of the plea….."

74. Following the refusal of the renewed application for leave to appeal, the prosecution of Gohil and Knuckey continued. On the 5th November, 2014, there was a Consultation (or meeting) involving SWQC, ESW, MM, DSW and another MPS officer. It is accepted by the Crown that MM's handwritten note refers to Source A. SWQC says that she has no recollection of Source A being mentioned. ESW has no recollection of a discussion of intelligence or its source. MM states that DSW provided information about Source A and that there was a general discussion as to the prosecution approach to Limonium material. However, on MM's account of events, it was not said that D/L 3 intelligence came from Source A.

75. We turn to the events of January 2016. At a hearing on the 11th, HHJ Testar indicated that he wanted to read the Limonium material. This judicial indication prompted a

consultation on the 12th, attended by (amongst others) SWQC, ESW, Fiona Alexander, DSW and MM. As summarised in the Crown' Respondent's Notice:

> "50. ….. SWQC raised the 10 September 2007 intelligence contained in DL3 and DSW informed the meeting that it came from Source A. SWQC immediately stated that Source A was capable of supporting Gohil's case, that she had previously thought the source was Gohil making anonymous allegations about corruption, that it fell to be disclosed and that the fact that it was from Source A likely meant that it was the end of the case…
>
> 51. MM was not present for the revelation, but joined shortly afterwards and had to be brought up to date. He expressed his surprise at the existence of Source A….."

76. As already intimated, there is a clash of views between DSW who states that the CPS and Counsel knew that the D/L 3 intelligence came from Source A at an earlier time and the position of the CPS and Counsel that the linkage between Source A and D/L 3 emerged only at the 12th January consultation. It is fair to Counsel to record that contemporaneous communications in January 2016 following the consultation support Counsel's standpoint that, so far as they were concerned, the emergence of the linkage between Source A and D/L 3 was (as expressed in one e-mail) a "bombshell".

77. At all events, the upshot of these developments in particular relating to Source A was that SWQC provided advice to the DPP and, on the 21st, the Crown offered no evidence against Gohil and Knuckey.

78. *(3) The approach to this application:* Two matters should be recorded here. First, our direction on the 23rd June, 2017, that the application should be dealt with by way of an oral hearing. As will be seen when we consider the state of authority (below) that is not to be regarded as the usual course; such applications to re-open final determinations of this Court – which should in any event be very few and far between – will ordinarily be dealt with on the papers. As it seemed to us, however, a combination of the sheer volume of material we were asked to consider and the grave nature of the allegations advanced, made it appropriate and convenient to deal with this application by way of an oral hearing. Whatever their true force, the allegations should be flushed out and dealt with through an open oral hearing. Our decision was necessarily fact specific.

79. Secondly, our ruling, also on the 23rd June, 2017, that this application to re-open should not be dealt with by way of a rolled-up hearing - together with the applications for EOTs, leave to appeal and any appeal hearings if leave is granted on the part of Ibori and others - but should instead be dealt with separately and *precede* those applications.

80. On the present occasion, Mr Kamlish returned to this topic, contending that either (1) we should reverse our previous decision and adjourn this application to be dealt with as a rolled-up hearing and heard together with the other applications or (2) we must throughout the present application make assumptions in Gohil's favour. There was, in effect, a binary choice to be made.

81. As recorded in a judgment dated 30th November, 2017, we rejected both submissions advanced by Mr Kamlish. As to (1), we maintained the view originally formed at the June directions hearing: namely, on the facts of this case, were we to have directed a rolled-up hearing, the question of Gohil's entitlement to re-open this Court's previous final determination to refuse leave to appeal would have become academic. For all practical purposes, the present application would simply comprise another application for leave to appeal and appeal (if leave was granted) in the other proceedings later in 2018. That would be wrong in principle. There is a real hurdle to be overcome in seeking to re-open a previous final determination of this Court. Such an application is not simply another application for leave to appeal.

82. As to (2), with respect, Mr Kamlish's submission struck us as too simplistic. As indicated in the 30th November judgment, we favoured instead a far more nuanced approach.

83. First, by the end of this hearing we might take the view that certain facts were simply irrelevant to our decision. If so, they would simply be put to one side.

84. Secondly, we accepted that there might be areas where if oral evidence was not now heard, the only fair course might be to make assumptions in Gohil's favour. That said, the picture altered dramatically over the course of the hearing. When he first addressed us, Mr Kamlish painted a picture of disputed factual issues, which we could not determine adversely to Gohil without hearing oral evidence, which will or may be before the Court when the other applications come to be considered – and which we had already indicated we would not be entertaining on this occasion. Tellingly, however, by the time of his reply, Mr Kamlish submitted or accepted that the "only real factual dispute" went to "seriousness": how many of those in the prosecution camp were involved in knowingly misleading the Court (as Mr Kamlish expressed it). Given Mr Kamlish's further submission that it was unnecessary for Gohil to contend which individual/s had behaved in bad faith or, indeed, as we understood Mr Kamlish, for the Court to make any such more specific findings, the scope for the need to make assumptions in favour of Gohil significantly narrowed.

85. Thirdly, as we said in our 30th November judgment:

> " There is a further alternative. The documents on some parts of the case may be so clear as realistically to preclude any significant contribution being made by any other materials to which we might come. That is a familiar position for a Court: for instance, in the civil jurisdiction in the context of giving summary judgment. There are instances where one can safely say that there is nothing else that could impinge on the state of the documentary materials, and there may be parts of this case where that is the correct conclusion."

86. It suffices to add that when we come to our conclusions (below), we shall, where necessary, indicate the approach followed.

87. *(4) Considerations going to the Regulation of Investigatory Powers Act 2000 ("RIPA"):* Ss. 17 and 18 of RIPA provide, insofar as material, as follows:

> " 17. (1) Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings **…** which (in any manner)—
>
> (a) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or
>
> (b) tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.
>
> 18. (7) Nothing in section 17(1) shall prohibit any such disclosure of any information that continues to be available for disclosure as is confined to –
>
> (a) a disclosure to a person conducting a criminal prosecution for the purpose only of enabling that person to determine what is required of him by his duty to secure the fairness of the prosecution;
>
> (b) a disclosure to a relevant judge in a case in which that judge has ordered the disclosure to be made to him alone….
>
> (8) A relevant judge shall not order a disclosure under subsection (7)(b) except where he is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice."

88. As we understood it, Mr Kamlish submitted that there may already have been a breach of s.17, RIPA, arising from the source of the information contained in the April 2014 Note. If, as Mr Kamlish suggested was likely, the source was intercepted communications, then, argued Mr Kamlish, it was not sufficient that the Crown simply disclosed the information to the defence. Instead, he said, the Crown was obliged to make an application for directions from the Court, pursuant to s18 of the RIPA and this they had failed to do. If s.17, RIPA was applicable, the Crown had failed to follow what Mr Kamlish described as the mandatory s.18 procedure. Not only did this failure compound the seriousness of the Crown's misconduct (as alleged) but it rendered the previous determination of this Court a nullity. Accordingly, the Crown ought to have conceded the previous application for leave to appeal and the present application.

89. Subject to s18, the prohibition contained in s17 is absolute and binds this Court just as it does any other body or person; no one may disclose the content of any intercepted communication if the disclosure is made in circumstances from which its origin as intercept may be inferred. However, Mr Kamlish's argument turns on the proper construction of s17 and 18, and can be dealt with without giving any indication whatsoever (which we emphatically do not give) about the existence or non-existence of any such material in the present case.

90. In our judgment Mr Kamlish's argument is wholly without foundation as a matter of construction. Ss. 17 and 18 do not compel the prosecution in a case of the nature postulated by Mr Kamlish to make an application to the Court.

91. S18(7) serves to disapply the prohibition in s17 where a Judge directs that disclosure should be made to him in the interests of justice. However, it may be, depending on the circumstances of the particular case, that it is perfectly possible for the prosecution to make a disclosure to the defence of information, in fact derived from intercepted communication, in a manner or form that makes it impossible to infer that that was its origin. In those circumstances the prohibition in s17 does not bite and there is no need for any application to be made to the Court.

