MOUNCHER INVESTIGATION REPORT

Author: Richard Horwell QC

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July 2017

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Mouncher Investigation Report

Author: Richard Horwell QC

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"The only way this case will fail is through disclosure."

Detective Chief Superintendent Christopher Coutts

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Executive Summary

Lynette White was just 20 years of age when in 1988 she was brutally murdered in a flat in Cardiff. Stephen Miller, John and Ronald Actie, Yusef Abdullahi and Anthony Paris, who later became known as the "Cardiff Five", were prosecuted for her murder and in 1990 three of them were convicted: Stephen Miller, Yusef Abdullahi and Anthony Paris. Those convictions represent one of the worst miscarriages of justice in our criminal justice system. The case against them comprised accounts from eyewitnesses; confessions to civilians; and a single recorded confession by Stephen Miller to police officers. Following the convictions, the main eyewitnesses withdrew their evidence as did most of the civilians to whom confessions were alleged to have been made. The Court of Appeal quashed the three convictions in 1992 because Miller's confession to police officers had been obtained by oppression involving bullying, hostility and intimidation at a level that had horrified the three Court of Appeal judges.

What is so perplexing about the prosecution of the Cardiff Five is that there was no scientific evidence against them when, if guilty, there should have been: the scientific evidence which was then available in fact tended to suggest that another and unidentified man had murdered Lynette White. Furthermore, the motive suggested for their killing her did not stand up to scrutiny.

Due to advances in DNA technology, in 2003 it was discovered from blood found at the scene that the murderer was Jeffrey Gafoor. Gafoor confessed to murdering Lynette White on his arrest and in that same year he pleaded guilty to her murder. Gafoor's explanation as to what happened, as disclosed in his plea in mitigation before sentence, was that he had murdered Lynette White on his own. He apologised to the Cardiff Five for what had happened to them and made it clear that he did not know them and had no connection to them.

The focus then shifted to the original murder trial. How could five men be prosecuted for murder when, as later events were to reveal, they had nothing whatsoever to do with either the murder or the murderer? How could eye witness have put them at the scene when they had not been there?

An investigation commenced into how and why civilian witnesses had lied and, in particular, into the police officers who had taken their witness statements. Eventually, in 2009, 13 police officers and two civilians were charged with offences of conspiracy to pervert the course of justice and perjury. The case against the police officers was that they had "moulded, manipulated, influenced and fabricated" the evidence against the five innocent men. There were to be two trials, the first of which commenced in July 2011 at Swansea Crown Court against eight of the police officers and the two civilians.

The trial was beset by problems especially those concerning prosecution disclosure. On 28 November 2011, the trial judge ordered the prosecution to identify and produce a particular class of registered documents which would enable the court and the defence to test the prosecution's ability to conduct its disclosure exercise in accordance with law. Documents were identified as falling within that class but could not be found. It was then believed that the documents, or some of them, had been destroyed on the instruction of the Senior Investigating Officer and that belief appeared to be confirmed by a note of a conversation between two police officers in 2010. That note had been found overnight and was produced at court the following morning. The prosecution then acted on the basis that the documents had been destroyed on the order of the Senior Investigating Officer and as a consequence, the prosecution decided that it could no longer have confidence in the trial and criminal process. Accordingly, on 1 December

2011 the prosecution offered no further evidence and the police officers in that and the following case were acquitted.

Seven weeks later on 17 January 2012, the "destroyed" documents were found at the police headquarters, albeit not in the Major Incident Room where they should have been located; they were found by the Senior Investigating Officer in his office. Concerns of "establishment cover up" and "conspiracy" naturally followed. Did the investigators deliberately sabotage the trial to ensure that their accused colleagues would avoid conviction and the inevitable sentences of imprisonment that would follow?

This investigation, which commenced in March 2015, was directed at discovering what had caused the trial to collapse and at investigating many related issues, principally involving the conduct of police officers and prosecution lawyers. This investigation follows a number of previous inquiries and a detailed judgment in connected civil proceedings.

On the evidence it is clear that very few emerge with credit: too many aspects of the investigation and prosecution were poorly managed. But my principal finding, from which much flows, is that bad faith played no part in the errors of either the police officers or the prosecution lawyers. It is human failings that brought about the collapse of the trial not wickedness.

The Senior Investigating Officer did not order the destruction of any material and as is already obvious, the documents believed to have been destroyed were not destroyed.

Because of the note of the 2010 conversation, it has always seemed likely that a document was destroyed but one has never been identified. As a result of this investigation, I have found that a document was destroyed and that it was a summary or schedule of material held by the South Wales Police Professional Standards Department (PSD); it is referred to as the "Jones Briefing Paper". The reason why I have excluded bad faith in its destruction is set out in detail in the report but it is important to understand that the Jones Briefing Paper was not an original document. A digital version, at least, of the document was always going to be available for inspection or use at PSD and there was nothing to be gained by the destruction of one of a number of hardcopy versions of it. The document was not considered as undermining the prosecution case and it in fact contained complaints from some of the police officers awaiting trial. Indeed, a prosecution lawyer had considered the document and had advised that it was then irrelevant to the investigation. The document was destroyed because originating from PSD it was rightly regarded as sensitive and there was no written policy as to how such documents should be managed. The lack of a clear policy led to a misunderstanding as to how the Jones Briefing Paper should be treated.

That is a world away from a corrupt police officer destroying an original document that undermined the prosecution case.

Notwithstanding the fact that the document was determined as being "irrelevant", it should nonetheless have been registered and available for future inspection. It had not been registered and obviously was not available, at least in the Major Incident Room, for future inspection. Despite a number of searches, the 22 page document has never been found and it is more likely than not that it was destroyed.

The evidence reveals a rather chaotic trail of poor management by police officers and the prosecution lawyers, particularly the CPS. There were too many disclosure failings which by 28 November 2011 had brought the prosecution case to a "knife's edge". As for the "missing" document and other related or similar documents, there was deep-set confusion as to what had

happened and as to what guidance or instructions, if any, had been given. At times it seems that if something could go wrong it would.

Although the main reason given for stopping the trial was erroneous, the evidence establishes that the prosecution was then in much worse shape than had ever been anticipated and that if the full facts had been known, there is no doubt that by the vulnerable stage the trial had then reached, it would still have collapsed.

My principal findings are set out at paragraph 24.10 of the report.

The three surviving members of the Cardiff Five have always suspected that the trial collapsed due to yet further police corruption. Such suspicion is entirely understandable but has not been supported by the evidence.

The three surviving members are determined that no one else should suffer in the way they have, both from the original murder investigation and from the collapse of the trial in 2011. This investigation has been directed at the latter trial and at paragraph 24.11 of the report, I have made 17 recommendations.

Disclosure problems have blighted our criminal justice system for too long and although disclosure guidelines, manuals and policy documents are necessary, it is the mindset and experience of those who do disclosure work that is paramount.

No one can ever say that there will not be disclosure errors in the future, but if these recommendations are implemented and if they and the changes already introduced are followed in both letter and spirit, the prospects of disclosure failings will be significantly reduced.

Richard Horwell QC
3 Raymond Buildings
Gray's Inn
19 January 2017

1. Introduction

1.1 The events that followed the murder of Lynette White in 1988 represent one of the worst miscarriages of justice in the history of our criminal justice system. Five innocent men were prosecuted for murder and in 1990 three of them were convicted; the convictions were quashed by the Court of Appeal in 1992. In 2009, 13 police officers were charged with perverting the course of justice in relation to the investigation that brought about those wrongful convictions. The trial against the first group of police officers collapsed in 2011 because it was accepted that relevant documents had been deliberately destroyed on the order of the Senior Investigating Officer. Prosecutors agreed that confidence in the prosecutorial process could no longer be maintained and that the trial had to be stopped. Whenever the prosecution of a police officer fails, especially when it is said that relevant documents have been destroyed, rumours of "establishment cover up" and "conspiracy" will inevitably follow and this was no exception. Through the eyes of those wrongly accused of murder in 1988, the original miscarriage of justice was severely aggravated by the inability to prosecute, at least to verdict, those accused of "moulding, manipulating, influencing and fabricating" the evidence against them. Their despair and suspicions were further increased when it was later discovered that the missing documents which had caused the collapse of the trial had not in fact been destroyed but were at St. Athan, which was the main police premises used for the investigation. It is a story from which very few emerge with credit and it should be required reading for those who either support capital punishment or are complacent about the quality and standing of our criminal justice system.

1.2 This investigation was established in 2015 at the request of the Home Secretary to examine the circumstances in which the trial of the police officers collapsed. My Terms of Reference (ToR) are at Appendix 3. The circumstances in which this investigation was set up will become clear once the relevant history has been explained. Appendix 1 is a chronology of the principal events and Appendix 2 is a list of the names of those involved. There is much to cover in this report but the starting point, especially for those unaware of the background, must be the murder itself and the criminal investigations that followed.

2. The Murder of Lynette White: LW1

2.1 Lynette White was 20 years old and worked as a prostitute in Butetown, the Docks area of Cardiff. In the early hours of Sunday 14 February 1988 she was murdered in the bedroom of Flat 1, 7 James Street, Butetown. Those premises were rented by Leanne Vilday, who was a close friend of White and also a prostitute. No one lived in the flat, it had no heating or lighting, and it was used solely for the purposes of prostitution. There was only one set of keys and Lynette White had had them for some time before her death.

2.2 Vilday became concerned for White because she had not seen her for a number of days. In the early hours of Wednesday 10 February 1988, White's boyfriend and pimp, Stephen Miller, had come to the address where Vilday was then staying looking for White, he was angry that White could not be found. On the evening of Sunday 14 February 1988, Vilday went to Flat 1 with a friend, Eddie Dimond, and found the door to the premises locked with no response from within. Vilday then went to Butetown Police Station and reported White as missing, she said she had not seen her for about five days. Two police officers accompanied her and Dimond back to the flat and just after 9pm, the door was forced open and White's mutilated body was found on the floor next to the bed. White had suffered at least 50 major stab or slash wounds with the majority being stab wounds to the chest. She also had wounds to her face and (importantly) wrists and defence wounds to her hands. There was a particularly severe wound to the neck, caused by at least two incisions, and this wound had severed the carotid artery, the jugular veins and the larynx. The neck wound was very likely to have been the cause of death because even without the other injuries it would have led to rapid unconsciousness and death. The pathologist was of the opinion that the majority of the wounds to the body had been inflicted either *peri-mortem* or *post-mortem* and that it was likely that the neck wound had been caused at an early stage of the attack. There was extensive bloodstaining in the vicinity of the body and blood was also found in other areas of the room.

2.3 The murder investigation which later became known as Lynette White 1 or LW1 was conducted by South Wales Police (SWP) and it was first led by Detective Chief Superintendent Williams and later, from August 1988, by Detective Inspector Mouncher. What is often described as the "golden hour" or sometimes the "golden 24 hours" – the time immediately following the discovery of a body during which real progress is to be made if it is to be made at all – revealed nothing to assist in the identification of the murderer or murderers. The murder weapon, for example, has never been found and there was no evidence as to which clients, if any, White had been with that night. Lynette White could have had contact with many anonymous men only some of whom might have been local to Cardiff. The Cardiff Docks community was both small and close but there were no leads of any consequence. The police were confronted with very real difficulties and the trail was cold and getting colder.

2.4 The crime scene was examined for evidence though it is important to appreciate that in 1988 the forensic use of DNA was in its infancy. DNA had first been used in a criminal investigation in 1986 and was not then the dominant feature of a murder inquiry as it would be today. The United Kingdom's National DNA Database, for example, was not established until 1995. In 1988 the primary scientific investigative technique was fingerprint examination and a much greater emphasis was given to this.

2.5 Because Lynette White was a prostitute and had been murdered in the room to which she took clients, the obvious assumption was that she had been murdered by a lone client and this assumption was later supported by an offender profile prepared by the then leading expert in offender profiling, Professor David Canter. Evidence to establish the identity of the murderer (or murderers), however, was not forthcoming. A 16-year-old girl reported that she had seen a "strange" white man outside 7 James Street at 3.05pm on the Sunday and that he appeared to have blood on his right hand. Considerable efforts were devoted to finding this man. A photofit was compiled and this was displayed to the public in posters and through extensive media coverage. This man has never been identified. There is no suggestion that this witness had invented her account but it significantly (and unnecessarily) misled the investigation and diverted resources. Scientific evidence can rarely be precise as to the time of death, but a Home Office pathologist, Professor Bernard Knight, and the police soon agreed that it was likely that White had been murdered in the early hours of the Sunday morning and, therefore, was likely to have been dead for many hours before this sighting. On the issue of timing, two further factors are of note. First, the watch White had been wearing had stopped at about 1.45 and a jeweller concluded that it had stopped because it had been subjected to shock, hence a possible time of death of 1.45am on the Sunday morning. Second, screams from a woman had been heard in the area at about 2am on the Sunday morning.

2.6 The first significant development occurred on or about 4 March 1988 when police were informed that scientists had found traces of "foreign blood" on White's jeans and socks and also on a skirting board and a wall in the room where White's body had been found. Those who commit murder with knives sometimes cut their own hands in the process either from a struggle over the possession of the knife or because, unless the knife has a guard, the hand may be forced onto the blade when a stabbing motion meets resistance from the body of the victim. This was, therefore, a very important discovery. The foreign blood on the jeans and sock was analysed and found to be blood type AB. Just over two weeks later, scientists reported that the foreign blood found on the jeans had revealed the presence of the "Y" chromosome which is only found in blood from a male. The belief, therefore, was that the murderer was a male with type AB blood and this evidence was used to eliminate a number of potential suspects. Type AB blood is rare.

2.7 The life of a street prostitute is rarely straightforward and the investigation revealed a number of possible motives for White's murder. Two of these motives provide a useful insight into the significant difficulties encountered by this investigation:

- On 12 February 1988, the trial of Francine Cordle commenced at Cardiff Crown Court. Cordle was indicted for attempted murder and wounding with intent and faced a significant sentence if convicted of those offences. The case against Cordle was that she had stabbed Tina Garton with a knife. Cordle denied the allegation and claimed that she did not have a knife. Lynette White was a prosecution witness in that trial and because it was believed she might not attend to give evidence, a witness summons had been issued and served on her. When White failed to appear at court for the trial, a warrant was issued for her arrest. There is no doubt that White did not want to give evidence and was in fear of so doing. White had not been present when Garton was stabbed, but was able to give evidence of a similar incident which had taken place a few months earlier when she had been stabbed in the shoulder by Cordle with a knife. The prosecution sought to adduce such evidence under the similar fact principle. White lived at 58 Dorset Street, Grangetown, Cardiff with Stephen Miller. By the time Cordle's

trial had started, White had not been at home for some days and one explanation was that she was determined to avoid giving evidence against Cordle and had decided to put herself out of the reach of the police. Cordle was a prime suspect in the murder investigation from the beginning together with her brother, Richard Cordle, and her mother, Helen Farrugia. Francine Cordle's trial was stopped after White's body had been discovered and she was later tried in May 1988 and convicted of the lesser offence of wounding without intent and sentenced to 18 months' imprisonment, twelve months of which were suspended.

- There was another explanation as to why White did not return home: there was evidence that White was afraid to face Stephen Miller. White's income from prostitution funded Miller's drug habit (cocaine and other drugs) to the extent of £60 to £100 per day and it was suggested that White was frightened that he would be violent to her because she had not earned enough money to satisfy his financial demands. Stephen Miller was also a prime suspect from the beginning and he was interviewed and his home and car were searched.

2.8 As further indications of the scale and difficulties of the investigation: 324 clients of local prostitutes were identified; other men were identified who either had a propensity to rob prostitutes of their earnings or who had convictions for sexual offences and violence; more than 3,500 "house to house" questionnaires were completed; nearly 3,000 witness statements were taken; and more than 30 suspects were considered and rejected. In addition, there was the obvious fact that the Docks area was frequented by men of many different nationalities who would visit periodically, for short times only, and would be very difficult to trace.

2.9 Lynette White's precise movements in the days preceding her murder have never been clear. During the days that White was living away from home, she spent the night of Sunday 7 February 1988 with her close friend Leanne Vilday at 19 St Clare Court. Vilday said that she had last seen White on the afternoon of Monday 8 February 1988.