92. There is nothing in RIPA to which our attention has been drawn which prevents the prosecution taking such a step without the authority of the Court. Accordingly, the failure of the prosecution to make an application to the Court could not, of itself, demonstrate impropriety on the part of the Crown, whatever the source of the information in question.

93. Furthermore, even in a case where RIPA, ss. 17 and 18 are applicable, we should not be taken as assenting to the submission that a failure to follow the procedure set out in s.18, RIPA has the consequence that the proceedings in question would be a nullity (whatever other consequences it might have).

94. It is unnecessary and indeed would be wrong to say more on this topic other than to record here that which we set out in a further ruling on the 30th November. Mr Kamlish had invited us to hear from the Crown *ex parte*. We did so. The ruling we made and recorded in open Court was that the Crown was not entitled to rely on the nature of Source A and the nature of Source B in support of its argument on who knew what and when. The Crown fully complied with this ruling in its submissions before us.

95. *(5) The jurisdiction to re-open final determinations of this Court:* We turn to this question of jurisdiction.

96. *(i) The CACD is a creature of statute:* As explained in *R v Yasain* [2015] EWCA Crim 1277; [2016] QB 146, at [16] and following, the jurisdiction and powers of the Court of Appeal (Criminal Division) ("CACD") are entirely statutory. Thus, the Court's jurisdiction and powers to entertain and deal with appeals against convictions and sentences are contained in *The Criminal Appeal Act 1968* ("the CAA 1968"). It is of course s.2 of the CAA 1968, as amended, which provides the sole test for allowing or dismissing an appeal against conviction:

> " (1) Subject to the provisions of this Act, the Court of Appeal –
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case."

97. Like any other Court, the CACD has an implicit power to revise any order pronounced before it is recorded as an order of the Court in the relevant record of the Court: *Yasain*, at [19]. However, the general rule is that where an appeal has been heard and the resulting decision or order has not only been pronounced but recorded in the relevant

records, there is no such jurisdiction; the order is final: *Yasain*, at [22]. As Lord Thomas of Cwmgiedd CJ, giving the judgment of the Court in *Yasain*, said, *ibid*:

> "The general position is that the court is at this point *functus officio* and will not re-hear an appeal, as it has no general jurisdiction to do so…."

98. *(ii) Nullity:* Plainly, if the previous order is a *nullity*, the Court cannot be *functus officio* and there can be no logical difficulty in there being a further hearing: *Yasain*, at [24] – [25]. Nullity may arise either when the hearing is a nullity, so that the ensuing order is a nullity, or when simply the order is a nullity (the Court making an order it had no power to make), despite the hearing being procedurally valid. Importantly, many, perhaps most, procedural irregularities, however otherwise grave, will not give rise to nullities.

99. In this regard, we should make it plain that we say nothing to minimise the potential gravity of any material non-disclosure on the part of the Crown, together with any misleading statements by the Crown to the Court. That said, in terms of characterisation, the *amicus* contended that any material non-disclosure or misleading statements to the Court by the Crown constituted *irregularities* but not nullities; they did not cause the Court to make orders it had no power to make. We agree.

100. It is unnecessary to explore nullity further, as, save in one respect, Mr Kamlish did not put his case on the basis of nullity. The exception concerned RIPA – and we have already rejected Mr Kamlish's argument in that regard.

101. *(iii) Defect in procedure which may have led to some real injustice:* In *Yasain*, at [26] – [27], the Court considered various authorities, in which it had been suggested that the power to re-open a final determination extended to instances where there had been "a defect in procedure which may have led to a real injustice". The Court concluded that none of these authorities explained the basis of any such exception, or its scope. The Court therefore preferred to consider the question as "a matter of general principle". The foundation for that consideration was furnished by the decision of the Court of Appeal (Civil Division) in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528.

102. *(iv) Taylor v Lawrence:* In the light of *Taylor v Lawrence*, it must be accepted that the Court of Appeal (Civil Division) has an "implicit jurisdiction" to re-open proceedings which it had already heard and determined. Giving the judgment of the Court, Lord Woolf CJ alluded (at [26]) to the two principal objectives of the Court:

> " The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents…."

103. The core reasoning of the Court is, with respect, to be found at [54] – [55] of Lord Woolf's judgment. Lord Woolf highlighted the need to avoid confusion between questions as to the jurisdiction of the Court and how that jurisdiction should be exercised. He continued (at [54]) as follows:

> " The residual jurisdiction ….vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised."

There was a "tension" between a residual jurisdiction of this nature and the need for finality in litigation; indeed, the jurisdiction to re-open proceedings after the ordinary appeal processes had been concluded could themselves create injustice. Accordingly:

> "There…needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen."

104. At [55], Lord Woolf spoke of this residual jurisdiction involving the taking of an "exceptional course". As he expressed it:

> " What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave."

105. The decision in *Taylor v Lawrence* has since been embodied in the Civil Procedure Rules ("CPR") and is now to be found at CPR, Part 52.30 (1), which provides as follows:

> " The Court of Appeal or the High Court will not reopen a final determination of any appeal unless –
>
> (a) it is necessary to do so in order to avoid real injustice;
>
> (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and
>
> (c) there is no alternative effective remedy."

106. *(v) The application of Taylor v Lawrence in the CACD:* The Court, in *Yasain*, concluded (at [38]) that there was no basis for any distinction between the Civil Division and the CACD as to the principles applicable to the jurisdiction to reopen concluded proceedings. The appellate jurisdiction in each case was statutory; both ought to have the same implicit jurisdiction. However, the Court emphasised (at [39]), as Lord Woolf CJ had done, the distinction between the existence of the implied or implicit jurisdiction and the way in which it was exercised.

107. Furthermore, Lord Thomas in *Yasain* went on to say this (at [40]):

> " The fact that both [the Civil Division and the CACD] have the same implicit jurisdiction does not mean that the jurisdiction has necessarily to be exercised in the same way…. "

In a criminal case, there would often be three interests to be considered, namely, that of the State, that of the defendant and that of the complainant or victim ("even though the victim is not a party to the proceedings under the common law approach"). In a criminal case, there was "the strongest public interest in finality". Thus:

> "The jurisdiction is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission."

108. Rather than extend the exception to finality by way of what we would term a piecemeal approach, the Court in *Yasain* preferred to determine the matter (at [41]) on the basis that the CACD's jurisdiction "is based on the same implicit power as the Civil Division determined it had in *Taylor v Lawrence*". The Court went on (at [42] and following) to call for the Criminal Procedure Rule Committee to formulate a rule similar to that contained in the CPR and for rules to clarify when an order is entered on the record.

109. On the facts, *Yasain* concerned a successful appeal by the defendant founded upon a mistake in relation to whether a verdict had been properly taken in the Crown Court, in respect of an offence of kidnapping. The error was that of the transcribers. That error came to light when the first CACD judgment was sent to the trial Judge. There was, accordingly, no factual basis for the CACD's earlier order and, as expressed in the head note "a real injustice would arise if the defendant did not serve the sentence that had been imposed on him". There was, of course, no possibility of recourse to the Criminal Cases Review Commission ("CCRC"). In the event, the Court concluded that it was appropriate to re-open the earlier appeal and to restore the conviction and sentence for the kidnap offence. At [49], the Court observed:

> " This is an exceptional case, as there was no basis in fact on which this court should have quashed the sentence; what had happened was a rare coincidence of circumstances – carelessness on the part of the transcriber, a failure by the prosecution to check the position, and a failure to check with the Crown Court at Harrow and the judge before accepting (1) that an experienced trial judge had passed a significant consecutive sentence on a defendant when the jury had not convicted that defendant and (2) that the record of the Crown Court which properly recorded the verdict and sentence were in error."

110. *(vi) The practical application of Yasain:* On the footing upon which *Yasain* was decided, namely that there is no difference between the jurisdiction of the Civil Division and that of the CACD to re-open previous final determinations, it can safely be said that the CACD will not re-open a final determination of any appeal unless:

i) It is necessary to do so in order to avoid real injustice;

ii) The circumstances are exceptional and make it appropriate to re-open the appeal; and

iii) There is no alternative effective remedy.

111. Though not to be interpreted as a statute, these form, in essence, what may be described as the "*necessary conditions*" for the exercise of the *Yasain* jurisdiction – and are, almost invariably, to be *cumulatively* satisfied if the jurisdiction is to be invoked. Moreover, we caution that *Yasain* does not hold that satisfying the necessary conditions is *sufficient* for the exercise of the jurisdiction; on our reading of these authorities, the Court retains a residual discretion to decline to reopen concluded decisions even if the necessary conditions are satisfied.

112. Subsequent case law suggests that the exercise of the jurisdiction is to be carefully confined. *R v Melius* [2016] EWCA Crim 1538 involved an (unsuccessful) attempt to re-open a question going to sentences imposed in a serious drugs conspiracy, on the ground of the Crown's change of stance as to pursuing "hidden assets" in confiscation proceedings. The VP CACD, Hallett LJ, observed:

> "6. The implicit jurisdiction of the court to reopen proceedings in exceptional circumstances when it is necessary to avoid injustice was reviewed recently in *R v Yasain*…. Lord Thomas CJ giving the judgment of the court made plain that it is an *exceptional* jurisdiction and one that will only be exercised in rare cases where it is necessary to avoid real injustice. He endorsed the general and important principle that there must be finality in litigation.
>
> 7. In our view reliance on *Yasain* in this case is misplaced. The judgment was not intended to open the doors to a flood of misconceived applications to reopen appeals. Those who believe they have grounds for a rehearing of an appeal may, in appropriate circumstances, make an application to the CCRC. An application to reopen an appeal is not the appropriate avenue. Only, we repeat, only in exceptional circumstances will this court consider an application to reopen an appeal.
>
> ……
>
> 10. If there were good grounds for challenging the sentences imposed, the applicant has a remedy – an application to the CCRC…. "

113. The *amicus* submitted that both principle and practicality supported:

> "…the judicial 'steer' apparent from the judgment in *Yasain* and in the subsequent cases that the jurisdiction to re-open a concluded appeal on the basis of evidence and material that was not before the court is to be confined to procedural errors of the sort that are clear and undisputed and where it is simpler and more expedient for the court itself to re-open the appeal and correct a manifest injustice without the need for further litigation. "

We shall return to this submission presently but examples are furnished by the decisions in *R v Daniel* [1977] QB 364 and, more recently, in *R v Powell* [2016] EWCA Crim 1539 and its tenor is undoubtedly supported by the decision in *R v Hockey (Practice Note)* [2017] EWCA Crim 742; [2018] 1 WLR 343.

114. In *Daniel*, an administrative error led the Court to fail, in breach of established practice, to notify Counsel of a hearing date. This defect in procedure led to a risk of real injustice and the Court held it had jurisdiction to relist the matter. *Daniel* was cited with approval in *Yasain*, at [26] – [27] and in *Hockey*, at [8].

115. *Powell* was another confiscation case where leave was sought to re-open the appeal because it had subsequently become clear that a sum of nearly £23,000 had wrongly been included in the figure for realisable assets. The CCRC had already refused to refer the case to the CACD on the ground that his appropriate remedy was to apply for a Certificate of Inadequacy. The High Court had, however, refused to grant such a Certificate. Importantly, the Crown did not oppose the application. The error needed correcting to avoid the injustice of the applicant having to pay money he did not owe the State and face the possibility of imprisonment in default. He could have appealed the refusal to grant the Certificate of Inadequacy or sought Judicial Review of the CCRC's refusal to refer the case to the CACD. However, the VP CACD, Hallett LJ said this (at [5]):

> " …In our view, enough time, effort and precious resources have already been spent on getting this error corrected. The application is before us. The applicant has acted in a timely manner. Any delays have not been attributable to him. We must put an end to this unhappy saga."

In these circumstances, the Court exercised the *Yasain* jurisdiction to re-open and allow the appeal.

116. *Hockey* concerned an application to re-open a concluded appeal on the ground that the proper construction of the legislation in issue had been misunderstood – and had been recognised as having been misunderstood in subsequent litigation. The application was rejected by Sir Brian Leveson P, giving the judgment of the Court.

117. Not only was the application misconceived in substance but other potential avenues for redress remained available. One such was the CCRC – referred to in *R v Bush* [2015] EWCA Crim 2313, by Rafferty LJ (at [27]) as a "tried and tested route".

118. Even *Powell* was to be confined to its own facts and not misunderstood. Sir Brian Leveson (at [13]) intimated that, in "reality", the decision to re-open the appeal in *Powell* had been taken "because the error was conceded by the Crown and [it was] expedient to prevent further litigation". *Powell* "should not be cited as a precedent for any attempt to sidestep the appropriate procedures to challenge decisions said to be wrong whether for legal or factual reasons, concepts of finality and the consequences of the court being *functus*."

119. Sir Brian Leveson emphasised (at [14]) the "very limited jurisdiction identified by *Yasain*". Moreover (at [17]), before the *Yasain* jurisdiction was triggered, it was a

"critical requirement" that there was no other remedy available. Sir Brian concluded (at [23]) with these observations:

> " ….There has been a real increase in the number of applications seeking to apply *Yasain* which are, almost invariably, without merit and are liable to be rejected summarily. Given the pressure on the Court of Appeal (Criminal Division) to deal with outstanding appeals and applications, it is therefore appropriate to underline the truly exceptional nature of this type of application and the strict need to justify attempts to bring cases within its remit…."

120. For completeness, the Court in *Hockey* (at [15] – [16]) gave guidance as to the procedure to be followed pending the formulation of a rule by the Criminal Procedure Rules Committee, similar to that contained in the CPR. It may be noted that under this procedure there is no right to an oral hearing unless so directed by the Full Court.

121. *(vii) The CCRC:* In the authorities already discussed, frequent reference has been made to the CCRC as an alternative remedy. As observed by Gross LJ in *R (Charles) v CCRC* [2017] EWHC 1219 (Admin); [2017] 2 Cr App R 14, at [2], the CCRC, established by the Criminal Appeal Act 1995 ("the 1995 Act"):

> "…now forms an integral part of the protection available in this jurisdiction against the risk and consequences of wrongful conviction, exercising a residual jurisdiction."

122. By s.9(1)(a) of the 1995 Act, where a person has been convicted of an offence on indictment in England and Wales, the CCRC *may* refer the conviction to the CACD. By s.9(2) of the 1995 Act, such a reference shall be treated for all purposes as an appeal.

123. S.13 of the 1995 Act provides the threshold conditions for the making of a reference under s.9:

> "(1) A reference of a conviction…shall not be made….unless -
>
> (a) the Commission consider that there is a real possibility that the conviction ….would not be upheld were the reference to be made,
>
> (b) the Commission so consider -
>
> (i) in the case of a conviction ….because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it…..
>
> (c) an appeal against the conviction….has been determined or leave to appeal against it has been refused."

124. On the face of it, recourse to the CCRC is the obvious route to follow or remedy to pursue, where fresh evidence or material (including by reason of non-disclosure) has come to light, following a concluded and unsuccessful appeal. Furthermore, it cannot

be over-emphasised that the CCRC has investigatory powers under the 1995 Act which this Court does not have.

125. Mr Kamlish sought to resist this conclusion, contending that the test for leave to appeal was different from that governing the reference by the CCRC of a conviction to the CACD. We reject the submission. The test for leave to appeal is whether the grounds sought to be advanced are "arguable". However, the meaning of "arguable" does not extend to contentions which, though capable of being formulated as an argument, are hopeless; in such instances, leave to appeal will not be granted. In this context, grounds of appeal are not "arguable" unless they have (at least) a reasonable or real prospect of succeeding. Insofar as there is a distinction between a "reasonable or real prospect of succeeding" and (the CCRC test) "a real possibility that the conviction would not be upheld", it is a distinction without any meaningful difference.