2.10 Police officers had been concerned about Vilday's candour from the beginning. Based on nothing more than her demeanour, it was suspected that Vilday had known that White's body would be found in Flat 1, 7 James Street when she took police officers to that address on the Sunday evening. Vilday has always maintained that she had not known that White's body would be found in the flat but to those investigating White's murder, their approach to Vilday had to be that if she did know that White had been murdered in that room then it was imperative to discover what else she knew and why she was withholding information from the investigation. Vilday was a person of significance from the beginning.

2.11 Two groups of key witnesses emerged amongst the many in whom the police had an interest. The first, and by far the more important, comprised: Leanne Vilday, Angela Psaila, Mark Grommek and Paul Atkins. Vilday, then aged 19, was in a relationship with Ronald Actie and was staying at 19 St. Clair Court, West Bute Street, Cardiff which was the home of her close friend Angela Psaila. Vilday had previously been living at Flat 2, 7 James Street and had rented Flat 1, 7 James Street from late 1987 but until it was habitable, she had decided to stay with Psaila. 19 St. Clair Court is just 75 metres from 7 James Street. Psaila, then aged 23, was also a prostitute. Grommek, then aged 29, lived at Flat 2, 7 James Street, which is immediately above Flat 1. From the autumn of 1988, Grommek was a DJ at the North Star Club in Cardiff which was frequented by White and Vilday because it was

open well beyond midnight. Atkins, then aged 34, lived at 87 Angelina Street, Butetown but had previously lived at Flat 1, 7 James Street. Atkins and Grommek were friends. Psaila and Atkins had very low IQs. For reasons which will become clear, and in different circumstances, this group was later referred to as the "Core Four".

2.12 The second group consisted of Pamela Mathews and Violet Perriam. As an indication of events to come, of the six witnesses from these two groups, five were later charged with perjury.

2.13 It is important to understand how the case against those ultimately accused of murder developed. Within a few weeks of the discovery of White's body, police had taken witness statements from the Core Four and in none of those statements did any one of them provide any information implicating any individual in the murder.

2.14 During the first six months of the investigation, for example, Vilday made a total of 16 witness statements and in none of them did she implicate anyone or profess to have any knowledge of the circumstances in which White had died.

2.15 In April and May 1988 a rather confused and confusing account emerged from two women, Jayne Sandrone (also known as Jayne Ormond) and Noreen Amiel, who together managed the Dowlais public house which was near to 7 James Street. They described Yusef Abdullahi as either confessing to the murder of White (Sandrone) or to the stabbing of someone else (Amiel).

2.16 There was another incident on 17 May 1988. Vilday was drunk in the North Star Club in Butetown and was having a conversation with Maxine Campbell which others overheard. According to Campbell, Vilday claimed that "Pineapple" and "Dullah" had murdered White and that she, Vilday, had witnessed the murder. "Pineapple" was the nickname of Stephen Miller and Yusef Abdullahi was often called "Dullah". Campbell confirmed that Vilday had implicated both Stephen Miller and Abdullahi in the murder in a witness statement dated 31 May 1988. A police officer spoke to Vilday about this conversation and although Vilday accepted that she had uttered those words, she said that she had been drunk and had taken "speed" (amphetamine sulphate) and that what she had said was not true. She also acknowledged that she may have wanted to "get at" Miller because she hated him for the way he took money off Lynette White, but was adamant that the allegation was false and that she did not know why she had made it. Notwithstanding Vilday's explanation, Abdullahi joined Miller as a suspect.

2.17 The desperation of the police officers attempting to solve White's murder was such that innovative and questionable measures were employed. On 15 June 1988, for example, Vilday was interrogated under hypnosis by Doctor Una Maguire. Doctor Maguire subsequently reported that Vilday had been co-operative throughout and that Vilday had witnessed nothing and could not help the investigation. Little regard appears to have been paid to the viability of this exceptional technique let alone its impact on the admissibility of any evidence that Vilday might thereafter give.

2.18 Grommek lived immediately above the murder scene and he was approached by police officers. He said that he had been at home on the night of the 13th/14th but had been asleep from midnight to 10am. There was evidence, which if true, indicated that Grommek had lied to the police about certain details of that night.

2.19 Contemporaneous documents do not reveal why Atkins became of interest to the investigation but the fact that he had once lived at Flat 1, 7 James Street together with his extensive criminal record, though not for offences of a violent or sexual nature, must have played a part.

2.20 On 10 April 1988, Atkins was interviewed by a senior detective and gave four accounts which were not only mutually inconsistent but were such as wholly to undermine his credibility: his accounts ranged from Vilday being at the scene shortly after the murder from which "Barry of Bristol" or "Barry the homo" emerged; to two separate accounts that involved Grommek killing White in order to steal her money; and finally to Atkins himself being the murderer. It is perhaps surprising that reliance was later placed on Atkins as a witness of truth.

2.21 November and December 1988 were the two critical months of this murder investigation and two witnesses, Pamela Mathews and Violet Perriam, were responsible for the first stages of what became a rapidly developing narrative.

2.22 Pamela Mathews lived at 18 St. Clair Court, next door to Vilday and Psaila. On 16 March 1988, Mathews reported to the police that she had seen Psaila acting suspiciously outside 19 St. Clair Court during the early hours of Saturday 13 February 1988. Later, on 12 April 1988, she described Psaila disposing of property in a rubbish chute at St. Clair Court and said that Psaila had looked "scared and nervous", again in the early hours of Saturday 13 February 1988. On 1 November 1988, however, Mathews significantly moved the date of such activities from the early hours of Saturday the 13th to the early hours of Sunday the 14th of February 1988. She also said that Psaila knew more than she had revealed to the police.

2.23 Violet Perriam worked as a receptionist at the Butetown Health Centre in the Docks and was also the social secretary of the Cardiff Yacht Club, also situated in the Docks. Consequently, she knew many from the local community. On 10 November 1988, Violet Perriam made a statement in which she described driving her car in James Street and seeing four "coloured men" arguing heatedly outside number 7 at about 1.30am on 14 February 1988. She said that two had familiar faces and that she would recognise them if she saw them again. She made it clear, however, that she did not know the names of any of them. On 16 November 1988, Perriam made a second statement in which she positively identified one of the four men as Rashid Omar and another as "almost certainly" John Actie. Perriam added that she could definitely say that Stephen Miller was not one of the four men.

2.24 Over the next 20 days events moved quickly and the nature of the evidence changed radically. Vilday, Psaila, Atkins and Grommek, the Core Four, were seen again by police officers. Accounts changed and often changed again, and some of the changes were dramatic in the extreme. The accounts given by the Core Four ranged from their saying that they had seen nothing to agreeing that they had witnessed Lynette White being murdered by five men. At the end of this process, any perceived inadequacies or contradictions in their accounts were, to some extent, amended or withdrawn. Of particular importance is that accounts became consistent with developments in the evidence whether scientific or otherwise. Eventually, there was "evidence" which on its face established that five men: Stephen Miller, Yusef Abdullahi, Anthony Paris, Ronald Actie and John Actie had been outside or inside Flat 1, 7 James Street at or about the time White was murdered.

2.25 Remarkably, however, there was no evidence that the five men were friends or that they even associated with each other and not even the two Actie cousins, Ronald and John, were close. There was no evidence that they had ever been seen together as a group other than on this one occasion as alleged by the Core Four. As for links between the five men and the Core Four, Ronald Actie was then in a relationship with Vilday and Paris was the brother of the father of Vilday's son.

2.26 On 7 and 9 December 1988 Miller, Abdullahi, Paris, Ronald Actie and John Actie, together with others, were arrested and whilst in custody and being interviewed, Psaila, Vilday and Perriam made yet further statements in the course of which yet further important evidence emerged. The rough edges of outstanding inconsistencies were in large part either removed or tempered (though not always eliminated) and there were some further fundamental changes to their accounts. By the end of this process, Psaila and Vilday had put themselves in the room at the time White was murdered together with the five men. Psaila and Vilday said that they had been forced to cut Lynette White's wrists in order to involve and implicate themselves in White's murder and thereby be coerced into silence. Vilday also said that they had been threatened and told that they would be killed if they went to the police. Their combined evidence was that each of the five men had stabbed White.

2.27 In the course of the police interviews, Miller was the only suspect to confess to White's murder. In the course of his confession, Miller implicated his four eventual co-defendants but especially and repeatedly implicated Paris and, to a lesser extent, Abdullahi. Miller also said that he had stabbed White. Some confessions can be compelling because they reveal information which subsequently can be independently verified and which at the time was not only unknown to the police but could only have been known to the offender. This was not such a confession. No significant facts were admitted by Miller which he either did not already know or which had not previously been put to him by the interviewing officers.

2.28 The remaining four suspects denied the allegation and gave alibis of varying detail and quality.

3. The Cardiff Five

3.1 On 11 December 1988, Stephen Miller, Yusef Abdullahi, Anthony Paris, Ronald Actie and John Actie were charged with White's murder and remanded in custody. They later became known as the "Cardiff Five".

3.2 At that time, the prosecution could be compelled to call witnesses upon whom it relied to give evidence before magistrates during "old style" committal proceedings. The prosecution called Vilday, Psaila and Atkins and one of the defendants curiously called Grommek on a discrete issue. In February 1989, the five defendants were committed to stand trial at Swansea Crown Court. By the time of the trial, each of the Core Four had become a prosecution witness.

3.3 In early January 1989, Nicola Haysham received a letter from her friend Vilday. Vilday revealed that she had been the victim of police malpractice. Vilday wrote that when she had been in the police station, she had been confronted by two stark choices: either to support the police case and implicate the Cardiff Five or to be charged with murder. This short extract is illustrative of the tone of the letter:

> "That meant I either say Yes I was there and I saw the 5 boys and got out of the police station that day. And then be a main witness in this fucking murder case. Or the other option I had was "to say the same as I've said from the day I found the girl". <u>Which is the fucking truth Nicky. I hope you believe me anyway</u>." If I would have said what I've been saying for 10 months which (<u>honest to god is the truth</u>) I would have been in the dock for murder Nicky. So I've lied to the police just so I could have got out of that fucking police station Nicola I was scared to death."

3.4 On 25 September 1989, after he had been seen on a number of occasions by DI Mouncher, Ian Massey provided a witness statement. Two years previously, in November 1987, Massey had been sentenced to 14 years' imprisonment for armed robbery and in December 1988 he was in the same wing of HMP Cardiff as Paris who in custody on remand awaiting trial. Massey's account was that Paris had confided to him that he, Paris, together with his four co-defendants, had murdered White and that Vilday and Psaila had been forced to cut White's body. Massey became a prosecution witness. He was later to become the sixth civilian prosecution witness in these proceedings to be charged with perjury.

3.5 On 3 October 1989, the trial of the five defendants commenced before Mr Justice McNeill. Despite some flaws in the rationale of the case against them (it was, for example, very much contrary to Miller's financial interests visibly to injure White, let alone murder her), the prosecution case was that White had left Miller on or after 9 February 1988 as the result of an argument. Miller had no income of his own and he relied on White's earnings to finance his drug habit. The loss of White's earnings made Miller angry and he became desperate to find her. He located the flat in James Street through Vilday and went to the flat in the early hours of the Sunday morning with the four other accused to teach her a lesson. The plan to punish her and make her return home went too far and after White had been murdered there was a pact of silence between those who had been present. The principal evidence for the prosecution was from three sources: first, the testimony of the Core Four which put the five defendants at the scene participating in the murder; second, the confession of Stephen Miller; and third, a small group of witnesses (including Ian Massey, Jayne Sandrone and Jackie Harris) who gave evidence that certain individual members of the Cardiff Five

made confessions. Miller's confession, unlike the others to civilians, had been recorded on tape and although in law it was evidence against him alone, it is unrealistic to suggest that if accepted as true, it would not have had a wider impact on the jury's approach to Miller's co-defendants. Because the confession had been taped, there was never any doubt, of course, that Miller had spoken the highly incriminating words; the issue for the jury was whether the confession was true.

3.6 The defences to this allegation varied in detail, especially the alibis, but each defence was identical on these two essential points: first, not one of the defendants had anything to do with the murder of White and second, not one of the defendants was present at or near to the scene when she was murdered. Their joint case in respect of the principal prosecution witnesses, the Core Four and the other "confession" witnesses, is that they were lying and were saying what police officers had directed them to say, in other words, a police driven conspiracy to fabricate and manipulate the evidence.

3.7 In the circumstances of Lynette White's murder, any evidence which put a defendant at the scene at the time she was killed, would have presented a formidable case to answer but it is worthy of note that in stark contrast to the eyewitness testimony, there was no scientific evidence which did so. None of the defendants had type AB blood and, therefore, the foreign blood could not have come from them. Nor was any of White's blood or the foreign blood found on any of their clothes or property. There was no link between the scene and the defendants by way of fingerprints, blood, fibres or any other scientific evidence. The lack of fingerprint evidence, in particular, was significant because none of the witnesses who put the defendants at the scene had ever suggested they had worn gloves.

3.8 The prosecution presented a positive case that notwithstanding the presence of the male Y chromosome, the foreign blood was Psaila's. This will be discussed in more detail below, but it was based on a controversial analysis of the scientific evidence.

3.9 As a tragic example of how little has ever been straightforward in this series of events, on 26 February 1990, just before Mr Justice McNeill was due to start his summing up, he died and the jury had to be discharged and a second trial had to be held in front of another judge. A draft of the summing up which Mr Justice McNeill had intended to deliver reveals his assessment of the evidence:

> "There is a suggestion that the evidence against each of the five defendants has been made up … there is not a shred of evidence that it happened."

3.10 The second trial started on 14 May 1990 before Mr Justice Leonard. Atkins had been a very poor witness at the first trial, he had a tendency to agree to any account put to him, and for this second trial he was abandoned by the prosecution. This perhaps was inevitable after Atkins' concept of the truth as revealed at paragraph 2.20 above; he was a fantasist. Defence counsel, however, wanted to cross examine Atkins and at their request, the judge took the unusual course of calling Atkins thereby enabling both sides to cross-examine him. Atkins' performance was again lamentable and the judge directed the jury to disregard his evidence. Furthermore, the judge indicated to the jury, and the prosecution agreed, that Vilday and Psaila had lied and contradicted themselves so often that they should be regarded as "discredited witnesses".

3.11 Massey had been called in the first trial to give evidence of Paris's "cell confession" and was also called in the second trial notwithstanding a letter dated 21 March 1990 from the

Assistant Chief Constable of West Yorkshire to DI Mouncher indicating that the evidence Massey was due to give "should be viewed with great caution". Massey had given evidence in an unconnected series of trials and the convictions obtained from them were later quashed by the Court of Appeal. There was some evidence to suggest that Massey had incited witnesses to give false evidence in those trials. The letter concluded, "Suffice it to say that Massey's credibility as a witness is now even more suspect than it was in October 1989". I have not been able to determine whether or not this letter, or at least the information on which it was based, was disclosed to the defence before the second trial. Whether disclosed or not, this letter obviously casts doubt on the decision to call Massey as a witness of truth in the second trial.

3.12 As for Vilday's letter to Haysham, this was disclosed and in both trials Vilday accepted that she had written the letter but claimed that its contents were not true.

3.13 In the course of her evidence at the second trial, Psaila admitted lying at the committal proceedings and she also admitted that when at the police station making her various statements she had said what she believed the police had wanted her to say in order to avoid being charged with murder.

3.14 The second trial lasted just over six months and concluded on 22 November 1990: Miller, Abdullahi and Paris were convicted of murder and the two Acties were acquitted. Numbers now depleted, Miller, Abdullahi and Paris became known as the "Cardiff Three".

3.15 Those verdicts were returned not only without any scientific evidence linking the convicted men to the crime but without any satisfactory evidence as to the identity of the male donor of the foreign blood on White's clothing – a man who on any view was very likely to have been involved in the murder yet whose identity remained unknown and whose presence at the scene was unexplained.

4. The Cardiff Three

4.1 Just as Lynette White's murder had attracted considerable nationwide attention, so did the convictions of the Cardiff Three. Concern was soon expressed as to the correctness of the convictions and the three men appealed. There was growing media interest and in February 1992, a BBC television documentary presented by Panorama suggested that there had been a miscarriage of justice and questioned the objectivity of the police investigation and the credibility of the prosecution witnesses.

4.2 One obvious inference from the verdicts was that the jury could not have relied upon the uncorroborated evidence of Vilday and Psaila because they had testified that all five defendants had stabbed White. That meant that Miller's confession, in which he had implicated both Abdullahi and Paris, is likely to have had a significant (though impermissible) influence on the jury.