126. It is fair to say that in respect of matters other than the initial test, there are differences of procedure between seeking leave to appeal and proceeding by way of a reference to the CCRC. But these differences are justified in the interests of justice and do not assist Mr Kamlish's argument. With regard to the workings of the CCRC, as explained in *Charles* (at [47]):

> " i) the CCRC exercises an important residual jurisdiction in the interests of justice;
>
> ii) the decision whether or not a case satisfies the threshold conditions and is to be referred to the CACD is for the CCRC and not the court; it is not for the court to usurp the CCRC's function;
>
> ……
>
> iv) the threshold conditions serve as an important filter, not least in preventing the CACD from inundation with threadbare cases; they also assist in striking the right balance between the interests of justice on the one hand and those of finality on the other;
>
> v) even if the threshold conditions are satisfied, the CCRC retains a discretion not to refer a case to the CACD ….."

Though the decisions of the CCRC, whether or not to refer cases to the CACD, clearly are subject to Judicial Review, the Court will closely scrutinise such applications, including at the permission stage and will be slow to intervene: *Charles,* at [47 vi)].

127. Mr Kamlish further raised the spectre of RIPA, ss. 17 and 18 as an objection to the CCRC constituting an effective alternative remedy. There is, with respect, nothing in this point. First, we have already rejected Mr Kamlish's submissions in this regard (in the terms set out above). Secondly, even *if* faced with a question of that nature, the CCRC is entitled to seek assistance from this Court, pursuant to s.14(3) of the 1995 Act.

128. Accordingly, while we would not be minded to go so far as to say that the CACD's *jurisdiction* to re-open concluded proceedings is *removed* by the availability of recourse

to the CCRC (see, *R v Walsh* [2007] NICA 4, at [30] – [31]), we agree with the observation of Leveson LJ (as he then was) in *R v Strettle* [2013] EWCA Crim 1385, at [12], that "almost invariably" the proper course in such circumstances will be by way of an application to the CCRC – certainly in non-disclosure or fresh evidence cases - rather than attempting to invoke the *Yasain* jurisdiction. In our judgment, such an approach is entirely consistent with *Yasain* and subsequent authority while not precluding the exceptional pragmatic approach adopted on the facts in *Daniel* and *Powell*, where the course adopted was unopposed.

129. *(viii) Pulling the threads together:* We venture to pull the threads together as follows:

i) The CACD has jurisdiction to re-open concluded proceedings in two situations. First, in cases of *nullity*, strictly so-called and distinguished from "mere" irregularities. Secondly, where the principles of *Taylor v Lawrence*, as adopted in *Yasain* are applicable, thus where the *necessary conditions* are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to re-open the appeal; and the absence of any alternative effective remedy. It is to be emphasised that these are almost invariably *cumulative* requirements - though not necessarily *sufficient* for the exercise of the jurisdiction, in that the Court retains a residual discretion to decline to re-open concluded proceedings even where the necessary conditions are satisfied.

ii) Though the principles of *Taylor v Lawrence* apply in both the Court of Appeal (Civil Division) and the CACD, as underlined in *Yasain* the jurisdiction need not necessarily be exercised in the same way, bearing in mind both the triangulation of interests in criminal proceedings (the State, the defendant and the complainant/victim) and the general availability of the CCRC to remedy the injustice of wrongful convictions.

iii) In exercising the jurisdiction to re-open concluded proceedings, the test applied by the CACD will be the same, regardless of whether the application is made by the Crown or on behalf of the defendant.

iv) We respectfully agree with the observation of the Court in *Yasain* that the jurisdiction of the CACD to re-open concluded proceedings is probably best confined to "procedural errors". Indeed, at least generally, we see the *Yasain* jurisdiction as directed towards exceptional circumstances involving (as submitted by the *amicus*) the correction of clear and undisputed procedural errors "where it is simpler and more expedient for the court itself to re-open the appeal and correct a manifest injustice without the need for further litigation". Such an approach is healthy as it does not altogether exclude room for pragmatism in practice, while confining its scope to appropriately very limited circumstances, where, even if recourse to the CCRC was otherwise available, it would be a wholly unnecessary exercise. As it seems to us, fashioning the jurisdiction in this manner accords with authority, principle, practicality and policy – not least the great importance of finality in criminal proceedings.

v) We accept that material failures in disclosure are *capable* of constituting "procedural errors" (see, *R (Bancoult) v Foreign Secretary (No.4)* [2016] UKSC

35; [2017] AC 300, esp. *per* Lord Mance, at [5] and following). However, both in non-disclosure and fresh evidence cases, almost invariably, the availability of the CCRC would tell decisively against exercising the *Yasain* jurisdiction. As it seems to us, complaints as to non-disclosure and the emergence of fresh evidence following concluded proceedings, may properly be viewed as paradigm cases for the CCRC, the more especially where investigation is required or would be beneficial.

vi) Throughout any consideration of a *Yasain* application in a conviction case, it is necessary to keep in mind the "end game": what, if any, bearing does the application have on the safety of the conviction? If the answer is that even a successful application to re-open will not impact on the safety of the conviction, then it must be overwhelmingly unlikely (to put it no higher) that the application will satisfy the necessary conditions – at least save in an extreme case where the procedural failure or the fresh material reveals an abuse which rendered it unfair for the applicant to have been tried at all or such an affront to justice requiring an appeal to be allowed, regardless of the safety of the conviction.

130. *(6) Disclosure: (i) Institutional separation:* As is typically the case in this jurisdiction, the prosecution proceeded in accordance with a "split" institutional structure, entailing separate roles for Police (investigators), CPS (prosecutors) and Counsel. As observed in the *Review of Disclosure in Criminal Proceedings,* by the Rt. Hon. Lord Justice Gross (September 2011) (at paras. 59 and following and 129 and following), given such a structure, there needs to be early, sensible and sustained cooperation between investigators and prosecutors in respect of disclosure, including, where possible, the early involvement of Counsel. In this case, it is plain that the CPS and Counsel were involved from very early in the proceedings; there can be no criticism in that regard. However, on the Crown's own case as to the admitted disclosure failures, it is apparent that there has been a breakdown in communications, at the least between the MPS on the one hand and the CPS and counsel on the other. Moreover, such communications, to be effective, must be robustly pursued or pressed. By way of examples, difficulties have arisen in this case in connection with the April 2014 Advice and the April 2014 Note which would have been avoided if Counsel had sight of the original source of the intelligence (upon which the Advice was being given) and if Counsel had prevailed as to the retention of the (subsequently deleted) material in the Note. This case unfortunately illustrates the seriousness of a communications breakdown within the prosecution "team" and the importance of the Crown "Getting [Disclosure] Right First Time", as urged in the *Review of Efficiency in Criminal Proceedings* (2015), (Principle 2.1) by the Rt. Hon. Sir Brian Leveson President of the Queen's Bench Division. We return to these themes below.

131. *(ii) The "context" test:* The prosecutor's duty in respect of initial disclosure under s.3(1)(a) of the *Criminal Procedure and Investigations Act 1996* ("the CPIA") requires the disclosure of prosecution material (not previously disclosed to the accused) "…which might reasonably be considered capable of undermining the case for the prosecution against the accused or assisting the case for the accused…". In accordance with *R (Nunn) v Chief Constable of Suffolk Police* [2014] UKSC 37; [2015] AC 225, the common law duty of fairness on the prosecutor post-conviction and pending appeal is (as summarised in the head note) "…to disclose to the defendant any material which came to light and might cast doubt on the safety of the conviction, unless there was

good reason for not doing so, and, where there was a real prospect that further inquiry might reveal such material, making that inquiry".

132. When seeking to perform their duty in respect of disclosure, reference has already been made to Counsel applying the "context" test, as appears in particular from ESW's 17th July, 2013 Note on Disclosure and the April 2014 Advice. Thus, documents were not disclosed, though disclosable when considered in isolation, if the overall context told against disclosure – because the full picture supported the Crown's case so that, in context, it was said, the material in question did not pass the test for disclosure. Mr Kinnear for the Crown admitted and averred that the context test was erroneous.

133. Some care is needed in this regard and, for our part, we think that the contrast between consideration of documents in isolation or in context, poses a false and distracting choice.

134. In our judgment, the flaw, with respect, in Counsel's approach was not that they sought to consider material in context. Material cannot sensibly be considered or evaluated other than in context. The flaw was instead a failure to see the material in question other than from the Crown's vantage point (coupled with the failure, already discussed, to determine, timeously and definitively, the true source of the material). That Counsel was confident that the Crown could *rebut* the inferences which might otherwise be drawn from the material undermining the Crown's case or assisting Gohil's case or casting doubt on the safety of his convictions, did not mean that the test for disclosure had not been passed. Counsel's view on disclosure in the 17th July, 2013 Note and the April 2014 Advice, hinged upon the Crown ultimately prevailing and *assumed* that it would; but the ultimate outcome of the issue, trial or appeal under consideration is not and cannot be the touchstone for disclosure and is not a tenable approach to either the CPIA or the common law fairness duties.

135. *(7) Conclusions:* We entertain no doubt that the Gohil application to re-open the concluded proceedings must fail. It falls wholly short of meeting the criteria for the exercise of this exceptional jurisdiction. It satisfies none of the necessary conditions. There has been no real injustice; there is nothing wholly exceptional; it would not be appropriate to re-open the concluded proceedings; there is an effective alternative remedy. Our reasons follow.

136. *First*, Gohil's knowledge of the (alleged) relationship between Risc and JMD, together with the tactical decision not to introduce the relevant material at his trials, of itself dooms the present application to failure – regardless of any prosecution disclosure failures. We have set out above the state of Gohil's knowledge in detail and need not repeat it here. We highlight his close involvement with Ibori's defence strategy, the reference to a "nuclear defence", Gohil's e-mail to Mr Ghaffur dated 29th May, 2009 and his remarkable "Draft Strategy Plan". We do not minimise the gravity of any prosecution disclosure failures but, in substantive terms, the complaint is empty: Gohil had more than enough information available to deploy at trial, had he chosen to do so, even if not in the same form as D/L 3. On any view, the DL/3 and DL/6 intelligence was no more potent in terms of establishing corrupt behaviour on the part of MPS officers than the material then available to Gohil. There remains no answer to the observations of Davis LJ, giving the July 2014 judgment, at [11] and [16]; indeed, all the more so, as Davis LJ (at [16]) was under the impression that the documents in

question had not been available to Gohil at the time of his trial/s, when we now know that they were.

137. The inference that Gohil made a tactical decision not to use the available material is irresistible as a matter of common sense. It is in any event supported by the Note from his leading counsel at the time (Mr Winter QC), which Mr Kamlish placed before us. Mr Winter QC, whilst of the view that the Risc invoice for £5,000 was, by itself, plainly insufficient to establish police corruption, went on to say that "without solid evidence of police impropriety" (which, we observe, the D/L 3 and D/L 6 material did not supply) arguments of that nature "would not sit well" with the defence Gohil was then advancing.

138. For this reason alone, the necessary conditions were not satisfied. In particular, any prosecution disclosure failures did not occasion real injustice; put another way, Gohil had the means available to raise the allegation of MPS corruption and chose not to do so.

139. *Secondly,* the present application must fail unless there is some (arguable) proper basis for vacating Gohil's Guilty plea in respect of the Augen indictment. There is, however, no such basis. We agree entirely with and adopt the observations of Davis LJ, at [47] of the July 2014 judgment, together with Davis LJ's characterisation of the argument as "singularly devoid of merit". The plea was unequivocal and, as made clear in Mr Winter QC's post-trial Advice (dated 20th May, 2011), there was a wealth of evidence pointing towards Gohil's guilt. Much was then made of the plea, as Davis LJ remarked, including remorse and certain other matters, for the purposes of mitigation. Mr Kamlish accepted that Gohil had authorised the mitigation advanced on his behalf. Having chosen to plead Guilty and thereafter actively sought the benefits of that plea, Gohil cannot now be heard to say (as Mr Kamlish sought to argue) that he continued to believe in his own innocence. On the footing that Gohil was indeed Guilty, as reflected by his plea in respect of the Augen indictment and the mitigation advanced on his own instructions accepting guilt and expressing remorse in respect of both the Tureen and Augen indictments (Mr Winter QC's Response of 12th November, 2017), self-evidently any prosecution disclosure failures could not have occasioned real injustice. Again, therefore, the necessary conditions have not been met and, for this reason too, the present application must fail.

140. *Thirdly,* for the two reasons already given, any prosecution disclosure failures – even if established as advanced by Mr Kamlish – have no arguable bearing on the safety of Gohil's convictions. In our judgment, it follows that the application does not satisfy the necessary conditions: there has been no real injustice; there are no exceptional circumstances and, even if there were, it would not be appropriate to re-open the concluded proceedings.

141. *Fourthly,* whatever view is taken as to Gohil's knowledge, his Guilty plea and the irrelevance of any prosecution disclosure failures to the safety of his conviction, and even *assuming* there is force in the argument advanced by Mr Kamlish, there plainly is an alternative effective remedy. For the reasons canvassed earlier, this is a paradigm CCRC case, for considering such relief (if any) to which Gohil might be entitled. We have already addressed and rejected Mr Kamlish's objections to that course, the "tried and tested" route as observed in the authorities. The availability of the CCRC route

presents an obvious, fundamental and additional fatal objection to this application, requiring no further elaboration.

142. *Fifthly*, there is no merit in Mr Kamlish's submission that the application should be allowed as a matter of expediency; to the contrary, if anything, considerations of expediency tell against the application. Mr Kamlish's contention was that rather than leave Gohil to have recourse to the CCRC, it would be expedient to allow the application in the present case, so that Gohil's application for leave to appeal could be considered together with the forthcoming applications of Ibori and others, catalogued above. Mr Kamlish went so far as to say that to hear those applications without Gohil, was equivalent to "Hamlet without the Prince". We disagree.

i) Ibori does not have an extant appeal; he has applied for leave to appeal very substantially out of time and will need to overcome the hurdle faced by such a late application: see *Roberts* [2016] EWCA Crim 71; [2016] 1 WLR 3249. There is nothing pragmatic or sensible about giving leave to re-open an appeal on the back of another case where leave has yet to be given and where the application for leave is some years out of time.

ii) Ibori pleaded guilty to all relevant counts against him. That will present an additional hurdle.

iii) As already set out, the *Yasain* jurisdiction does not preclude expediency in appropriate and confined circumstances, such as found in *Daniel* or *Powell*. However and in any event, to invoke expediency as Mr Kamlish sought to do here, would be to drive a coach and horses through the necessary conditions. It would involve an unprincipled assimilation of an application to re-open with applications for EOTs and leave to appeal.

iv) The absence of Gohil from the applications of Ibori and others occasions no difficulty whatever, *a fortiori*, no injustice. There are thus and in any event no compelling considerations of expediency which support Mr Kamlish's proposed course. The only remaining risk from the point of view of expediency is that Gohil, following this judgment, does seek and obtain recourse from the CCRC who refer the matter back to the CACD, so requiring a further hearing. We are prepared to run that risk.

143. Matters do not end there. As the *amicus* submitted, were we to allow the application "…there would be a contested appeal indistinguishable from a conventional appeal, with the same issues to be litigated". The situation would be far removed from the expedient correction of a clear and undisputed procedural error. In our judgment, the *Yasain* jurisdiction was not intended for a case such as this and neither principle nor expediency supports its exercise here.

144. *Sixthly*, we turn to the complaint as to prosecution disclosure failures. In the light of our conclusions thus far, this argument is academic, at least unless it succeeds to the extent of establishing that the prosecution disclosure failures were of an order as to give rise to an abuse, such that it was unfair for Gohil to be tried at all or comprise such an affront to justice at the leave to appeal stage, so that his appeal must be allowed – a necessary pre-condition being that this application must be allowed. Insofar as we

understood Mr Kamlish to press the non-disclosure argument that far, we are wholly unable to accept it.

145. We start with the concession properly made by Mr Kinnear for the Crown (recorded above) that the April 2014 Note had been "inaccurate, incomplete and misleading". We do not minimise the prosecution's disclosure failures in this case. To the contrary, we take a grave view of them. Considerations of fairness underpin the Crown's disclosure obligations. As recent events have yet again emphasised, disclosure failures can cause great injustice. That, on the view we have formed, the prosecution's disclosure failures did not undermine the safety of Gohil's convictions, is a matter of good fortune. Even so, the disclosure failures here probably (see below) meant that Gohil was exposed to a charge of attempting to pervert the course of justice (on the basis alleged) for significantly longer than he should have been. Additionally and quite apart from any impact on Gohil, the upshot has been a massive, costly exercise, dwarfing (as already remarked) the scale of the disclosure task had it been properly undertaken in the first place.