4.3 For the purposes of the appeal, and for what limited value it may have in the circumstances, two prosecution witnesses, Jayne Sandrone and Jackie Harris (Abdullahi's partner), made affidavits retracting the evidence they had given and in the case of Harris, blamed the police for supplying her with the false account she had given (on 8 December 1988, for example, Harris had signed a witness statement in which she had been recorded as saying that Abdullahi had confessed to the murder of Lynette White). Other prosecution witnesses also made affidavits retracting the evidence they had given and alleging malpractice against the investigating police officers.

4.4 The appeal was heard in December 1992 before the then Lord Chief Justice, Lord Taylor, Mr Justice Popplewell and Mr Justice Laws. The Court of Appeal was plainly not impressed with the quality of the eye witness evidence, in particular, that of Vilday and Psaila and the court then moved on to consider Miller's confession.

4.5 Miller had been in police custody for five days and was interviewed over some 13 hours. The interviews were recorded on 19 tapes and Miller's solicitor was present from tape 3 onwards. On tapes 1 to 7, Miller strenuously denied being present at the scene. On tapes 8 and 9, when a second team of police officers interviewed Miller, he began to accept presence at the scene and thereafter he said that Paris had stabbed White, tape 18, and later that he (Miller) had stabbed White, tape 19. The main ground of appeal was that the interviews were oppressive under section 76(2) of the Police and Criminal Evidence Act 1984 (PACE) and that accordingly, the whole course of questioning was such as to render the confession unreliable and, therefore, inadmissible.

4.6 It is rare indeed for the Court of Appeal to be as condemnatory of police conduct as it was in this appeal, as the following extract from the judgment of Lord Taylor demonstrates:

> "We are bound to say that on hearing tape 7, each member of this Court was horrified. Miller was bullied and hectored. The officers, particularly Detective Constable Greenwood, were not questioning him so much as shouting at him what they wanted him to say. Short of physical violence, it is hard to conceive of a more hostile and intimidating approach by officers to a suspect. It is impossible to convey on the printed page the pace, force and menace of the officer's delivery, but a short passage may give something of the flavour:
>
> Stephen Wayne Miller: "I wasn't there."

D. C. Greenwood: "How you can ever …?"

Stephen Wayne Miller: "I wasn't there."

D. C. Greenwood: "How you … I just don't know how you can sit there, I …"

Stephen Wayne Miller: "I wasn't …"

D. C. Greenwood: "Really don't."

Stephen Wayne Miller: "I was not there, I was not there."

D. C. Greenwood: "Seeing that girl, your girlfriend, in that room that night like she was. I just don't know how you can sit there and say it."

Stephen Wayne Miller: "I wasn't there."

D. C. Greenwood: "You were there that night."

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "Together with all the others, you were there that night."

Stephen Wayne Miller: "I was not there. I'll tell you already …"

D. C. Greenwood: "And you sit there and say that."

Stephen Wayne Miller: "They can lock me up for 50 billion years, I said I was not there."

D. C. Greenwood: "'Cause you don't wanna be there."

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "You don't wanna be there because if …"

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "As soon as you say that you're there you know you're involved."

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "You know you were involved in it."

Stephen Wayne Miller: "I was not involved and I wasn't there."

D. C. Greenwood: "Yes you were there."

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "You were there, that's why Leanne is come up now …"

Stephen Wayne Miller: "No."

D. C. Greenwood: "'Cause her conscience is …"

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "She can't sleep at night …"

Stephen Wayne Miller: "No. I was not there."

D. C. Greenwood: "To say you were there that night …"

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "Looking over her body seeing what she was like …"

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "With her head like she had and you have got the audacity to sit there and say nothing at all about it."

Stephen Wayne Miller: "I was not there."

D. C. Greenwood: "You know damn well you were there."

Stephen Wayne Miller: "I was not there."

and so on for many pages.

We have no doubt that this was oppression within the meaning of section 76(2).

Mr. Elfer [prosecuting counsel] submits that Miller stood his ground and made no admission in that interview despite what he concedes was bad behaviour by the officers. Moreover, his solicitor was present to look after his interests. In our view, although we do not know what instructions he had, the solicitor appears to have been gravely at fault for sitting passively through this travesty of an interview. We are told he was called to give evidence at the first trial but not the second, and he agreed in evidence, having heard the tapes played, that he ought to have intervened.

As to Miller standing his ground, it is significant that in the very next interview (tape 8) within an hour after the bullying, he was persuaded by insidious questioning to concede that under the effects of drugs, it was possible he was there and did not remember it clearly. Thus at tape 8, page 32, he said:

"I am just … I am just certain that I wasn't there that's all, I am, I am certain I wasn't there but it could … it could happen, it could have happened."

Once he opened that chink, the officers kept up the questioning to open it further. Of course, it is perfectly legitimate for officers to pursue their interrogation of a suspect with a view to eliciting his account or gaining admissions. They are not required to give up after the first denial or even after a number of denials. But here, after the oppression in tape 7, Mr. Mansfield (counsel for Miller) complains that the other officers were also guilty of a less blatant form of oppression. They made it clear to Miller on many occasions that they would go on questioning him until they "got it right." By that they clearly meant, until Miller agreed with the version they were putting.

Mr. Mansfield submits that additional pressure was applied by telling the appellant he was talking drivel and rubbish and telling him his alibi was blown away. The alibi had never been totally water-tight, but so far as it went, it was not, on the police information, blown away. The prosecution's version of events was said to be supported by a number of witnesses, which it was not. Vilday's account was put again and again as being wholly reliable. Miller was threatened with the prospect of a life sentence more than once. Much of the interviewing was taken up, not with questions put to the appellant but with the officers putting detailed descriptions of what they believed had happened and what role Miller may have played. Thus, they persistently suggested he was "stoned" due to the effects of cocaine so as to persuade him that he might have been present even though he had no clear recollection of it. Having gained admissions by this approach, the officers then insisted that the appellant must know and tell them every detail of what occurred at the scene, e.g. which way Lynette fell, where the body was in the room, who came in, at what stage and so on. It is submitted that Miller was in effect brain-washed over these 13 hours into repeating back to the officers facts they had asserted many times to him.

It is clear on listening to the tapes that for extended periods, Miller was crying and sobbing, yet he was not given any respite. It is true that after some of the interviews concluded, he was asked if he wanted a break and he expressed willingness to continue. The context was that he was being led to believe the officers were seeking to eliminate him from participation in the attack and he wanted to get to the end of the questioning.

The solicitor in attendance did intervene during the last tape (tape 19, p. 15). He said he had asked to be allowed to take instructions from Miller between tapes 18 and 19, since fresh matters had been raised. Presumably, the fresh matters were the officers' ultimate assertions that Miller had not only been present but had himself stabbed the deceased. The solicitor's request had not been met and he renewed it. The officers fobbed him off by refusing to interrupt the interview but promising to inform the custody officer of his request. They never did.

Having considered the tenor and length of these interviews taken as a whole we are of opinion that they would have been oppressive and confessions obtained in consequence of them would have been unreliable, even with a suspect of normal mental capacity. In fact, there was evidence on the *voir dire* from Dr. Gudjonsson, called on behalf of Miller, that he was on the borderline of mental handicap with an IQ of 75, a mental age of 11 and a reading age of eight.

It is fair to the learned judge to say that, although he was invited to listen to part of tape 7, it was played only up to page 17 of the transcript. The bullying and shouting was from page 20 onwards. Why the most important part was not played to the learned judge has not been explained to us. Had he heard the rest of it, as we did, we do not believe he would have ruled as he did.

In the upshot, it is sufficient to say that in our judgment the Crown did not and could not discharge the burden upon them to prove beyond reasonable doubt that the confessions were not obtained by oppression or by interviews which were likely to render them unreliable. Accordingly, in our view these interviews ought not to have been admitted in evidence."

4.7 What some police interviews must have been like *before* tape recording became mandatory under PACE remains a matter for both speculation and concern.

4.8 On 10 December 1992, Miller's appeal was allowed and his conviction quashed. The Court of Appeal also had to consider the convictions of Abdullahi and Paris. The Court could have held that those convictions could stand because Miller's confession in law was not admissible against Abdullahi and Paris, but that was a legal fiction the court was not prepared to uphold. Lord Taylor put it in this way:

> "… whilst a defendant may have to accept the admission of evidence relevant only to another accused where they are jointly tried, he should not have to suffer the admission of prejudicial evidence in the trial which is not admissible against any one."

4.9 The appeals of both Abdullahi and Paris were also allowed and their convictions were quashed. Lord Taylor said that the circumstances resulted from a combination of "human errors" some of which established that:

> "… the police officers adopted techniques of interrogation which were wholly contrary to the spirit and in many instances the letter of the codes laid down under the Act. In our view, those responsible for police training and discipline must take all necessary steps to see that guidelines are followed."

5. The Aftermath

5.1 The quashing of a conviction is not a judicial declaration of the innocence of the successful appellant. Immediately afterwards, SWP announced that the investigation into Lynette White's murder was not going to be reopened, rudimentary code which possibly betrayed a belief by SWP that the Cardiff Five, or at least the Cardiff Three, were responsible for White's death. In 1997, Satish Sekar published "Fitted In: The Cardiff Three and the Lynette White Inquiry" which postulated that the Cardiff Three were the victims of a miscarriage of justice brought about by police officers who, believing in their guilt, fashioned the evidence they obtained to "fit in" with that belief. In June 1999, after an interval of some six and a half years following the successful appeals, SWP commissioned a review of the original murder investigation. There were two significant aspects to this review, the first involved two retired Lancashire Constabulary senior detectives, William Hacking and John Thornley, who were instructed to examine all elements of the original investigation. The second involved an evaluation of all of the work previously conducted by the Forensic Science Service (FSS) during the original investigation. This scientific appraisal was led by Dr Angela Gallop.

5.2 Hacking and Thornley reported their findings in May 2000. The Hacking and Thornley report is an exceptional piece of work and a great debt is owed to both men for their contribution to what followed. If the rigour, logic, fairness and investigatory zeal displayed by Hacking and Thornley in the preparation of their report had been applied to the original murder investigation, I have no doubt that the outcome would have been very different and that this inquiry, and those which have preceded it, would not have been necessary.

5.3 For the purposes of this investigation, there are four key aspects of the Hacking and Thornley report. First, from discussions which Hacking and Thornley had with a number of the original investigating police officers, it is clear that those officers believed at the time of the investigation, and post appeal still did believe, that the five men charged with murder were guilty. That explains not only a lack of objectivity but perhaps much more in respect of what else might have happened. Second, the report is highly critical of parts of the original murder investigation. Third, it recommended lines of inquiry to identify the murderer or murderers. Fourth, and most importantly, it raised considerable concerns as to the integrity of the original investigation, especially its treatment of witnesses and the manner in which evidence emerged.

5.4 The criticisms were wide ranging and included the following:

- The exhibits officer had had no training in that role and had not been an exhibits officer before.
- Notwithstanding the doubts raised about Vilday's candour on 14 February 1988, and White's connection to the premises, 19 St. Clair Court had not then been searched.
- Grommek's flat at Flat 2, 7 James Street was not searched.
- Disproportionate time and energy was spent attempting to identify the "strange" white man who was seen outside 7, James Street at 3.05pm on 14 February 1988 and who appeared to have blood on his hand. Furthermore, it had been too readily accepted

that the blood on this man's hand must have been White's. This had had a damaging effect on other lines of inquiry.

- Although it was accepted that the police officers had undertaken a huge amount of work and were commended for their industry, the available resources had been inefficiently deployed and a great deal of time and effort had been expended on what appeared to be extensive but low level inquiries.

- The priority that was given to fingerprint examination was to the detriment of the blood examination. Insufficient emphasis was placed on the importance of bloodstains and a particular worry was that whenever Ninhydrin, the chemical used to reveal fingerprints, comes into contact with blood, that blood thereafter cannot be subject to meaningful analysis. This lack of emphasis is illustrated by the fact that the review team working together with Dr Gallop (see below) discovered further and important evidence of blood distribution of which the original investigators had been unaware.

5.5 In their 477 page report, Hacking and Thornley made 107 recommendations.

5.6 As to future lines of inquiry, Hacking and Thornley made a number of suggestions, one of which stressed the importance of the foreign bloodstains and the need to exhaust all scientific analytical possibilities, in particular, the latest form of DNA profiling (Recommendation 11).

5.7 But it was the disquiet that Hacking and Thornley had as to the integrity of the original investigation that stands out in their report. At paragraphs 13.2.1 and 13.2.2:

> "The fact that so many witnesses did change their statements to the detriment of the defendants, together with other matters, does raise the question of the integrity and objectivity of the investigation. Particularly when some of those witnesses have said in affidavits and in evidence that they were under pressure from police officers investigating the case. The question of the objectivity and integrity of some of the investigators during the second phase of the investigation has been raised during the course of the review by lawyers and by three of the defendants who insist that they were "fitted up" by the police. The integrity issue has also been raised, perhaps indirectly, in books and television programmes in connection with this case.
>
> Vilday and Psaila, two of the major witnesses in the case, have stated, either verbally or in documentary form, that they lied to assist the police case."

5.8 And at 13.2.5:

> "It is the view of the Review Team that there is sufficient concern and evidence available to warrant a criminal investigation."

5.9 Recommendation 81:

> "It is recommended that a criminal investigation is instigated into areas of concern in an effort to ascertain if any criminal offences have been committed. Particular emphasis should be placed on the possible offences of perjury and/or conspiracy to pervert the course of justice."

5.10 Linked to the above was Recommendation 82:

> "It is recommended that Vilday, Psaila, Grommek and Atkins be investigated as possible suspects by the continued investigation team. There is a need to carefully co-ordinate this part of the investigation with the criminal investigation into areas of concern."

5.11 Dr Gallop's scientific review was conducted together with Andrew McDonald, a specialist in DNA techniques. This review revealed further staining from the foreign blood, the nature and distribution of which indicated that it was intimately connected to the murder and, therefore, to the murderer.

6. The Murderer Identified: LW2

6.1 Following the recommendations of Hacking and Thornley, on 23 August 2000 SWP launched a second criminal investigation to identify White's murderer. The investigation was named "Operation Mistral" and was also known as Lynette White 2 or LW2.

6.2 At the forefront of this second investigation was the foreign blood and the further examination which revealed that it was widely distributed on surfaces relevant to the murder to the extent that it reflected all the main activities in which Lynette White's killer must have been engaged. These included the following locations of foreign blood which were consistent with the following acts:

- On the right cuffs of White's jacket and sweatshirt – compatible with the murderer pulling her jacket off one arm and around her body.
- On the leg bottoms of White's jeans – conceivably from dragging her body the short distance from the bed to where it was found.
- On items or surfaces around White's body including a cellophane wrapper, skirting board and cardboard box – possibly from repeated blows with a knife delivered with a bleeding hand.
- On swabs taken of various points along what must have been the exit route including the inside of the front door – which could have resulted from the killer blundering along the passageway in the dark (the flat did not have electricity) and fumbling to open the front door after the attack.

6.3 There was no scientific evidence of anyone else having been at the scene at the time of the murder. Dr Gallop emphasised the very large number of items belonging to the Cardiff Five which the police had seized for scientific examination: 26 from Miller, 32 from Ronald Actie, 54 from John Actie, 214 from Abdullahi and 236 from Paris. Entire wardrobes full of clothing yet none contained any trace of White's blood or of the foreign blood.

6.4 There was very limited foreign blood left to be analysed and police officers then had difficult decisions to make in such circumstances: too many tests and the risk is run that there will no blood left to analyse if and when scientific techniques improve. The investigating police officers were well aware of those risks and acted cautiously, though no doubt too slowly for some.

6.5 Eventually, through the use of methods not available at the time of the original investigation, a DNA profile was obtained for the foreign blood. That profile was not on the National DNA Database.

6.6 Between 2001 and 2002 the original defendants and the Core Four volunteered samples from which their respective DNA profiles were prepared and not one of them matched the DNA profile from the foreign blood or from anything else at the scene. There was, therefore, no scientific evidence to connect either group to the murder.

6.7 Through a painstaking process of elimination, employing a relatively recent "familial search" of the National DNA Database, it was discovered that the DNA profile from the foreign blood was similar to that of a 14-year-old boy whose profile was on the Database. The similarity

was such that the profile from the foreign blood was likely to have been that of a close male relative. Jeffrey Gafoor is the boy's uncle and he became a potential suspect. Gafoor was seen by police officers on 27 February 2003 and on request provided a sample for DNA profiling. Gafoor told the officers:

> "I knew Lynette. I have had sex with her … A week before she was murdered … In the flat … the one in which she was murdered."