146. Prosecution disclosure failures related to D/L 3, D/L 6, Source A and Source B. It suffices to focus on the essence of those failures, arising out of a failure to link the first paragraph of D/L 3 with Source A. Taking a snapshot at the time of the April 2014 Note, the contents of D/L 3 were by then well-known to the entire prosecution team. So too, it was also by then known that the information in question had been supplied to the MPS by HMRC. However, on the Crown's case the link between that paragraph of D/L 3 and Source A was not known to counsel (SWQC and ESW) or the CPS (in particular, DW and MM who were key personnel) until January 2016. As of April 2014, Counsel appear to have thought that the source of D/L 3 was an anonymous tip-off. That mistaken understanding was reflected in SWQC's submissions to this Court, (presided over by Laws LJ) on the 15th April, 2014 ("nothing untoward" had been found at all, as set out above). So too, with SWQC's submission, recorded by Davis LJ (at [19] of the July 2014 judgment) that the prosecution was aware of "nothing" calling for disclosure. On the basis that the source of the first paragraph of D/L 3 *was* an anonymous tip-off, still more so if the information was planted by Gohil himself, SWQC's remarks to the Court can be explained (even if erroneous as to disclosure). Conversely, on the basis that the original source of that paragraph of D/L 3 was Source A, SWQC's statement to the Court are simply indefensible.

147. Hindsight poses acute dangers. It is <u>now</u> known that the linkage to Source A was of the first importance in respect of disclosure. But even without hindsight, we cannot avoid concluding that the prosecution disclosure failure was eminently avoidable:

i) In April 2013, the MPS had asked to give an oral briefing in relation to operation Limonium. It is most unfortunate that no such meeting was convened. Such a meeting could have ironed out any misconceptions or uncertainty as to the source of the intelligence in the first paragraph of D/L 3, which had not been eliminated by the form of wording circulated by DSW in June 2013.

ii) On any view, the first paragraph of D/L 3 remained of importance in April, 2014. With great respect, by then, at latest, Counsel and the CPS should have insisted on sight of the "original source intelligence" (as ESW put it in her April 2014 Advice). The Crown ought not to have gone into the April 2014 hearing, without Counsel having full knowledge of that original intelligence.

iii) On the Crown's own case, these failures evidence a serious communications breakdown within the prosecution team – a matter of real importance, as earlier underlined.

iv) The matter was compounded, with respect, by the erroneous approach to disclosure taken in the 17th July, 2013 Note on Disclosure and the April 2014 Advice, already discussed. Had the correct test then been applied, the "revelation" of January 2016 (the Crown's wording) would have come about in the course of 2013 or by latest April 2014. The prosecution of Gohil for attempting to pervert the course of justice could not thereafter have proceeded, *at least on the basis alleged*.

v) Further still, the deletion from the April 2014 Note (recounted above) was most unfortunate and had the effect of distorting the meaning of that Note, thus misleading the Court. With respect to all concerned, the MPS was wrong to require that deletion and the CPS and Counsel were wrong to acquiesce in it. A suitable form of wording could and should have been included, reflecting ESW's proper concern. The effect of the inclusion of a sentence as to "boasting or bragging" would, in our view, itself have resulted in a chain of events advancing the timing of the "revelation".

148. But what of these disclosure failures? For the reasons already given, they emphatically do not call into question the safety of Gohil's convictions. Nor could it be said that a communications breakdown or drafting error, even one misleading the Court would, of themselves, give rise to an abuse of process so that it was unfair to try Gohil at all or such that his appeal must be allowed.

149. It is against this background that we return to Mr Kamlish's submission in its final form, as will be recollected, that the prosecution errors were "egregious" and that one or more of those in the prosecution camp had acted in bad faith, though it was unnecessary for Gohil to say who that was. To this was added the charge that the Tarbes prosecution of Gohil was brought and pursued on a knowingly false basis for illegitimate reasons (to protect the reputation of the MPS and the Tureen and Augen convictions; and to undermine Gohil's appeal).

150. Pausing there, we observe that this submission was, as already noted, very significantly more restricted than Mr Kamlish's earlier position as to the factual issues with which we needed to grapple: all that remained in issue was how many of those in the prosecution camp were involved in knowingly misleading this Court.

151. Moreover, in his final submissions Mr Kamlish no longer submitted – as he had earlier in the hearing – that the April 2014 Advice was "dishonest". By the conclusion of the hearing, Mr Kamlish said that the April 2014 Advice was plainly ("egregiously") wrong and that there could be a number of reasons why that was so; one of those was dishonesty – but, for the purpose of these proceedings, he said in terms that he did not invite the Court to make such a finding. Suffice to say, we deprecate the apparently casual manner in which such a grave allegation of dishonesty could have been advanced against Counsel on the first day of the hearing, only to be recanted on the second day; that is not the way proceedings ought to be conducted in this Court by anyone, let alone leading Counsel. The allegation was rightly withdrawn; it should not have been advanced.

152. Coming to the merits of Mr Kamlish's final submission, we have no hesitation in rejecting it.

153. To begin with, the complaints as to prosecution non-disclosure and the Tarbes prosecution all *post-date* Gohil's trials. We fail to see how on these grounds it could be said that it was unfair for Gohil to have been tried years previously.

154. Further and to repeat, even if MPS corruption was established in respect of the period prior to Gohil's trials, it had, as already indicated, no bearing on the safety of Gohil's convictions.

155. In that regard, to the extent that complaint was made of information passing *from* Risc *to* the MPS, we have recorded the only available material, dating back to 2007. It plainly should not have happened but it too had no conceivable relevance to the safety of Gohil's convictions.

156. Next, it would require a truly exceptional case to warrant re-opening concluded appellate proceedings on the ground of abuse, when a fresh appeal was bound to produce the same outcome because the safety of the underlying convictions could not be impugned. There is no semblance of such a case here.

157. In the circumstances and especially as Mr Kamlish's final submission drew back from alleging bad faith against any individual, the short answer is that the case for Gohil goes nowhere far enough as to warrant re-opening the concluded proceedings on the basis of abuse of process at the leave to appeal stage. We only add briefly to this conclusion out of fairness to those who have been the subject of these very serious allegations.

158. We recognise that we have not heard oral evidence. Nonetheless, on the material before us, we regard the suggestion that Counsel (SWQC and ESW) knowingly misled the Court as fanciful. We have already accepted (as does the Crown) that errors there were in dealing with disclosure and that, as a matter of fact, the Court was misled as a result of the April 2014 Note and the submissions of Counsel then made. However, as it seems to us, the contention that Counsel knowingly misled the Court faces insuperable hurdles:

    i) It will be recollected that the April 2014 Advice recommended the giving of "voluntary information (as opposed to disclosure)". That voluntary information included the extracts from D/L 3 and D/L 6, set out above. Counsel must be taken to have assumed that the recommendation would or might be accepted; no other assumption is realistic. Wrong though the giving of voluntary information might be in CPIA terms and wrong though Counsel were in the approach taken to disclosure, the tenor of this Advice tells decisively against an intention knowingly to mislead the Court.

    ii) We have already summarised the reaction of Counsel in and following the consultation of 12th January, 2016. That reaction is, realistically, only compatible with the emergence of Source A comprising a "bombshell", as it was then described. We have not overlooked DSW's evidence that Counsel and the CPS had known earlier of the link between D/L 3 and Source A or that his recollection of a remark of ESW at the 12th January consultation supported his account. We intend no disrespect to DSW in saying that his evidence, as far as

it goes, does not provide a realistic counterweight to the contemporaneous reaction of Counsel to the unfolding events of January 2016.

iii) Accordingly, on the footing that it is fanciful to suppose that oral evidence would make any difference, we conclude that neither SWQC nor ESW knowingly misled the Court.