6.8 It was as if Gafoor knew or at least suspected that his DNA had been found in the flat and was advancing a pre-emptive defence in the event of a match. Gafoor also added:

> "I thought you had the people for this?"

6.9 There was a degree of confidence that the murderer might have been found and whilst the DNA results were awaited, police officers kept observation on Gafoor. The next day he was seen buying a large quantity of paracetamol and he was followed back to his home. It was suspected that Gafoor might attempt to commit suicide and police officers forced an entry to his home and discovered that he had taken an overdose of paracetamol. Gafoor was arrested and on the way to hospital, he confessed to White's murder:

> "Just for the record, I did kill Lynette White. I've been waiting for this for 15 years. Whatever happens to me I deserve … I sincerely hope that I die."

6.10 Later in the treatment room at hospital, Gafoor volunteered to a nurse:

> "The reason they're concerned is because I killed someone 15 years ago and they want me alive to go and stand trial."

6.11 On 4 March 2003, Gafoor was released from hospital and was interviewed over the following two days. He declined the offer of legal representation and answered questions about his background, accepting that he was an introvert and that he had not seen his family for nine years, but he elected not to answer questions about the circumstances in which Lynette White died. He was charged with murder and remanded in custody. Gafoor later instructed two lawyers to represent him who happened to have been involved in the original murder trials: Gafoor's solicitor was Bernard de Maid, who had represented Yusef Abdullahi, and his leading counsel was John Charles Rees QC, who had represented John Actie.

6.12 At Cardiff Crown Court on 4 July 2003, Gafoor pleaded guilty to the murder of White and was sentenced to life imprisonment by Mr Justice Royce.

6.13 In mitigation, Rees QC made it clear that Gafoor accepted full responsibility for the killing of Lynette White and that no one else had been involved. Rees QC said that on the night of 13/14 February 1988, Gafoor had gone to the Docks to find a prostitute and having met White, had gone back to White's flat where he paid her £30. Gafoor then changed his mind, did not want sex and asked for his money back. When White refused to return his money, he took out a knife that he was carrying in an attempt to intimidate White and when that failed, White tried to take the knife from him. There was a struggle, and he stabbed her with the knife. In the frenzied attack that followed, Gafoor accepted that he had caused the injuries depicted in the post mortem photographs. Gafoor was aged 22 years at the time of the murder and was then living in Cardiff in Malefant Street above his

sister and brother-in-law's shop where he also worked. Malefant Street is in Roath, a suburb of Cardiff, about three miles from Butetown. Afterwards, Gafoor moved outside Cardiff and became a recluse. Rees QC said that Gafoor had acted alone:

> "… he is very sorry for the five men who were falsely accused of her murder, who stood trial and were incarcerated for a long period of time, some for up to four years in prison … although two of them were acquitted at the end of the trial and three were acquitted by the Court of Appeal some two years later, those men have been stigmatised ever since. I want to say on Mr Gafoor's instructions that they had absolutely nothing to do with the killing of Lynette White ... He didn't know the five men at all and had no connection with them."

6.14 Mr Justice Royce subsequently set the minimum term at 12 years and 8 months. The fact that Gafoor had allowed "innocent men to be arrested, to stand their trial and be convicted of a murder he knew he had committed" was regarded by the sentencing judge as a significant aggravating factor.

6.15 As a further indication that little in this narrative is straightforward, it later transpired that Gafoor's plea of guilty was contrary to the advice of his counsel, John Charles Rees QC, who had wanted further time to examine whether or not one or both of the partial defences to murder, namely provocation or diminished responsibility, might be available. Rees QC gave evidence at the trial of Mouncher and others and said that Gafoor had given a number of conflicting accounts which included one that suggested that others might have stabbed White after he had attacked her "to make themselves look bigger over the people they were with". At times Gafoor had said there were people on the stairs above him (Grommek lived on the floor above) when he left the flat and that there was also a group outside. Gafoor had also said that he could only remember stabbing White 12 times. Notwithstanding these various accounts, Rees QC made it clear that the mitigation delivered on 4 July 2003 was based on Gafoor's then instructions and that Gafoor had admitted that no one else had been involved and that he had caused all of White's injuries including the severe wound to her throat.

6.16 Nine months later, on 24 March 2004, Gafoor (it has been said reluctantly) signed a witness statement in which he reiterated the factual basis on which he had pleaded guilty and emphasised that he was the sole person responsible for Lynette White's murder and that no one else had been involved before, during or afterwards. He confirmed that his wrists and knuckles had been cut during the struggle for the knife, thereby explaining how his blood had been found at the scene, and he also made clear that he could not recall seeing anyone else at the flat either on arrival or departure.

6.17 Importantly, there has never been any evidence that Gafoor knew either the five original defendants or the Core Four, let alone that he associated with any one of them. There were two rather tenuous family connections: first, Gafoor had a cousin, Tony Dickman (also known as Tony Gafoor), who was a good friend of Yusef Abdullahi and who knew at least one of the Acties, but Gafoor was not close to his cousin, they did not socialise, and as just stated, there was no evidence that Gafoor knew Abdullahi or the Acties, or had ever met them. Second, Gafoor's aunt, Marjan Gafoor, was Tony Dickman's mother. She was a prostitute and a regular at the North Star Club in Cardiff which was frequented by Stephen Miller and Lynette White. She had known White for many years. Gafoor was not close to his aunt, they met at family occasions only which were held about once or twice a year.

6.18 The investigation that had started in February 1988 without any evidence of the murderer's identity had been transformed. The evidence now confirmed the assumption which had been reasonably clear from the start, and which had been supported by the offender profile of Professor Canter, namely that White had been murdered by a lone client. But once it had been established that Gafoor was that client and had acted alone, two questions demanded to be answered: why had the Core Four made statements and given evidence that the original five defendants were guilty of the murder and how had a case been assembled against those five men which had been so compelling as to convict three of them? The murder investigation of 1988 and 1989 could now be seen through very different eyes and the recommendation of Hacking and Thornley that there should be a criminal investigation to ascertain if offences of perjury and/or conspiracy to pervert the course of justice had been committed was now capable of only one response.

7. Investigating the Investigators: LW3

7.1 On 7 July 2003, just three days after Gafoor had admitted his guilt, Sir Anthony Burden, the Chief Constable of South Wales Police, issued an apology for the wrongful conviction and imprisonment of Miller, Abdullahi and Paris. Much later, in April 2008, the then four remaining members of the Cardiff Five sued the Chief Constable of SWP for malicious prosecution and misfeasance in public office. The claim was settled and the men received substantial damages and letters of apology. On the day the 2003 apology was issued, SWP announced a criminal investigation: "To identify and investigate any criminal or disciplinary offences arising from the original investigation". SWP were to conduct the investigation and Detective Superintendent (later Detective Chief Superintendent) Christopher Coutts was appointed Senior Investigating Officer (SIO) to lead it and Detective Inspector (later Detective Chief Inspector) John Penhale was appointed the Deputy SIO. DCS Coutts remained on the investigation throughout and DCI Penhale was, at times, involved in other police work such as a secondment to the Home Office and being the SIO on other investigations. The fact that SWP was investigating itself will be considered later. This investigation became known as Lynette White 3 or LW3.

7.2 Due to the nature of the investigation it was subjected to a degree of supervision and scrutiny. It was initially referred to the Police Complaints Authority (PCA – the predecessor of the Independent Police Complaints Commission (IPCC)) but the PCA declined to supervise it. Subsequently, on 25 August 2004, after the IPCC had been created, the investigation was referred to the IPCC which accepted the referral and decided to supervise the investigation. Tom Davies, the IPCC Commissioner for Wales, supervised the investigation throughout its remaining seven years. Assistant Chief Constable Stephen Cahill (Deputy Chief Constable from 2005) had the ACPO oversight role from a very early stage until 1 December 2008, when he was succeeded by Colette Paul who was then Assistant Chief Constable. The investigation was also supervised through a Gold Group comprising Cahill (and later Paul), Coutts and Chief Superintendent Tim Jones, the head of the SWP Professional Standards Department (PSD) and additionally through an Independent Advisory Group (IAG). The IAG had previously been set up to advise LW2/Operation Mistral and DCS Coutts wisely decided to invite it to continue to have oversight of LW3. The IAG was chaired by Professor Margaret Griffiths. As part of the exercise of these various supervisory functions, frequent meetings with senior investigators were held. In addition, in 2004, three former police officers with Major Crime investigation backgrounds: Malcolm Ross, Dennis McGookin and Philip Pyke were approached by DCC Cahill and they were instructed to act as independent consultants to give advice on strategic and operational issues. There can be no doubt that in theory at least, LW3 had access to a significant degree of independent guidance and oversight.

7.3 The prosecution lawyers, appointed at different times, were the following: the team of counsel comprised Nicholas Dean QC, James Bennett and James Haskell. Haskell was disclosure counsel. The CPS lawyers specifically appointed to LW3, again at different times, were: Ian Thomas, Howard Cohen, Gaon Hart, Michael Jennings and Simon Clements.

7.4 On 1 September 2003, the original five defendants were designated as victims as were those individuals who had been arrested but not charged: Rashid Omar, Martin Tucker and Anthony Miller (the brother of Stephen Miller). On the same day the Core Four were

categorised as suspects. Keeping solely to civilians for the moment, subsequently Perriam and Massey were also designated as suspects.

7.5 The scale of this investigation was vast, it involved the unravelling of a complex murder investigation which had taken nearly three years and seen two trials which had been conducted over nearly 12 months; the subsequent appeal proceedings and the evidence obtained for them; and all that had happened in the ten and a half years following the appeal. At the outset, the investigation was divided into two offices, one at Rumney Police Station in Cardiff and the other at Tai Bach Police Station near Port Talbot. Due to the scale of LW3, a Major Incident Room (MIR) was necessary and in December 2007 one was established at RAF St. Athan. As its name implies, this was on a secure military base and the police officers thereafter became isolated from the general police community and this carried both advantages and disadvantages. It was plainly an advantage to the investigation because SWP was looking into SWP and, therefore, isolation was to the benefit of all concerned. But isolation to this extent and over such a long period of time can be harmful to the mind-set and morale of those involved and it certainly is not conducive to longevity of employment. As will be seen, there was, in particular, a very high turnover of disclosure officers.

7.6 The investigation was divided into two essential, though linked, parts: first did the Core Four commit perjury and second, if they did, was that of their own choosing and direction or was it at the instigation and under the influence of police officers or anyone else?

7.7 As to the first part, the Core Four were arrested on 1 October 2003 and Vilday, Grommek and Atkins were interviewed under caution. Psaila was not interviewed because her solicitor suggested that she was not fit due to her poor mental health. The interview of Atkins was suspended after a short time because there was concern that he did not understand the caution. As for the remaining two, Vilday accepted that her witness statement of 11 December 1988 was "total rubbish" and that she had given perjured evidence on each of the three occasions she had taken the oath. Grommek also admitted making false witness statements and giving perjured evidence. Psaila was eventually interviewed on 12 January 2004 and she too admitted signing false witness statements and committing perjury. Vilday, Grommek and Psaila said that police officers had subjected them to extreme pressure to persuade them to comply with the police version of events. Both Vilday and Psaila said that they had been threatened that they would be charged with White's murder if they did not adopt the police script. Grommek said that he had been threatened with imprisonment if he did not submit to the will of the police. Each was adamant that they had no material evidence to give as to the circumstances of Lynette White's murder because they had not been in the room at the time she had been killed. Atkins was further interviewed on three occasions in 2004 and on each occasion he made no comment. Prosecution lawyers eventually determined that there was sufficient evidence to prosecute each of the Core Four for perjury. Even though the Core Four would be indispensable witnesses in any subsequent prosecution of police officers, it was nonetheless decided that there could be no promises not to prosecute them in exchange for assistance and no special treatment; their crimes were too serious to be ignored. On 26 February 2007, the Core Four were charged with perjury. Vilday, Psaila and Grommek were indicted on three counts of perjury, one count for each occasion on which they had given evidence (the committal proceedings and the two Crown Court trials), and Atkins was indicted on two counts of perjury (the committal hearing and the second of the two Crown Court trials). Atkins was not charged in relation to his evidence at the first Crown Court trial because it was considered so vague

as not to amount to material evidence. Atkins and Psaila declined to engage in a section 73 sentence/handling agreement under The Serious Organised Crime and Police Act 2005 (SOCPA), Vilday and Grommek had been interviewed for the purpose of providing a section 73 SOCPA statement but neither in fact signed such a statement.

7.8 The case against the Core Four was very strong and was based on two main grounds: first, the Cardiff Five were innocent of White's murder and were not present at the murder scene, therefore, any evidence that directly implicated them must be false, and second, in the course of LW3, three of the Core Four had made clear admissions when interviewed under caution to having lied about the involvement and presence of the Cardiff Five.

7.9 Uncontested medical evidence proved that Atkins was unfit to plead and on 9 July 2008 a Director's Case Management Panel (DCMP) was convened and it agreed that it was not in the public interest to prosecute Atkins and on 11 July 2008, he was informed that the case against him would be discontinued. On 23 July 2008, the prosecution offered no evidence against Atkins. This decision was later to be the subject of some controversy.

7.10 On 7 October 2008, Vilday and Psaila each pleaded guilty to one count of perjury, the count which related to their evidence in the second trial of the original defendants (the trial which had led to the conviction of three of them), although they accepted that they had committed perjury on each of the other two occasions on which they had given evidence, and later, on 27 October 2008, during his trial, Grommek pleaded guilty to each of the three counts of perjury after a ruling that the defence of duress did not apply to his circumstances. On 19 December 2008, Vilday, Psaila and Grommek were sentenced to 18 months' imprisonment by Mr Justice Maddison. In opening the facts, the prosecution accepted that the three defendants had lied about the events of 14 February 1988 due to a combination of suggestion, persuasion and bullying from the original investigating police officers. In his sentencing remarks, Mr Justice Maddison summarised the case as follows:

> "… this is, in my view, about a bad a case of perjury as is likely to come before the court … It has been submitted on your behalves, it has been accepted by the prosecution and I, too, accept that you are to be sentenced on the basis that all three of you, vulnerable in different ways as you were, were seriously hounded, bullied, threatened, abused and manipulated by the police during a period of several months leading up to late 1988, as a result of which you felt compelled to agree to the false accounts that they were suggesting to you … it is on that factual basis that I will sentence you and, on that basis, the behaviour of the police was simply unacceptable in a civilised society and this feature of the case makes a very substantial difference to the sentence."

7.11 The prosecution team now had to decide whether any police officer from the original murder investigation should be prosecuted for perverting the course of justice or for a similar offence. Opening the case against Vilday, Psaila and Grommek on the basis that police officers had perverted the course of justice was a very different proposition to proving it. Mr Justice Maddison realistically had no option but to accept the case which had been presented to him by both sides and his sentencing remarks are not in any sense evidence, let alone proof, of their content.

7.12 The concerns which Hacking and Thornley had articulated were reinforced by the evidence obtained in the course of the LW3 investigation. Both logic and evidence dictated the following: Gafoor had murdered Lynette White on his own and the Cardiff Five had not been present when she was murdered. Therefore, the Core Four had lied about their own

presence and involvement and that of the Cardiff Five in the murder. This was established by a combination of factors:

- There was no scientific evidence to put the Cardiff Five at the murder scene.
- There was no scientific evidence to put the Core Four at the murder scene.
- There was scientific evidence to connect Gafoor to the murder and no one else.
- Gafoor had pleaded guilty to murder and was serving a sentence of imprisonment for life.
- When sentenced, Gafoor had accepted that he had been on his own when White was murdered and had not suggested that anyone else was involved.
- The motive alleged against the Cardiff Five for killing White had never stood up well to scrutiny. The suggested reason for the murder was both convoluted and irrational because, as already stated, it was positively against Miller's short term commercial interest visibly to harm White and to murder her would have been inimical to his long term financial wellbeing. Miller had been violent to White before but the level of violence that had killed her was in a different league and there has never been any sensible explanation as to why Miller would have felt it necessary to recruit four assistants, some of whom were not well known to him, to teach a lesson to the diminutive Lynette White. The motive for Gafoor killing White on his own, however, was straightforward and wholly credible.
- Three of the Core Four had pleaded guilty to perjury and were serving a sentence of imprisonment. It was safe to conclude that Atkins had also committed perjury.

7.13 The one critical fact of which neither police officers nor witnesses could have had any knowledge in 1988 and 1989 was that Gafoor had been responsible for Lynette White's death. If a fact is not known, of course, it cannot be introduced into the evidence through manipulated confessions or fabricated witness statements. The absence of any reference to Gafoor in any of the evidence gathered in those two years says much about the quality of that evidence and the manner in which it was obtained.

7.14 The next stage was to consider why the Core Four had lied. That four people should have given wholly fabricated but similar accounts of events that had never occurred can only have happened in one of two ways: either by collusion between them or by their being controlled and manipulated by others acting in a co-ordinated fashion. Coincidence, on the facts, can be excluded. Multiple false accounts, of course, only have a chance of appearing to be credible if they are at least reasonably consistent. The Core Four cannot have lied of their own volition in 1988 (and thereafter) to implicate the Cardiff Five because there was no rational motive for their so doing and they cannot have lied for personal gain because there was none sensibly to be had. It did not benefit them to volunteer a close association to a murder in which they had had no involvement and to which no evidence connected them. Furthermore, they cannot have lied to assist Gafoor because they did not know him and would have had no reason to protect him from prosecution after he had committed such a horrific crime. It is not unimportant that Vilday was a close friend of White and there was no evidence that Vilday had wished her harm or would have wanted to shield those who had caused her harm. There must have been another reason for their lies (and

the lies of others) which incriminated the Cardiff Five, and the LW3 investigators suggested that the reason must have been police malpractice, persuasion and pressure; in a word, corruption.

7.15 The investigation revealed evidence that tended to demonstrate that witnesses were being controlled when "interviewed" (none of which were tape recorded – then only interviews of suspects had to be recorded, interviews of significant witnesses were not recorded though today they are) and their witness statements manipulated not only to incriminate the Cardiff Five but also to meet the developing and changing evidential picture and so procure that essential element of consistency between them. The evidence obtained during LW3 was extensive but the following facts and examples give a good indication of the nature of the case which was being prepared and the manner in which it was alleged that evidence had been "moulded, manipulated, influenced and fabricated" as the indictment was later to allege (note the number of occasions on which the date 11 December 1988 occurs – that is the date on which the Cardiff Five were charged with Lynette White's murder):

- A "Book 59" (B59) was regularly used at police stations to record, amongst other events, the details of significant witnesses who were spoken to during this murder investigation, including the arrival and departure times of each witness. The B59s revealed that principal witnesses were in police stations for extraordinarily long periods of time, so long that the duration was consistent only with enforced confinement rather than with voluntary attendance. Two examples from the B59 for Butetown Police Station illustrate the point: first, during 10 and 11 December 1988, Psaila was a "voluntary attendee" for 12¾ hours between 10.15pm on the 10th and 11am on the 11th. Second, on 11 December 1988, Vilday was a "voluntary attendee" for over 17 hours, from 2.15am to 7.30 pm. During those 17 hours two witness statements totalling just eight pages were signed by Vilday. Such protracted periods of "voluntary attendance" are not normal, in my experience they are unprecedented, and raise considerable concerns as to the motive for such attendance and as to what in fact had occurred. Furthermore, on other occasions, the B59 recorded the arrival time of a witness but not the time of his or her departure.

- On 17 November 1988, Psaila is recorded as having said (for the first time) that Stephen Miller and other "Docks boys" had come to 19 St. Clair Court at about 2am on Sunday 14 February 1988 looking for White. She is then recorded as having said that Miller was aggressive and threatening and was with some young boys from the Docks. According to the written record of interview, she was specifically asked whether John Actie was with Miller and she replied, "No, it wasn't John Actie or Ronnie Actie. I know them. These were younger boys." She was then seen by DI Mouncher and later that same day, Psaila went on to name each of the Cardiff Five as having been present. On Day 11 of the Mouncher trial, 20 July 2011, at pages 134 and 155-156, Psaila gave the following evidence about her treatment at the police station:

  > "I'll tell you what happened. The police, wherever I was, they would come and collect me and they would take me to the police station. I didn't -- I never once, once went to the police station voluntary from wherever I was living or staying. I never once went to that station voluntary. I was always taken by the police and I mean taken. I had no choice. I had to go and it was not voluntary. I was always taken. I would like to make this plain to the court … They would come and collect me and say, "You have to come with us". They didn't tell me if I was under arrest

> or anything. I didn't know anything like that. They said to me, "You will have to come to the police station with us", and they would take me there, and I didn't feel, because I wasn't a streetwise person anyway -- I didn't feel as if I could argue with these -- with these men … The police wouldn't believe me. They would not -- they would not have it when I turned round and told them I was not there. They would not believe me, Mr Dean. As far as they were concerned I was there. You know, they were -- it was as if they were making a film and they were making – how can I put it to you -- it's like they -- somebody is making a film. They are making a story. They're putting people where they wanted them to be, because no matter how many times I told the police that I wasn't there, they were not going to listen to me. They did not want to listen … they didn't threaten me I don't think, but they were – it was their manner that was forceful. They would not believe what I said to them ... You know, they were shouting, pointing, pointing their finger at me, saying, "You were there. You know what happened to Lynette. You saw what happened to Lynette", and, you know, doing all this business and writing things down with a pen and paper. If they asked me a question, I would answer it, and then all of a sudden they would start shouting at me. They would not believe me when I told them I wasn't there that night. There was no way on God's earth they were going to believe me. They had it in their mind. They knew what they were doing, and they knew what they were saying to me, and they knew the story that they were making up, because no matter what I said to them they would not listen. They only wanted to listen to themselves. I don't know if you can understand what I'm trying to tell the court or the court can understand. It was as if they were making a film and putting people where they wanted them to go."

- On 17 November 1988, Psaila is recorded in writing as having said that outside 7 James Street, soon after she had heard screaming from that address, she saw a taxi driver, Jack Ellis, and his black and white taxi, a motor vehicle which she had earlier described as being a Ford Cortina or something similar. The record indicates that she was "positive" about her identification of Ellis. On 22 November 1988, Grommek is recorded as having mentioned a black taxi outside the premises. An example, it was suggested, of their accounts perhaps merging together. They were recorded as having been unequivocal in their claims. The potential problem for the investigating police officers was that Ellis was adamant that neither he nor his black and white taxi were in James Street at the relevant time. Even though Ellis was in a police station for over 10 hours, he was resolute about his not being present. It is of interest that notwithstanding the time that Ellis was at the police station, he was not asked to make a statement and there are no records of who saw him or what he had said. Ellis's refusal to conform to the preferred case was an inconvenience and to avoid the credibility of Grommek and especially Psaila being undermined, their accounts had to change. On 6 December 1988, a witness statement was signed by Psaila in which there was not only no mention of Ellis but the black taxi had become a "dark coloured Ford Cortina similar to those used by taxi firms". On the same day, Grommek signed a witness statement in which there was no reference to any car or taxi and Vilday also signed a witness statement in which there was a description of her hearing a scream and running to 7 James Street outside of which was parked "Ronnie Actie's green Cortina". The LW3 investigators suggested that for the purpose of consistency and in order to accommodate Ellis's refusal to cooperate, Ellis had to be air brushed out of the picture and his black taxi had to be transformed into another motor vehicle. As prosecuting counsel later submitted, "… the police were not uncovering evidence, they were manufacturing it". Ellis made

a witness statement to the LW3 police officers in which he said that he had been subjected to very hostile questioning in 1988. The interview that Ellis described was not dissimilar to that of Miller, the interview which had been so strongly condemned by the Court of Appeal. The difference being that as a suspect, Miller's interview had to be recorded on tape but as a mere witness, Ellis's interview did not. Ellis described the police conduct towards him in Docks Police Station in these terms:

> "… When they started the questioning it was just normal leading up to the fact that I couldn't tell them any more than what I already had. One of the officers then asked me why I liked working with the scum at the North Star. I told them it was just work and it didn't matter who I picked up, I'm a taxi driver. That's how it started and from then on it got nasty accusing me of pimping for the girls.
>
> After that they just started insinuations and asking questions from all angles in such a way that made you feel as though you wanted to say yes you done it. The trauma they caused me was something else, and as I said, I thought it only happened in American films and not British officers operating as policemen. The four of them were standing. Although they were not shouting as such, they were so close to me. I had one shouting in each ear and one behind me, one shouting in my face and it was very, very frightening. When they were doing this they were within a foot of me. However, I would not say that I was ever threatened nor did I hear any officers swear even during informal talk. Neither were there any movements or violent suggestions made towards me. They were just making out that I was bigger scum than they were. I can't remember making a statement on that day or writing anything or saying anything. The thing is the fact that I was so scared that it still frightens me now and I never want to experience anything like that again. They must have asked me fifty questions between them and I only answered two of them, because they never gave you the chance to answer or even think of an answer. They gave me a rough time but there were other distractions, such as hearing men crying in another room. As a result of this my mind just ran wild, it was frightening when interviewed … I was in fear, and believed they were trying to make me admit murdering Lynette White. They were trying to make out that I was such a fantastic friend of hers and I wanted her and because I couldn't, I therefore murdered her."

- On 16 November 1988, Perriam made a statement in which she was clear that Rashid Omar had been one of the four "coloured men" arguing outside 7 James Street at the relevant time. She added that Omar was known to her from her work at the Butetown Health Centre. The problem is similar to the one identified above concerning Ellis. On the strength of Perriam's statement, Omar was arrested on 7 December 1988 for White's murder. Omar vehemently denied any involvement in the murder or presence at or outside the scene. Perriam was the only witness who put Omar in James Street and for that reason it was suggested that the police officers must have thought it prudent to cause Perriam to change her account in order to protect her credibility. On 11 December 1988, Perriam was brought back to a police station and she made a statement which began with the words: "I have been asked about the identification that I made concerning Rashid Omar". She then withdrew her previous identification of Omar. On the same day, Omar was released without charge. What appears to have distinguished Omar's position to that of the four of the Cardiff Five who had denied presence at the scene, is that this part of Perriam's account was not corroborated

by the Core Four; it was safer, therefore, to dispense with it for the benefit of both Perriam and the Core Four.

- A similar issue of identity arose in relation to Martin Tucker. On 6 December 1988, Vilday mentioned for the first time that Martin Tucker had been at the door to Flat 1 at the time White had been murdered. Grommek also described Tucker as being outside 7 James Street. On the basis of those accounts, Tucker was arrested on 7 December 1988. Tucker robustly denied having anything to do with the murder and said that he had not even been at the scene. On 8 December 1988, Grommek made a further statement in which he qualified his identification of Tucker by saying that he did not know him at the time and only learnt that it was Tucker afterwards. On 11 December 1988, Vilday reversed her previous account and now said in a statement that she had not seen Tucker in the flat. On 11 December 1988, Tucker was released without charge. Another potential inconvenience had been removed.

- On 2 December 1988, Psaila had been the victim of an attack unconnected to these events. She reported the crime to the police and to assist that investigation a sample of her blood was taken. On 9 or 10 December 1988, the result of the analysis of that blood was made available to the police officers conducting the murder investigation and it revealed that Psaila was blood type AB. Notwithstanding the fact that one sample of the foreign type AB blood from the scene had the male Y chromosome together with the overwhelming likelihood that each sample of foreign blood had come from the same donor, scientists developed the contentious theory that the particular sample of foreign blood with the Y chromosome *could* be a mixture of Psaila's blood and that of a male. At one stage it was even suggested that this particular sample was a mixture of Psaila and Abdullahi's blood. The scientific evidence was so contentious that the scientist who had given this opinion, John Whiteside, was later interviewed under caution on suspicion of perverting the course of justice but was not charged. The LW3 police officers postulated that the original investigators must have believed that this was Psaila's blood (and perhaps had wanted to believe that this was Psaila's blood because if it was her blood it put her at the scene), and, therefore, its presence had to be explained. This presented another problem because by this stage, Psaila had not put herself inside the flat. On 11 December 1988, Psaila made a further statement and said for the first time that not only had Vilday entered the flat with her (inside of which were the Cardiff Five) but also that she, Psaila, had been punched twice causing her mouth to bleed and that afterwards, she had attempted to pull White off the bed. She then added that both she and Vilday had been forced to cut White's wrists in order to implicate them in the murder and thereby ensure their silence. They had both then left. Afterwards, and on the same day, Vilday also changed her account which was now in conformity with that of Psaila. A more dramatic change to Psaila's previous accounts (and those of Vilday) is difficult to imagine but it solved the potential problem in that it explained how "Psaila's blood" had come into contact with White's clothing. The officers who dealt with Psaila claimed that they had not told her that "her blood" had been found in the flat and that it was a coincidence that Psaila happened to explain how "her" blood had been found on White's body. As an indication of the mind-set of the original investigating police officers, on 5 April 1989 the Deputy SIO wrote a report on the evidence which stated that there was "no doubt" that the foreign blood was that of Psaila. The LW3 police officers, of course, could look at these events from a very different perspective: the foreign blood was Gafoor's not Psaila's and there had been nothing for Psaila to explain.

Psaila's sudden change of account says much more about the police officers who were managing her than it does about Psaila.

- There is a similar narrative concerning another one of the Core Four, namely Atkins. His fingerprints had been found inside the flat which cannot have come as a complete surprise because he had once lived there. But the LW3 police officers suggested that it must have been thought prudent to proceed on the basis that Atkins had been in the flat at the relevant time and on 22 November 1988, Atkins made a further statement in which his account again changed radically. Having previously maintained that he had seen nothing on the night of the murder, he now claimed that he had gone into the flat and had seen the body. His movements inside the flat explained the presence of some of his fingerprints though not all of them. It was suggested that this statement was the result of manipulation rather than the truth, born out of a belief that important and possibly inconvenient evidence had to be explained irrespective of the veracity of the explanation. On the day this further witness statement was made, Atkins had been at the police station for over 13 hours.

- Scientific evidence tended to support the allegation that statements had been moulded to the detriment of the Cardiff Five. Electro-static Detection Apparatus (ESDA) analysis of witness statements showed four significant occasions on which certain pages of the statements of Vilday, Psaila and Grommek had been destroyed and rewritten during the key November to December 1988 period. Two examples demonstrate the value of this evidence: first, page 7 of Psaila's statement of 6 December 1988 had originally contained two references to Jack Ellis, both references had been omitted when page 7 was rewritten and the second version described a car seen outside 7 James Street as "a dark coloured Ford Cortina similar to those used by taxi firms" rather than Ellis's black and white taxi which Psaila had previously described. Second, page 3 of Grommek's statement of 22 November 1988 had once contained the words, "I have s[ince] lea[rned] that two of the persons are ________ as Dullah and Ronnie Actie". That evidence may well have been insufficient to have proved in an admissible fashion that Abdullahi and Ronald Actie were at the scene through this witness because the identification was based on hearsay rather than direct knowledge. Those words had to be altered if this important evidence was going to place Abdullahi and Ronald Actie at the scene. That page was destroyed and its replacement read, "I know two of these persons to be Dullah and Ronnie Actie". The difficulty had been resolved. Whenever a witness changes an account, as witnesses sometimes do for entirely innocent and understandable reasons, there is never a justification for removing or destroying the earlier account. Properly to test evidence, a court must have available to it everything that a witness has said at each and every stage and nothing must be suppressed. The ESDA evidence added weight to the developing case that the original investigating police officers were manipulating the evidence to fit their theory and the emerging developments in the evidence.

7.16 I have concentrated so far solely on the case prepared and advanced by the prosecution and I must make it clear that it is no part of my task to make any pronouncement on the guilt or otherwise of the police officers who were charged; my interest is solely in how the prosecution and defence cases were structured and what happened within the criminal justice system. The prosecution case was logically sound, though as will become clear, there was a fierce dispute within the prosecution team as to whether or not there was sufficient evidence to charge any police officer or civilian. The concern was that no matter how

sound the case may superficially appear, it was of necessity based in very large part on the evidence of the Core Four and their credibility was clearly poor because their accounts had changed so often. To prove that the Cardiff Five were innocent, the prosecution also decided to call those who were still alive from that group: Ronald Actie had died on 27 September 2007 and Yusef Abdullahi had died on 20 January 2011. For the same purpose, it was also decided to call Gafoor. Both decisions had their patent shortcomings. The prosecution case had been formulated in such a way that those witnesses had become essential to its survival, yet the general credibility of each witness would be easy to undermine and the evidence from the original murder trial could again be deployed to show that the Cardiff Five were *or may* have been guilty. To have convicted the Cardiff Three, the jury had to have been *sure* of their guilt but due to the reversal of positions and the change in emphasis, if any jury deciding the guilt or innocence of the police officers concluded that the Cardiff Five or the Cardiff Three (or any other permutation) were or *may* have been guilty of Lynette White's murder, or were or may have been in the flat, then that would be a significant step in the direction of acquitting the police officers. By suggesting that the Cardiff Five were in fact, or may have been, guilty, the police officers were ensuring that any trial of them for conspiring to pervert the course of justice would be as close to a rerun of the original murder trial as they could make it. It follows, therefore, that any prosecution of the police officers would be far from straightforward.