159. The *dramatis personae* from the CPS was, as has been seen, rather larger. At least DW, MM, JD and AP were centrally involved at some time or another. There are, it has to be accepted, some puzzles. Thus, there is (as set out above) JD's manuscript note of July 2013, reacting to Counsel's "Briefing Note". There is, too (also set out above), MM's handwritten note of Source A, in the context of a November 2014 consultation. That said, in April 2014, DW and MM went beyond the position taken by Counsel in calling for the Limonium intelligence to be disclosed – not simply supplied as "voluntary information". That the CPS and Counsel were in error in giving way to the MPS requirement to make the deletion in the April 2014 Note and that DW and MM did not press the disclosure point is one thing; but the stance they took calling for disclosure tells overwhelmingly against any intention knowingly to mislead the Court. Though the contemporaneous reaction of the CPS to the "revelation" in January 2016 is not as clearcut as that of Counsel, there is nothing in the evidence of those events to support prior CPS knowledge of the link between Source A and the first paragraph of D/L 3 – other than DSW's account, already described. Albeit, after more reflection than that required when considering the position of Counsel, we are not persuaded that there is any basis for the allegation that the CPS through any of its diverse representatives knowingly intended to mislead the Court. Given the weakness of the allegation as it stands, we are not persuaded that it stands any realistic prospect of success and therefore cannot see a proper foundation for making any assumption in Gohil's favour in this regard.

160. The position of the MPS is different in that it is common ground that its officers, including DSW, knew much earlier than January 2016 that Source A was the original source of the first paragraph of D/L 3. It does <u>not</u> follow that the MPS or DSW knowingly intended to mislead the Court in the 2014 hearings. On the materials we have seen, it is more likely that the errors in that regard followed:

i) from a communications breakdown involving DSW wrongly thinking he had explained the position to Counsel and the CPS when he had not in fact successfully done so; and

ii) a drafting error as to the April 2014 Note, when a deletion is made with unintended consequences; such drafting errors are hardly unknown and could readily have arisen from DSW's concern (recorded in his contemporaneous note) as to the sensitivity of the intelligence concerned.

161. These, however, can be no more than provisional conclusions. For the purposes of the present application, the proper course is to *assume* in favour of Gohil that DSW knowingly observed Counsel misleading the Court in the 2014 hearings and did nothing to correct the error (although we repeat our provisional view that that is unlikely). Even so, in all the circumstances, such conduct - wholly reprehensible *<u>if</u>* it in fact occurred - falls well short of satisfying the necessary conditions and justifying the re-opening of

the concluded proceedings. Instead and again, if Gohil should choose to pursue this aspect of the matter, the obvious route to follow is that of the CCRC.

162. We take the allegations relating to the bringing and pursuit of the Tarbes prosecution very briefly indeed. In our judgment, they lend no support to Gohil's case; the foundation for the complaint of *mala fides* is simply lacking.

i) Though some play was made of Counsel encouraging consideration of such a prosecution (not in itself, we would add, evidence of bad faith or wrongdoing at all), it is clear that the decision to prosecute Gohil was taken by the CPS without input from Counsel.

ii) It is, moreover, clear that the CPS rotated personnel to avoid any conflict of interest between resisting Gohil's appeal and bringing the prosecution against him for attempting to pervert the course of justice. It was this very proper concern on the part of the CPS that resulted in the introduction of JD and MM into the case.

iii) We are unable to accept that the decision whether or not to prosecute Gohil for attempting to pervert the course of justice would have had any bearing before any constitution of the CACD on the outcome of his application for leave to appeal his convictions. It would simply be another issue in the proceedings and would not influence the Court, one way or the other. Insofar as Counsel, the CPS or the MPS expressed views to the contrary, we wholly disagree. At all events, we are satisfied that the decision to prosecute Gohil had no bearing whatsoever on the July 2014 judgment. As to the timing of the decision to prosecute, it came after the originally listed date for the hearing of the Gohil application for leave (April 2014). We can understand that Counsel wanted from the CPS *a decision* on prosecution but we cannot see that the ultimate emergence of that decision, immediately prior to the re-fixed June 2014 date when the leave application came to be heard, bears any sinister inference.

iv) For completeness, it may be noted that the CPS decision not to prosecute JMD (the other Tarbes strand) was taken in 2013, following advice from JD, who had no prior involvement with these matters whatever. It may be that JMD was indeed fortunate to escape prosecution (having regard to the totality of the material before us) but we cannot say that the decision taken was not tenable, especially bearing in mind the distinction between *intelligence* and *evidence*.

163. *(8) Postscript:* On the 30th January, 2018, with the draft judgment at a very advanced stage, the Court received notice from Mr Kamlish QC, that further disclosure had been received from the Crown and that further submissions on behalf of Gohil would likely be forthcoming. The Court set a short timetable for the production of those submissions, for any response from the Crown and any reply to the Crown's response. The Court has now anxiously considered all the submissions it has received. It suffices to say, for the reasons which follow, that nothing in these further submissions causes us to alter any of the conclusions already expressed in this judgment.

164. To keep the matter in perspective, the total further tranche of material disclosed by the Crown amounted to some 46 pages; of the 46 pages, only 4 comprise new disclosure material.

165. Mr Kamlish's submissions focus on three documents, conveniently described as follows: (1) MG6C; (2) the 5 x 5 x 5 intelligence report; (3) the second page of MG6D. We take them in turn.

166. *MG6C:* Entry 4037 in the Phoenix MG6C reads as follows:

> " Intelligence Report dated 16/04/2015. DS Wright report; follows a telephone call with DC McDonald where DC McDonald reported the content of a meeting of a colleague (officer from a different unit) with a legal representative who said that he (legal rep) was doing some work for Ibori's Lawyers. The Legal rep also said that Duncan McKelvie was doing some work on the case. DC McDonald arranged to meet his colleague on the 16 April 2016 [presumably, 2015] in a more suitable place; the colleague confirmed the meeting he had with the legal rep was on 28 February 2015. The Legal rep took a call during the meeting which triggered the conversation re Ibori lawyers and McKelvie. DC McDonald confirmed the detail by email to DS Wright."

167. Mr Kamlish sought to deploy this document to mount a wide-ranging allegation, charging the MPS with seeking to "have a discussion with one of Ibori's legal representatives with the intention of subverting LPP" and having "a plan to infiltrate the defence legal team". Mr Kamlish reminded the Court, which, with respect, needed no reminder, of the importance of disclosure and respect for Legal Professional Privilege ("LPP"). However, the difficulties in the way of Mr Kamlish's submission are insuperable.

i) First the passage does not begin to support the allegation advanced. The conversation with the lawyer in question was neither sought by the MPS nor followed up. It is not at all clear that there was any breach of LPP; if there was, the only person who breached it was the lawyer. The note does no more than record a conversation the lawyer had with the colleague of JMD nearly two months previously. There is no sensible basis on which this passage could be said to support either the intention or the plan attributed by Mr Kamlish to the MPS. Accordingly, no arguable question of any abuse arises. Moreover, matters do not end there.

ii) Secondly, the document has been disclosed as potentially relevant to any substantive appeal. It does not at all follow, contrary to Mr Kamlish's submission, that it is, therefore and without more, relevant to the present application or the Tarbes prosecution. For our part, we do not think it is. On the face of it, the document has no relevance to Gohil whatever.

iii) Thirdly, we have already dealt with the single instance of information passing from Risc to the MPS in 2007 and have nothing to add to what is said above.

iv) Fourthly, if further investigation is sought of this document (or any related concerns) then, yet again, this is a paradigm case for raising with the CCRC (which will exercise its own judgment as to whether to pursue it).

168. *The 5 x 5 x 5 Intelligence Report:* This is no more than a note of the meeting held with MM on the 23rd September, 2013, already summarised above. The note seeks to distinguish between the investigation into Gohil's "media campaign" and his (and others') dealings with the Nigerian Attorney General. The final sentence talks of giving "priority" to a report on the media campaign as this "may impact on Gohil's appeal and asset confiscation". Seeking to build on this sentence, Mr Kamlish returns to his theme of (in summary) bad faith in the Tarbes prosecution. Again, the submission is without foundation. First, we repeat what we have already said as to the Tarbes prosecution. Secondly, even if the note can be read as relating to a charging decision, it does not say that Gohil should be charged regardless of the merits, still less as a device to defeat his appeal. Thirdly, we reiterate that the notion of the Gohil prosecution impacting on a CACD constitution's consideration of his appeal, is groundless and misconceived.

169. *The second page of MG6D:* This document takes matters no further. The substance has already been sufficiently noted when dealing chronologically with ESW's and DW's knowledge.

170. Finally, Mr Kamlish's concluding and "overall submission" is that there may yet be further disclosure and that, accordingly, as we understood it, both this application and the Ibori applications should be put on hold or should be heard together. We reject this submission. First, the existence of further disclosure undermining any conclusions we have reached on this application is wholly speculative. Secondly, there are in any event the most cogent reasons for not hearing this application together with the very different applications of Ibori and others. Those reasons have already been set out and it is unnecessary to repeat them. Thirdly, while it would much be preferred if all disclosure had already been given, the reality in any large case is that there always is a risk of further stray documents coming to light. It is fanciful to suppose that either this application or the Ibori applications should now be put on hold by reason of the small tranche of additional disclosure most recently supplied. Fourthly, the additional disclosure most recently given suggests that the Crown is very much alive to its continuing duty in this regard – and no doubt will remain so. Fifthly, in the event that any further material *did* come to light after delivery of our judgment which undermined its conclusions, the option of seeking recourse from the CCRC remains.

171. *(9) Overall conclusion:* For the reasons given, the Gohil application to re-open fails and is dismissed.

THE PREKO APPLICATION TO RE-OPEN

172. We have already summarised the procedural history in respect of Preko and the general nature of the case against him. The detail is set out fully in the February 2015 judgment: [2015] EWCA Crim 42. It is unnecessary to rehearse those details again.

173. There were 7 grounds of appeal. Each concerned some aspect of the conduct of Preko's re-trial: the refusal of the trial judge to admit evidence of the acquittals on some counts at the first trial; cross-examination of Preko on a document, the provenance of which was said to be insufficiently established; inappropriate comments by the prosecution when closing the case; inadequacies in the judge's summing up. None had any connection with the manner of the police investigation or with alleged police corruption.

174. Before the hearing of the appeal there was a disclosure hearing. We do not have a transcript of the hearing. However, we do have the skeleton arguments lodged with the Court by counsel then acting for Preko and by prosecution counsel. It is apparent from the skeleton arguments that a schedule of unused material was in the hands of those then representing Preko and that disclosure was sought of three particular items. The schedule (the relevant part of which had been served shortly before the re-trial) revealed that the material concerned e-mail contact between JMD and a manager at Goldman Sachs named Sassoon. On behalf of Preko it was argued that this was relevant to an issue in the case, namely the credibility of one of the prosecution witnesses at the trial. The witness, a man named Ford, was also employed by Goldman Sachs. He gave evidence at both trials of a significant meeting with Ibori which took place in February 2001. His account of the meeting was in conflict with the account given by Preko. At the
second trial (but not prior to that), Ford said that Sassoon had been present at the meeting. The submission made on behalf of Preko to the Court of Appeal was that the e-mail contact was disclosable on the basis that it may have assisted the defence case and/or undermined the evidence of Ford.

175. The prosecution position was that it was Preko who first had suggested that Sassoon might be someone of significance in the case, this suggestion coming in the first trial. The e-mail contact was a result of Preko raising the point. Prior to that the prosecution had not considered Sassoon to be of any relevance to the case. The prosecution had served a schedule identifying the e-mail contact. Although there had been many other disclosure requests in the lead up to the re-trial, no request had been made in relation to the e-mail contact. The prosecution's position was that Sassoon's whereabouts were well-known – he had a position at an Oxford college by the time of the re-trial – and the defence could have contacted him had they thought him to be of significance.

176. It is clear that the Court of Appeal examined the material. That much is stated in the appellant's skeleton argument. It is apparent that the Court determined that it was not disclosable material. It played no part in the substantive appeal. Indeed, Sassoon does not appear to have figured at all in the arguments raised in the appeal as it proceeded.

177. We have been provided with the material in question. It has been disclosed to those now representing Preko. JMD posed a list of questions to Sassoon. Most of them concerned procedures at Goldman Sachs in relation to money laundering compliance. Sassoon's answers on those matters are not said to assist the case of Preko. On the face of it they are inimical to Preko's case at trial. He was also asked when he was employed by Goldman Sachs. His answer was between 1980 and 2000. This corresponded to other evidence called in the case i.e. that he resigned his directorship in November 2000. The potential significance of this was that the meeting which Ford said Sassoon attended was early in 2001. This theoretically was possible since Sassoon's contract did not terminate until February 2001 but it was unlikely given the cessation of the relationship between Sassoon and Goldman Sachs. This point was made by those representing Preko at trial. Given that Sassoon's reply to JMD about his employment was the same as the evidence at the trial, it is not clear that it was disclosable. In any event, it added nothing to what already was known. Sassoon also said that he did not remember meeting Ibori. However, he also said that he met hundreds of clients a year and he would not be able to recall the names of accounts. Again, even if nominally

disclosable, it added nothing to the case. The only way properly to utilise it would have been to call Sassoon which would have been damaging to Preko's core case.

178. The basis upon which it is argued on behalf of Preko that this is a proper case to give leave for him to re-open his appeal against conviction is the failure of the prosecution to disclose the material obtained by JMD from Sassoon. This is the only basis independent of the case put by Gohil. There is a very obvious difficulty with the proposition. The Court which heard the appeal in 2015 was aware of this material. The prosecution provided the Court with the material so that the court could reach its own judgment as to the disclosure. The Court determined that it was not disclosable. For us now to allow the point to be re-opened would be tantamount to allowing an appeal against the decision of this Court. That would be wholly improper. Fortunately, it is not necessary for us to grapple with the propriety of the course suggested on behalf of Preko. The decision of the Court in 2015 was clearly justified given the content of the material concerned. Even if that material notionally was disclosable, disclosure of it would have made no difference at all to the appeal in 2015 and it would not have affected the course of the trial. This disclosure point is not even barely arguable. It does not begin to satisfy the necessary conditions. If there is anything in it at all – which we are satisfied there is not – it is something for the CCRC to consider.

179. Preko also relies on what he argues is demonstrable bad faith on the part of the prosecution in the various prosecutions which was so pervasive that it should operate to permit his appeal to be re-opened. He cannot point to any particular feature of his case affected by the bad faith alleged on behalf of Gohil. He simply says that the conduct of the prosecution was so egregious that no conviction arising out of this series of prosecutions should be allowed to stand. Thus, he should be permitted to re-open his appeal in order that the court may put right this injustice. Leaving aside the need to consider some causal link between prosecutorial misconduct and a conviction following trial, Preko's argument could only succeed if there were such substance in the case mounted by Gohil that the appeal should be re-opened. In view of our conclusions in relation to the case put on behalf of Gohil, Preko's argument which is parasitic in nature must fail.

180. The officer in the case in respect of Preko's prosecution was JMD. On behalf of Preko it was suggested – albeit very faintly – that the officer's corruption must have carried over into Preko's trial. No suggestion was made as to what was done or not done by JMD as a result. As was put by the prosecution when responding to Preko's application, we were being asked to reach a conclusion favourable to Preko on the basis of unknown unknowns. Put bluntly the submission made on behalf of Preko was completely speculative. It could not form a proper ground of appeal let alone the basis for re-opening an appeal already concluded.

181. The final point made on behalf of Preko was that his conviction depended upon the conviction of Ibori. We shall assume for present purposes that this is the case though it does not necessarily follow. It is said that, if Ibori's convictions are overturned, Preko's convictions also must fall. Ibori has applied out of time for leave to appeal against his convictions and a hearing will take place later in 2018. The pragmatic and sensible course would be to permit Preko to re-open his appeal so that he may join with Ibori's application.

182. There are a number of objections to this argument, essentially to the same effect as those set out above when rejecting Gohil's argument as to expediency. Additionally, aside from the assertion that Preko's convictions cannot stand if Ibori's convictions are quashed, there is no obvious common ground between their cases.

183. Insofar as Preko has any basis independent of Gohil on which to argue that his appeal should be re-opened, it is without substance and is dismissed. Preko's application accordingly fails and is dismissed.