7.17 The dispute as to whether there should be any further charges was finally resolved and on 2 March 2009, the charging decision was signed in favour of charging 13 serving or retired police officers from the original murder investigation and two civilians. The police officers were: Graham Mouncher, Richard Powell, Thomas Page, Michael Daniels, John Gillard, Paul Jennings, Paul Stephen, Peter Greenwood, John Seaford, Wayne Pugh, John Murray, Rachel O'Brien and Stephen Hicks. The two civilians were: Violet Perriam and Ian Massey. Subsequently, proceedings against O'Brien were dropped when on 15 April 2010, the Attorney General entered a *nolle prosequi* on account of her being too ill to stand trial.

7.18 The indictment contained seven counts. The principal count was Count 1, conspiracy to pervert the course of justice, and it was laid against each of the police officers. The particulars of offence were in these terms:

> "… between 14th day of February 1988 and 22nd day of November 1990 conspired together and with others to do acts tending and intended to pervert the course of public justice in that they agreed to mould, manipulate, influence and fabricate evidence relevant to the investigation of the murder of Lynette White and the alleged culpability and prosecution of John Actie, Ronnie Actie, Stephen Miller, Yusef Abdullahi and Anthony Paris."

7.19 There were a further six counts in the seven count indictment. Perriam, Massey and Mouncher each faced two counts of perjury relating to the evidence they had given in each of the two murder trials, one count per trial.

7.20 Perriam – Counts 2 and 6:

> "… wilfully made a statement material in that proceeding which she knew to be false namely that she witnessed events material to the charge, in particular the presence of John Actie and others at or near the scene of the murder in the early hours of 14th February 1988."

7.21 Massey – Counts 3 and 6:

> "… wilfully made a statement material in that proceeding which he knew to be false namely that the then defendant, Anthony Paris, had confessed to involvement in the murder of Lynette White and had made other incriminating remarks."

7.22 Mouncher – Counts 4 and 7:

> "… wilfully made a statement material in that proceeding which he knew to be false namely that a witness, one Ian Massey, with whom he, Graham Mouncher, had had discussions concerning the case and from whom he had taken a statement on 25 September 1989, had not, before giving evidence, raised or discussed with him the question of parole, and that he, Graham Mouncher, had not offered Massey the inducement of the promise of assistance with parole before he, Massey, gave evidence."

7.23 The first trial did not commence until 4 July 2011. There are a number of reasons why there was a delay of 28 months from the decision to charge to trial, one of them being the vast disclosure exercise which had to be completed by the prosecution before the trial could begin.

7.24 The trial was before Mr Justice Sweeney at Swansea Crown Court and to make the trial process more manageable, the indictment had been severed or split into two trials: of the 14 now remaining defendants, 10 were to be tried in the first trial and the remaining 4 in the second. Mouncher, Powell, Page, Daniels, Jennings, Stephen, Greenwood, Seaford, Perriam and Massey were the defendants in the first trial.

7.25 The defence to the count of conspiracy to pervert the course of justice was that not only had nothing been done to interfere with, let alone pervert, the course of justice, but that in fact, justice had been partially achieved at the second murder trial because the Cardiff Five had murdered Lynette White and the Core Four (and others) had given truthful evidence of the Cardiff Five's guilt. As already stated, the quashing of a conviction by the Court of Appeal is not in law proof of innocence. The defence point, in brief, was that the evidence given by the Core Four at the original murder trial about the room in which Lynette White's body was found, the position of the body and the persons present, contained so much detail that it must have been the truth because it could only have been provided by eye witnesses who had been at the scene. It was also suggested that Miller's taped confession was also true because it too contained details that could only have been known to someone who had been in the room when Lynette White had been murdered. This was especially the case because Miller's evidence was that he had never been to Flat 1, 7 James Street and could not, therefore, have described it in the detail he had done.

7.26 Save for the scientific evidence, the principal witnesses called by the prosecution were: Jeffrey Gafoor, Pamela Mathews, Angela Psaila, Jack Ellis, Paul Atkins, Mark Grommek, Leanne Vilday, Jackie Harris, Stephen Miller, John Actie and Anthony Paris.

7.27 The greatest inconvenience to the defence case was, of course, Gafoor. When Gafoor gave evidence, he was cross-examined in a variety of different ways that were mainly linked to the proposition that although he had stabbed White, he had not killed her, and that after he had left the flat, she had then been stabbed many more times by the Cardiff Five who had gone into the bedroom with some of the Core Four immediately after Gafoor had left. It was even suggested that Gafoor had been put under pressure to plead guilty to murder in order to assist the Cardiff Five. These various strands of cross-examination were

based on the different and sometimes conflicting accounts that Gafoor had given to his legal representatives after he had been charged (see: paragraph 6.15 above). Such previous inconsistent accounts would normally have been protected by legal professional privilege but they became available for use because a taxation note entitled "Assessment of Case" from Rees QC surprisingly came into the possession of the CPS. In the Assessment of Case, Rees QC explained why he had to spend so many hours working on the case and it is believed that prosecuting counsel made use of this document when he submitted his own claim for fees. When the Assessment of Case was discovered and its relevance appreciated, it was disclosed to the defence in the Mouncher prosecution. On 9 May 2011, Sweeney J ruled that because this document had come into the possession of the CPS, privilege had been "destroyed" in respect of not only the document but also Gafoor's underlying instructions set out in it. The following extracts from this document clearly illustrate the relevance of this otherwise unobtainable material:

> "Although he admitted killing Lynette White his admissions varied from time to time, his admissions were not consistent with the known facts (e.g. he was unable to say whether he killed her in the daytime or night time, he did not know whether he killed her in a house or a flat, he maintained he only stabbed her 10 times and so on), his account was sketchy with him maintaining he could not remember what had happened. At one stage he suggested that Lynette White attacked him with a knife raising the possibility of self-defence. Without any real reason being given for this killing possible provocation had to be considered. Knowing the evidence against the five men who originally stood trial the possibility of Gafoor acting under duress had to be considered.
>
> … His accounts of what happened varied. Until the last week before he pleaded guilty he suggested at one time that at the time of the killing there were people on the stairs outside the flat and when he left there were people outside the premises about to enter. He floated the idea that they may have entered and inflicted further stab wounds possibly killing Lynette White. However he refused to accept my advice to plead not guilty so that this account could be explored insisting that he had murdered her and stating that he could not remember the details."

7.28 Notwithstanding the many conflicting accounts Gafoor had given to his lawyers, the suggestion that the Cardiff Five and the Core Four happened to arrive at 7 James Street just as Gafoor was leaving and instead of caring for the (by then) gravely injured Lynette White, calling for an ambulance and seeking to restrain or arrest her blood stained attacker, proceeded instead, for no discernible reason, to inflict further and multiple stab wounds upon her was, to put it mildly, somewhat unrealistic. Not simply because of the remarkable coincidence that one homicidal assailant should quite inexplicably and independently be followed and substituted by another or others, but also because there was no rational explanation for the second attack. Furthermore, it was suggested to Vilday and Psaila that they had been in the bedroom of Flat 1, 7 James Street and that they had witnessed the Cardiff Five murder Lynette White. It is very difficult to reconcile that suggestion with the fact that they had both pleaded guilty to perjury for having given that very same evidence and as a consequence of their admitting perjury, had each served a sentence of 18 months' imprisonment.

7.29 The defence case had been rather modified by the time the first witness from the Cardiff Five, Stephen Miller, came to give evidence. After protracted cross-examination the suggestion eventually made was that Miller might have used Gafoor as a means of getting White into the room where he and the others could confront her. Such suggestion was not

easy to correlate with the primary facts. Why was there any need to use Gafoor? If Gafoor could locate White then so could Miller; Miller's knowledge of her habits, acquaintances and movements was far greater than that of Gafoor. Why would Miller have required four other men plus Gafoor to confront Lynette White? Why did Gafoor in these circumstances attack White so viciously with a knife? Why was he not stopped? Why were Gafoor's 12 or so stab wounds followed by a further 38 from another or others? If there had been no plan to murder White and all events in the room had been spontaneous, and White was still alive when Gafoor's involvement had been completed and he then left, why would Gafoor have pleaded guilty to murder with the mandatory life sentence that such a conviction attracts? This suggestion, incidentally, had not been put to Gafoor which implied that it was an afterthought. Miller was then cross-examined on the basis that Vilday might then coincidentally have entered the room and stumbled upon the murder scene. This suggestion also raises a number of questions, such as why, if that had been the simple truth, did Vilday not say so from the beginning? And why, as has already been suggested, did she subsequently plead guilty to perjury? Furthermore, as reliance was being placed on the truth of Miller's confession, why was that confession so at odds with the case now being put and the facts as then known?

7.30 The pathologist's evidence indicated that White had died at an early stage of the attack upon her and that a number of her wounds had been inflicted *post mortem*. That too was inconsistent with the case now being put, a case that of necessity had to include all the evidential developments since her death, principal amongst which was the knowledge of Gafoor – a man whose identity and involvement was unknown before 2003. The prosecution would no doubt have argued that Miller's confession and the evidence of the Core Four and others were palpably false because Gafoor never featured either in the confession or that other evidence. If evidence is being fabricated and manipulated this can only be done on the basis of the circumstances as then known. The sudden and wholly unexpected introduction of Gafoor in 2003, it was said, revealed all attempts in 1988 and 1989 to explain how Lynette White had died as being no more than fabrications because they had to be based on the woefully incomplete information then available.

7.31 There will be much more about disclosure and the collapse of the trial later in this report, but for the moment it is sufficient to state that disclosure became more and more of a battleground between the defence and the prosecution as the trial progressed. The defence persistently criticised the prosecution and questioned its ability to fulfil its disclosure obligations according to law, to such an extent that on 28 November 2011, before the case for the prosecution had closed, the trial judge, Mr Justice Sweeney, as a means of testing the competence of the disclosure system, ordered the prosecution to provide certain documents which police officers, through the use of an E-Catalogue, had identified as disclosable but which the prosecution lawyers had decided not to disclose. D7447 was the HOLMES reference number of one of a series of documents which came under the ambit of the order. D7447 was a copy of original documents which were still in the possession of the IPCC and it comprised four complaints which John Actie had made against SWP between 7 July 2005 and 10 March 2007. D7447 could not be found in its expected location at St. Athan. DS May remembered a conversation with DS Allen, in which DS Allen had said that he had shredded D7447 because it was not relevant to the investigation and that a similar copy document, D7448, (the original of this was still with the SWP Legal Services Department (PLSD) had been shredded on the order of DCS Coutts. During the evening of 28 November 2011, DCS Coutts spoke on the telephone to Dean QC and he denied ever having given an instruction to destroy any case material. Notwithstanding

DCS Coutts' denial, the prosecution proceeded on the basis that both D7447 and D7448 had been shredded (the latter on the instructions of Coutts) and concluded that there could no longer be any confidence in the disclosure process. On 1 December 2011 the prosecution stopped the case. Dean QC gave the following explanation:

> "It was and is clear to us that the apparently deliberate destruction of documents would inevitably be fatal to this case … The decision to dispose of documents was itself deliberate … The decision involved not only the Senior Investigating Officer but also the officer who was at the time the Lead Disclosure Officer … For those reasons the prosecution can no longer sustain a position maintaining that the court and the defendants can have the required confidence in in the disclosure process … In those circumstances I formally offer no further evidence and will invite my Lord to direct the jury to return not guilty verdicts."

7.32 After an investigation that had lasted over eight years and had cost the taxpayer many millions of pounds, the criminal process was at an end without any verdict from a jury. One week later, on 8 December 2011, the case against the remaining four defendants was also brought to an end in a similar fashion and not guilty verdicts were entered against their names as well.

7.33 The IPCC set up an independent investigation and the DPP invited Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) to look into the collapse of the trial.

7.34 The three surviving members of the Cardiff Five: Stephen Miller, Anthony Paris and John Actie, the "three claimants", wrote to the Home Secretary requesting a public inquiry under the Inquiries Act 2005. The request was declined.

7.35 St. Athan had been in lockdown from the moment the case collapsed. On 17 January 2012, DCS Coutts was due to retire and he was permitted supervised access to St. Athan to remove some personal property from his office. He was accompanied throughout by David Jenkins, a Senior Investigative Assistant from the SWP PSD. Coutts found D7447 and D7448 in his office in a box.

7.36 On 9 March 2012, the three claimants issued proceedings for a judicial review of the Home Secretary's decision not to establish a public inquiry. On 17 July 2012, Mr Justice Mitting refused permission. The application for a judicial review was subsequently renewed.

7.37 Following the renewed application for a judicial review, the Home Secretary was asked to reconsider her decision. On 16 September 2013, the Home Secretary informed the court of her decision not to hold a public inquiry.

7.38 On 10 and 11 February 2014, a preliminary hearing for the renewed application for a judicial review was held in Cardiff.

7.39 Again, as if to emphasise that nothing can ever be straightforward in this series of events, on 14 February 2014, 26 years to the day after Lynette White's murder, HM Chief Inspector of HMCPSI, Michael Fuller, received a telephone call from a "retired police officer", whose name has not been revealed, who informed him that 227 "unregistered" boxes of potentially relevant material to the LW3 investigation had been located at St. Athan which had never been subjected to the disclosure process. Fuller passed this information to the IPCC.

7.40 On 21 March 2014, the Home Secretary proposed a settlement to the three claimants of a QC led review rather than a public inquiry. That proposal was eventually accepted and on 2 March 2015 this inquiry, the Mouncher Investigation, commenced.

8. The Mouncher Investigation

8.1 I was appointed to investigate and to report in respect of that inquiry and throughout I have had the assistance of Patrick Hill. As already indicated, the ToR are at Appendix 3.

8.2 At an early stage I became aware that 15 claimants were in the process of suing the Chief Constable of SWP for claims of malicious prosecution, false imprisonment, misfeasance in public office and breach of the Article 8 right to respect for private and family life. 13 of those 15 claimants were the 13 serving or retired police officers who had been charged in LW3 and the remaining two, Adrian Morgan and Erica Coliandris, were police officers who had been arrested in the course of LW3 but had not been charged. This civil action can best be summarised from the opening submissions on behalf of eight of the claimants:

> "The Defendant's (SWP) officers embarked upon the investigation wrongly convinced of the guilt of these claimants. They proceeded on the questionable assumption that Gafoor was the only person involved in the murder of Lynette White and that five men, Stephen Miller, Yusef Abdullahi, Tony Paris, John Actie and Ronnie Actie, known as "the Original Defendants" were wholly innocent. In that way, ironically, they made the very errors they wrongly accused these Claimants of. This approach prevented a fair and impartial investigation, as any evidence or fact capable of undermining those fixed beliefs was ignored or treated as false … The Claimants denied any wrongdoing in the LW1 investigation. They maintained that there was a substantial body of evidence to implicate the original defendants. They believed that the Core Four had demonstrated awareness of the murder before the alleged conspiracy involving the Claimants began. There was also evidence that cast serious doubts on the theory that Gafoor had acted alone. His inability to provide a detailed account of what happened and in particular to account for the number of injuries or the fatal wounds to the throat was very unsatisfactory and a potentially unsafe account … It is maintained on behalf of the Claimants that from top down, that is at the level of DCS Coutts and DCI Penhale, there was a plan designed to ensure prosecution and conviction of the Claimants irrespective of the quality of evidence against them. They proceeded on the debatable assumption that the original defendants had no involvement whatsoever in the murder and that Gafoor had committed it alone. There was therefore a "mind-set of guilt" towards the Claimants from the outset and throughout which led to systemic failures and an inappropriately close relationship between the police and the original defendants and other witnesses."

8.3 In short, those who had been accused during the LW3 investigation of closing their minds to reality, of having too narrow a focus and of manipulating evidence were now facing their accusers and making the same or similar allegations against them. The civil trial had been set down to commence on 12 October 2015 and was due to last some 10 weeks before Mr Justice Wyn Williams at the Cardiff Civil Justice Centre. There were to be six separate legal teams comprising 13 counsel acting together with many other supporting lawyers and assistants. Some of the witnesses to be called were highly relevant to the issues I was required to investigate and Mr Justice Wyn Williams would deliver a detailed judgment in which findings of fact would be made which would inevitably be germane to this investigation. This was too valuable a resource to ignore and I had no doubt that the Mouncher Investigation should wait until the civil claims had been heard and judgment given. I met the three surviving members of the Cardiff Five: Stephen Miller, Anthony Paris and John Actie in Cardiff on 29 May 2015 and they agreed that this investigation should be

postponed until the completion of the civil proceedings. They were well aware that this was likely to be their last chance to discover what had happened and accepted that it was in their interests that the Mouncher Investigation should have as much evidence and assistance as possible.

8.4 The civil proceedings concluded in court on 17 December 2015 and judgment was eventually given on 14 June 2016; it shall be considered in detail later.

8.5 My ToR provide that the purpose of this investigation is to understand how the trial of *R v Mouncher and others* collapsed on 1 December 2011 and that I should do so "with the assistance of the investigations which have already taken place". I now include in the "investigations which have already taken place" the civil trial and the judgment therein.

8.6 I must therefore take into account the following:

- The IPCC Report
- The HMCPSI Review
- The Operation Dalecrest Report
- The civil proceedings before Mr Justice Wyn Williams

9. The IPCC Report

9.1 The ToR for the IPCC investigation are at Appendix 4. The report was signed off by IPCC Lead Investigator Andy Riley and is dated 4 July 2013. It was published on 16 July 2013. The IPCC investigation was conducted over six months.

9.2 At paragraph 19 of the report, it is recognised that the IPCC investigation was "narrow in scope" because it was specifically focussed on the "four specific copy files" which were the immediate cause of the collapse of the trial.

9.3 The IPCC report refers to the "four specific copy files" as if it is obvious what is meant by those words but unfortunately that is not so; the report is not as precise as it should have been as to the documents D7447 and D7448. And so, although it is tolerably clear, ultimately, that the "four specific copy files" is meant to be a reference to D7447, there are various examples in the report where it is not clear. Those listed below suffice as illustration for now. Such imprecision was by no means confined to the IPCC report. Its true extent, scope and importance and the confusion that flowed from it, will become clear in chapters 17 and 18. The examples are:

- Para. 15: "*Four specific copy documents were found to be missing from their expected location*". This suggests that the IPCC report had in mind the four Actie complaints but these were only part of D7447. D7447, as it had been copied by the IPCC, in fact comprised six folders (the four Actie complaints plus two additional files that related to one of the complaints) together, importantly, with two witness statements of William Peter Evans which had no connection whatsoever to the four Actie complaints and the two supporting files. The Evans witness statements, however, had not been registered anywhere, either as part of D7447 or on the E-Catalogue for D7447. Because the two Evans witness statements and the two supporting files were kept together with D7447, there was uncertainty as to precisely what D7447 was.

- Para. 16: "*Initial investigation showed that these documents, which were copies of original documents obtained from a third party, had first been found to be missing on 24 February 2010. On this day a conversation had taken place between two police officers, recorded contemporaneously in writing by one of them, to the effect that the copy documents had been destroyed on the instruction of the SIO, DCS Coutts*". This suggests that the IPCC had in mind as the "four specific documents" D7448 and not D7447, because it was only in relation to D7448 that DS May's note recorded any involvement by or instruction from DCS Coutts: May's note does not record that D7447 was destroyed <u>as a result of any instruction</u>; and May's note says nothing of the two Evans witness statements.

- Para. 25: "*The IPCC investigation has established that the documents relating to this investigation were all copies of third party material obtained by the LW3 investigation from the IPCC. The IPCC had at all times up until 28 November 2011 retained possession of the original documents from which the copies had been made.*" This, like bullet one, suggests the IPCC had in mind D7447; for it is only D7447 that came from the IPCC; D7448 came from PLSD.

- Para. 26: *"The documents consisted of the following material:*

  – *A copy of a statement from Mr William Peter Evans relating to complaints against the police made about the LW3 investigation team. This lengthy statement and an associated shorter one had been obtained by a South Wales Police Professional Standards Department investigator on 20 April 2009. Copies had then been forwarded to the IPCC on 13 May 2009.*

  – *Three full copies of original IPCC files in respect of complaints against the police made by John Actie. These were three different complaints made by Mr Actie relating to the conduct of police officers towards him on three separate occasions and were unconnected to the LW3 investigation."*

  As already made clear, there is no certainty whatsoever that the two Evans witness statements were part of D7447 (indeed the overwhelming weight of evidence indicates that they were not) and D7447 contained four Actie complaints and not three.

- Para. 56: *"Carole Williams is a police staff HOLMES indexer. It has been established via the HOLMES audit that on 18 August 2009 she initially registered the copy IPCC material and the copy South Wales Police Legal Services material which had been obtained separately by DS Allen."* [HOLMES is the acronym for the police documentary database otherwise known as the Home Office Large Major Enquiry System]. Again, the report refers to "the copy IPCC material" without stipulating what that was and whether or not it included the two Evans witness statements which were collected at the same time as the Actie complaints.

9.4 Whatever criticisms may legitimately be made of the limitations of the scope of the IPCC investigation, its adequacy in meeting its ToR, its silence on methodology and the precision of the report finally produced, its explanation of the relevant policies and procedures that applied at the time of the LW3 investigation (and therefore ought to have governed the management of the "missing material") is helpful; many of its findings are essentially sound; and the evidence obtained – comparatively soon after the relevant events, and very soon after the collapse of the trial – is invaluable in reaching a proper understanding of how the "missing documents" were processed, what ought to have happened to them, and (to a degree) what did in fact happen to them and beyond that, to any understanding of the deeply felt reactions of many of the police officers to the manner in which the trial ultimately came to its end.

9.5 Five SWP officers were considered to be "principal officers" within the IPCC investigation: DCS Coutts (SIO), DCI Penhale (Deputy SIO), DS Mark Allen (Lead Disclosure Officer until December 2009), DS Edward May (Office Manager in February 2010) and DC Gary O'Connor (Lead Disclosure Officer in December 2010). They were identified at an early stage by Andy Riley, IPCC investigator, as those most likely to have relevant evidence to assist in relation to the "missing documents". DCS Coutts and DCI Penhale because of their particular senior roles; DCS Coutts in addition given the reference in DS May's note dated 24 February 2010 to his involvement; DS Allen given his role in third party disclosure, his conversation with DS May on 24 February 2010 and his conversations *inter alia* with Dean QC and Penhale respectively on 28 and 29 November 2011 (and witness statement dated 29 November 2011); DS May given his involvement in relevant events on 24 February 2010 and 28 and 29 November 2011; and DC O'Connor given his role in secondary disclosure in late 2010 and at court on 28 November 2011.

9.6 In addition to the evidence received from those officers, in the course of his investigation Riley also received evidence from other relevant SWP police officers and staff, IPCC employees, and a HOLMES expert (by witness statements); disclosure counsel James Haskell (by exchange of email and receipt of a note provided by Haskell to HMCPSI). There was therefore evidence from:

- Those at the IPCC who had been responsible: for the preparation of material for inspection by SWP disclosure officers in July 2009, for the copying of the material requested by those disclosure officers, and for the request of a "firewall" to be implemented in relation to that material at St. Athan;
- Those within SWP who had inspected the material, who had selected the material to be copied, who had physically received it at St. Athan, who had reviewed and registered the material (in part, as D7447) and who had retained the material, and added to it material that had been received at around the same time from PLSD (D7448);
- An experienced operator of HOLMES who was able to identify with some precision the steps taken, and by whom, in relation to the processing of the material that would come to be registered as D7447 and D7448 in the period from 18 August 2009.

9.7 The framework of policy and procedure that the IPCC report sets out as applicable to LW3, and the protocols and policies as applied by the prosecution in *R v Mouncher & Ors*, may be conveniently summarised as follows:

(1) The relevant statutory framework for the investigation was the CPIA, and was supplemented by the Code of Practice and the Joint Operational Instructions for the Disclosure of Unused Material (JOPI);

(2) "[L]arge and complex cases will inevitably need close and early liaison between the disclosure officer and the prosecutor and that where appropriate they may agree to look at the material together before the schedules are prepared" (JOPI per IPCC report paragraph 30);

(3) The police are required to record and retain material obtained in the course of a criminal investigation that may be relevant to the investigation (JOPI and the Code of Practice per IPCC report paragraphs 28 and 29);

(4) Material is relevant when it has "some bearing on any offence under investigation or any person being investigated, or to the surrounding circumstances of the case, unless it is incapable of having any impact on the case" (the Code of Practice, per IPCC report paragraph 29);

(5) The police must make reasonable enquiries of third parties to ascertain if they have information which may be relevant to a criminal investigation (JOPI, per paragraph 28);

(6) Any material provided in connection with (5) is material obtained in the course of an investigation and if relevant must be recorded and dealt with just like any other material (JOPI, per para. 28);

(7) In Mouncher, "The Protocol for Disclosure of Unused Material" provided – and this is relevant to point (4) above – that "*a working assumption should be made that all material*

held is relevant. The assumption may only be displaced only where it is absolutely clear that specific material is incapable of having any impact on the case."

(8) Further, that "*material ultimately deemed to be irrelevant must be retained and made readily identifiable*";

(9) And finally, that "*at the stage of secondary disclosure material previously deemed to be irrelevant must be re-reviewed and scheduled if new information renders specific material relevant.*"

9.8 So far as the disclosure process adopted in LW3, the IPCC report observed:

(1) All material, whether relevant or irrelevant, that came into the possession of the LW3 investigators had first to be registered on HOLMES and, therefore, each document would have a unique reference number;

(2) The first step was for material to be initially submitted to a "receiver", who would consider the material and attach "a HOLMES document label describing the material and giving relevant instructions to the "indexer" (sometimes referred to as the "registrar")";

(3) The indexer was "then responsible for registering the document on the HOLMES database." Once the document had been registered, its audit trail within the HOLMES database could commence;

(4) The indexer would write the unique HOLMES number on the HOLMES document label which should remain with the document at all times as the document is moved through the required processes within the MIR;

(5) Once so registered, a disclosure officer would make a decision as to whether the material was:

- "used" i.e. a statement or exhibit intended to be used as evidence in the event of a prosecution and, therefore, provided to (or "served on") the defence as part of the prosecution case;

- "irrelevant" i.e. of no bearing/incapable of impact;

- "relevant" i.e. of some bearing, but not intended (or at least not initially intended) to be used in evidence in the event of a prosecution, in which case there was a further decision to be made namely, whether the material may undermine the prosecution case or assist the defence case, in which case it ought to be disclosed to the defence; if it assuredly did not undermine or assist, it would simply be scheduled in order that the defence would know of its existence and thereafter could request it or apply to the court for its disclosure.

(6) As for the last bullet point, if a disclosure officer in LW3 believed that material ought to be disclosed because it met the test, he would list the document on a form (referred to as an "E-Catalogue") by the HOLMES reference number; submit the E-Catalogue to Haskell; and Haskell would decide first whether the material was relevant at all (i.e. of any bearing/capable of impact) and if it was, whether it should be disclosed, or whether it should be simply scheduled.

(7) Guidance (called "Major Incident Room Standardised Administrative Procedures": "MIRSAP") determines the "administrative procedures and the document routing" applicable to material received in an MIR, and includes an instruction to the receiver to attach an "other document form" to anything to be registered as such and guidance that the indexer should then register the document in the most appropriate manner.

Although it will be necessary to elaborate upon aspects of the above, it is an uncontroversial and helpful starting point.

9.9 As to the factual picture that emerged from the IPCC's report, I will deal with it shortly here because it will be necessary to consider the overall picture later in further detail in chapters 17 and 18, but in summary:

(1) On 23 July 2009, DS Allen, who at the time was the Lead Disclosure Officer, inspected a quantity of material in the possession of the IPCC at its Cardiff Office for the purposes of determining whether any documents may be disclosable to the defence as part of the prosecution's third party disclosure obligations;

(2) From the 14 "bundles" of material he inspected, DS Allen was interested in two: Bundle 13, which contained IPCC files relating to complaints against SWP police officers made by or on behalf of serving and retired police officers who had been arrested as part of the LW3 investigation and Bundle 14, which contained several complaints against SWP police officers made by John Actie between 2005 and 2007. As for Bundle 13, DS Allen was only interested in complaints made in the 20 page witness statement dated 20 April 2009 of William Peter Evans (a retired police officer and the husband of Police Inspector Carole Evans, also retired) and in relation to Bundle 14, he was interested in all the complaints made by John Actie against the police;

(3) Chris McCoy of the IPCC stated that DS Allen requested that he provide "full copies of all the IPCC files relating to John Actie complaints" without reference, in the report, to the witness statement of William Peter Evans;

(4) DS Allen collected the IPCC material from the IPCC office a few days later, the documents were given to him in an "Iron Mountain" cardboard box. On taking the material to St. Athan, DS Allen said he "discussed" it "informally" with James Haskell, the disclosure junior;

(5) DS Allen said that Haskell then requested that four items – "three of the John Actie complaints against the police and the statement of Mr. Evans" – should be listed on an E-Catalogue and DS Allen then asked DC Robert Rowlands to list those items on an E-Catalogue;

(6) DC Rowlands recalled that he was asked by DS Allen to list some of the copy IPCC material on an E-Catalogue and did so. Of the seven columns of the E-Catalogue, two were completed by DC Rowlands on 4 August 2009. In the "issue description" column he recorded that item 2, a complaint by John Actie against police of racial abuse on 1 October 2005, could be disclosable because it "may undermine Actie's credibility as it is suggested that the complaint may be malicious and investigating officer suggested in a report of considering prosecuting Actie for wasting police time". As for the remaining three items, Rowlands made no comment in relation to item 1 (William Peter Evans

witness statements: there were in fact two) and for items 3 and 4 (two further Actie complaints), he stated that the documents appeared to be "irrelevant";

(7) On 12 August 2009, Haskell made detailed endorsements about his assessments of the documents in the "comments" column of the E-Catalogue. Haskell described item 1 as being "not relevant to the current prosecution" because there "is nothing to suggest that the credibility of those individuals [the police officers against whom complaints had been made by William Evans] will be in issue in the ongoing proceedings". Haskell confirmed that there was "no need to schedule" item 1 but that it would have to be reconsidered if the credibility of the named police officers became relevant after defence statements. As for item 2, however, Haskell disagreed with DC Rowlands's assessment that it should be disclosed. Haskell accepted that it was relevant to the investigation and that it should be scheduled on the MG6C but was "unconvinced" that it did in fact undermine Actie's credibility and, therefore, concluded that there was no need to disclose it. Haskell's final comment on item 2 was, "It can be re-assessed if it is apparent from DCS [defence case statement] that Actie's credibility is in issue". Haskell assessed items 3 and 4 as again being "relevant" because Actie was a prosecution witness and that, therefore, they had to be scheduled on the MG6C but (although he did not say so in terms, it is plain that) he concluded that like item 2, they were not at that stage disclosable;

(8) There was another set of documents which had been inspected by DC Allen during a visit to PLSD. He was interested in five files relating to civil claims brought against SWP for false imprisonment and other similar claims by five police officers who had been arrested in the course of LW3 – PC John Murray, Inspector Carole Evans (wife of William Peter Evans), DC Michael Daniels, PC Erica Coliandris and Chief Inspector Adrian Morgan. These five files were forwarded by PLSD to DCS Coutts under a covering letter dated 28 July 2009;

(9) On 18 August 2009, as is apparent from examination of HOLMES, police staff indexer Carole Williams registered on HOLMES, DS Allen believes at his request, D7447 ("18/8/2009 Independent Police Complaints Commission document regarding complaints by John Actie against South Wales Police) and D7448 ("18/08/2009 five files in relation to civil claims against South Wales Police by John Murray, Carole Evans, Michael Daniels, Erica Coliandris and Adrian Morgan");

(10) Ms Williams told the IPCC she believed that it was likely that she would have been in possession of all the material registered as D7447 and D7448 at that time and that she would have copied the descriptions set out at (9) above from the "label completed by the Receiver" (a role DS Allen believes he fulfilled);

(11) On 28 August 2009, again as is apparent from examination of HOLMES, DS Allen updated the HOLMES disclosure records for D7447. DS Allen entered the description: "Material from IPCC relating to four separate complaints by John Actie against the South Wales Police. First complaint (July 2005) when he was sprayed with CS Spray; second complaint (October 2005) when he was allegedly racially abused; third complaint (October 2006) when he was subject to stop and search; and fourth complaint (April 2007) when he was allegedly verbally abused. All complaints were unproven." The HOLMES system required an entry to be made detailing the location of the document and this was shown as "Incident Room St. Athan";

(12) On the same day, DS Allen also updated the disclosure record for D7448. DS Allen entered the description: "Five files which relate to Civil Claims brought against South Wales Police by John Murray, Carol Evans, Michael Daniels, Erica Coliandris and Adrian Morgan in 2008. The claims allege false imprisonment and personal injury. Each file contains documents including a claim form, consent order and correspondence between the parties. All civil claims have been stayed pending the outcome of the criminal proceedings." The HOLMES system required an entry to be made detailing the location of the document and again this was shown as "Incident Room St. Athan";

(13) On 14 October 2009, DS Allen signed and dated the printed MG6C form which included D7447 and D7448 (it cannot be ascertained from HOLMES when they were printed);

(14) On 28 October 2009, DC House, who was based at St. Athan *inter alia* as MIR Receiver, made a change on HOLMES to the "queue status" for D7447 and D7448 – to "no reading required" – although he believes it is unlikely that he would have had the documents themselves at the time. This is the last time there is any "HOLMES audit information" for D7447 and D7448;

(15) DS Allen stated that he believed D7447 and D7448 was kept together in his office in a box until he left the LW3 investigation on 4 December 2009 to move to the SWP PSD;

(16) DS Allen believed that the material "should not be stored within the MIR in the usual manner" because some of the complaints were against currently serving LW3 police officers and were, therefore, sensitive. In addition, a "policy decision had been made by South Wales PSD that such material should not be disclosed to the LW3 officers subject of such complaints" and DS Allen also "understood that Mr McCoy of the IPCC had insisted on a firewall between such material and those officers subject of complaint";

(17) DS Allen did not recall "any specific conversation" with any officer, particularly DCS Coutts, at this time, and did not record his rationale for not storing the documents within the MIR (as would normally be the practice) or their location; and although Coutts did recall a conversation in 2009 involving complaints material received from the IPCC, and although he recalled asking DS Allen to confirm *inter alia* that the material had been secured, that the originals were with the IPCC, and that the material had been registered, and moreover recalled instructing that the material not be retained in the MIR (to maintain the integrity of the complaints procedure), he had no "specific knowledge of the material within either D7447 or D7448 and believed he had never seen that material prior to 17 January 2012";

(18) On 24 February 2010, DS May was conducting an audit of material as Office Manager when he discovered D7447 and D7448 were not in their expected locations within the MIR. Following a conversation with DS Allen, he recorded: "D7447 + D7448 contacted DS Mark Allen @ PSD – he stated that both docs were copies of info held by IPCC + our legal services. James Haskell had looked at D7447 and decided it wasn't relevant to our enquiry so Mark shredded them (they were scheduled on the MG6C phase 13). With regards D7448 the complaints include Carol Evans whose husband had made official complaints against SIO and others – SIO instructed Mark to get rid of them so he shredded them. Originals are with IPCC + legal services, Holmes updated";

(19) Although DS Allen could not recall having the conversation described in DS May's note and was therefore unable to say whether the note was accurate, he believed that it was most unlikely that he told DS May that he had been responsible for shredding "any documents that formed part of the unused material disclosure process". Carole Williams, however, had a clear recollection of DS May being shocked and annoyed and of his telling her something like "He's shredded them", and further recalled – as confirmed by an examination of HOLMES and by a note in her MIR notebook – that DS May asked her to update HOLMES, which she did, to reflect the fact the originals of D7447 and D7448 were held by IPCC and PLSD respectively. Regrettably, other than write his note and briefly discuss the matter with Carole Williams, DS May did nothing further and, in particular, did not advise either senior police officers or prosecution lawyers that the documents were missing;

(20) When D7447 and D7448 next arose for assessment, in the course of a complete review of material for the purposes of secondary disclosure following receipt of defence statements in autumn 2010, DC Morris, like DS May before him, was unable to locate the material in its expected location (which is hardly surprising if it remained in the office once occupied by DS Allen). From material recovered by the IPCC, it is clear that DC Morris signed and dated the page which showed his review of material including D7447 and D7448 on 13 December 2010. Although DC Morris had no specific recollection, he accepted that it was almost certain that he had found D7447 and D7448 to be missing on that date; believed it was possible that he had found the description of the location of the current location of the material; accepted that he had endorsed the D7447 and D7448 entries on the printed list respectively "with IPCC" and "with PLSD"; and expected that he would have raised the matter with DC O'Connor – at the time Lead Disclosure Officer;

(21) DC O'Connor recollects that DC Morris brought the absence of D7447 and D7448 to his attention and has a "vague recollection" that he raised the matter with Haskell who advised him that he had assessed the documents at the primary disclosure stage and assumes/strongly believes that Haskell must have told him that there was, in the circumstances, no need to retrieve the documents. DC O'Connor accepted that normal practice would have been to retrieve the material but Haskell was readily on hand for advice and it would have been impossible to note every conversation they had;

(22) Haskell, by contrast, was emphatic that no such conversation had taken place; apart from anything else, if he had been told that documents were missing he would have requested that further copies be obtained in order that secondary disclosure could be assessed and that the terms of his secondary disclosure guidance could properly be followed. In the event no attempt was made to request the original material or to obtain a further copy;

(23) As referred to above, almost a year later, five months into the trial itself, and against a backdrop of "alleged…prosecution failings with disclosure", on 28 November 2011 Mr Justice Sweeney ordered the prosecution to conduct an exercise directed at testing the quality of Haskell's decision making. By noon on 29 November 2011, the prosecution was to produce every E-Catalogue in which a police officer had recommended a document for disclosure but Haskell had decided that it should not be disclosed;

(24) Although the exact sequence was unclear to the IPCC, events unfolded on 28 November 2011 as follows:

- At some point in performing the judge's exercise, an E-Catalogue was found which showed no HOLMES document numbers but simply items 1 to 4;
- To DS May this indicated the documents had been "assessed" before they had been registered;
- Those documents were "later registered as D7447 and D7448";
- DC O'Connor phoned DC Kingsbury who was at St. Athan and asked him to establish whether "D7447 and D7448" were in their expected location, but those documents were not found;
- DC Kingsbury was neither asked to, nor conducted, anything that might be regarded as a proper search of St. Athan for the missing documents but did have a quick look around St. Athan, to no avail;
- DC Kingsbury reported back;
- DS May checked HOLMES and noting the locations of the material, recollected his conversation in 2010 with Allen;
- DS May travelled to St. Athan and found his note;
- Dean QC was informed and spoke on the phone with DS Allen to request a statement (the evidence of what was said is set out in the IPCC report at paragraphs 97 and 102 to 105);
- Dean QC spoke on the phone to DCS Coutts (the evidence of what was said is set out in the IPCC report at paragraphs 97 and 108 and the detail is examined later);
- The original material was recovered from the IPCC and PLSD;
- By the early evening, as DC O'Connor recollected, there was a growing acceptance that D7447 and D7448 had been destroyed (and therefore there would have been no reason to search for the material);

(25) Certainly by the following day, 29 November 2011, the leading prosecution lawyers took the view that the defendants could no longer have confidence in the integrity of the disclosure process;

(26) And on 29 November 2011:

- DS Allen received a telephone call from DCI Penhale chasing his witness statement which was said to be required by 9.00am;
- DS Allen received a further telephone call from DCI Penhale again chasing his witness statement, as a result of which Allen sent a statement described by the IPCC as "brief and vague";

- Dean QC saw Mr Justice Sweeney in chambers and requested an adjournment until 1 December 2011;

(27) Having been given time to consider their position and to consult the DPP, the prosecution returned to court on 1 December 2011 and stopped the case by offering no further evidence. The jury was discharged from returning any verdicts and the judge then entered verdicts of not guilty in the case of each defendant in respect of each relevant count; and

(28) On 17 January 2012, D7447 and D7448 were found in DCS Coutts' office, by Coutts, still in the Iron Mountain box provided by the IPCC when DS Allen collected the copy documents from the IPCC office.

9.10 Against that backdrop, the IPCC investigation reached the following 25 relevant conclusions (paragraph 121 *et seq.*):

(1) The problems with "these documents" had their origin in (a) the failure by DS Allen to record, precisely, the material he obtained from the IPCC in July 2009 and (b) the failure by DS Allen to record the actual date he came into possession of the material;

(2) DS Allen came into possession of the "four specific copy documents" on a date unknown between 23 July 2009 and 4 August 2009;

(3) DS Allen asked DC Rowlands to "list these four documents" on an E-Catalogue which by 12 August 2009 he had done;

(4) Between 4 and 12 August 2009, Haskell considered the "four specific documents" and decided that item 1 (William Peter Evans witness) was irrelevant, and that items 2 to 4 (the Actie complaints material) should be listed on an MG6C;

(5) In breach of the Disclosure Protocol, the Evans "statement" was not retained and made readily identifiable so that at the stage of secondary disclosure the relevance of "those statements" [sic] could be re-reviewed;

(6) On a date between 12 and 18 August 2009, DS Allen combined the IPCC material and PLSD material;

(7) On 18 August 2009, the "IPCC material" was registered as D7447 and the PLSD material as D7448;

(8) In breach of MIRSAP, the Evans "statement" was not registered as a separate document from the Actie complaints material (there was "no association" between the Evans statements (for there were in fact two) and the Actie complaints, apart from their common origin in the IPCC). *[The IPCC appears to proceed on the basis that the Evans complaints material was registered as part of D7447 (albeit not described as such): this, I am satisfied, is not correct, as I explain below]*;

(9) In breach of MIRSAP, no "separate 'other document form' was attached to each bundle" i.e. to the Evans "statement" and to the Actie complaints. This should have occurred immediately upon their entry into the MIR and would have resulted in each "bundle" being given a unique HOLMES reference number and a HOLMES audit trail would have commenced from that point onwards. Registration on HOLMES should have occurred

before any further consideration of the documents, and in particular before the creation of an E-Catalogue; this would have provided a "firm link" between the two systems and would have ensured that a HOLMES reference number would then have been on the E-Catalogue;

(10) On 28 August 2009, DS Allen, "very likely…in possession of D7447 and D7448", moved both sets of material "through the HOLMES disclosure queues";

(11) On 24 February 2010, DS May found D7447 and D7448 to be missing from their expected locations and whatever the precise terms of the Allen/May conversation on that date (the IPCC report describes the terms as being "disputed"), it is clear that DS May understood DS Allen to be saying that "the copy material, relating to D7447 and D7448 had been destroyed on the instruction of DCS Coutts". *[This importantly does not accurately reflect the evidence of DS May and DS May's note];*

(12) DS May made a note "immediately or shortly after" the May/Allen conversation and asked Carole Williams to update HOLMES, which she did, to show the location of D7447 and D7448. Williams also made a note;

(13) In breach of the CPIA and "procedure", the May note and the Williams note were not "immediately considered as documents material to the investigation" or subject to the disclosure process. Had they been, Haskell would have been notified and "immediate efforts made to rectify and resolve the problem";

(14) When the D7447 and D7448 material was next found missing, on 13 December 2010 during secondary disclosure, it is "likely" that DC Morris raised the issue with DC O'Connor. No effort was made to recover the originals or further copies from the IPCC or the PLSD;

(15) Although DC O'Connor recalled the missing material "possibly having been the subject of informal discussions" between him and Haskell around 13 December 2010, no record of any such discussion was ever made by DC O'Connor, and Haskell was emphatic that no such discussion had ever taken place. Accordingly, it was "impossible to decide whether such discussions did take place";

(16) Following the discovery on 28 November 2011 that D7447 and D7448 were missing, DS May's note of the Allen conversation on 24 February 2010 was, on 29 November 2011, "accepted as being the most persuasive account despite the contradictory information as to the reliability of its contents being obtained [on 28 November by Dean QC] from DCS Coutts";

(17) "[No] effort" was made at that time to locate D7447 and D7448. In other words, when it was discovered that the copy documents were missing, St. Athan was not then searched in an effort to find them;

(18) Although the original material forming D7447 and D7448 was recovered on 28 November 2011 [this is what the IPCC found but the original material that had formed D7448 was *not* recovered on 28 November 2011], this was "considered to be unsatisfactory as there could be no certainty that the copy material considered and assessed by Mr Haskell on 12 August 2009 was identical to the original material";

(19) "[T]here can be no doubt that the Iron Mountain box recovered from the office of DCS Coutts on 17 January 2012 contained various items which constitute all the material referred to both within D7447 and D7448" and all the material on the Rowlands E-Catalogue (i.e. the Evans complaints material). There are, however, no HOLMES document labels;

(20) On the balance of probabilities, the material recovered on 17 January 2012 was the material which the prosecution had informed Swansea Crown Court on 1 December 2011 had been destroyed "on the instructions of DCS Coutts";

(21) On the balance of probabilities, "…no instruction was ever given by DCS Coutts or any other officer to destroy the copy documents obtained from the IPCC. The only evidence about such an instruction comes from DS May and his conversation with DS Allen. Whilst DS May's recollection is the only one supported by contemporaneous written records, DS Allen cannot recall saying this, and DCS Coutts, alleged via hearsay to have given such an instruction, is adamant that he did not and would not ever have issued it. The fact that it is now clear that the documents were never destroyed is the deciding factor leading to this conclusion";

(22) On the balance of probabilities, "… a conversation did take place between DCS Coutts and DS Allen around the storage of third party material relating to complaints against DCS Coutts and the LW3 investigation team. As the specific material had not come into the possession of LW3 until 23 July 2009 at the earliest and DS Allen left the investigation on 4 December 2009 it is most likely that any such conversation took place between those dates";

(23) On the balance of probabilities, "…DCS Coutts gave an instruction to DS Allen that this copy material was not to be stored within the MIR. The expectation of DCS Coutts was that following disclosure assessment the copy documents would be returned to the third parties concerned and not be stored normally within the MIR". Accordingly, DCS Coutts did not at any time give an instruction that "this copy material" was to be destroyed;

(24) The material referred to at Swansea Crown Court on 1 December 2011 as having been destroyed "consisted of those documents listed on the E-Catalogue examined and endorsed by James Haskell on 12 August 2009" i.e. the "lengthy" Evans statement and "three IPCC files relating to complaints against the police made by John Actie". *[This is not obviously so; it excludes D7448 and the fourth Actie complaint]*; and

(25) Finally and significantly, "…there is no misconduct by any police officer that would justify the bringing of misconduct proceedings. There are however breaches of policy and procedure by individual officers which the IPCC feel should be considered as performance matters and which the IPCC recommend South Wales Police address appropriately".

9.11 The IPCC recommended that DS Allen, DS May and DC O'Connor should receive "appropriate management action" in respect of "performance issues" which have been sufficiently detailed above.

9.12 The fact that the IPCC found no evidence of misconduct by any police officer involved in the LW3 investigation (and, by implication, no evidence of criminal conduct) is the most

significant of its conclusions. I am not, of course, bound by this or any other conclusion and have examined the evidence throughout my inquiry for any suggestion that documents were either destroyed or deliberately withheld from the defence to pervert the course of justice. Stephen Miller, Anthony Paris and John Actie, the surviving members of the Cardiff Five, have an obvious and understandable suspicion that because SWP officers were investigating SWP officers, the investigators may have deliberately and maliciously compromised the inquiry in order that the prosecution should fail – an act, quite simply, of sabotage.

10. The HMCPSI Report

10.1 The ToR for the HMCPSI investigation are at Appendix 5. The investigation was led by HM Chief Inspector, Michael Fuller, and the report was published by design on the same date as the publication of the IPCC report, namely 16 July 2013. The HMCPSI investigation was conducted over 15 months.

10.2 Just as the IPCC investigation did not examine the conduct of prosecution lawyers, so the HMCPSI investigation did not examine the conduct of police officers, indeed paragraph 3.4 of its ToR makes it clear that the HMCPSI review "specifically does not deal with the conduct of police officers assigned to the inquiry (known as operation Rubicon)". HMCPSI did, however, receive written evidence from DS May and DS O'Connor, two of the Lead Disclosure Officers. Whether having two independent inquiries was better than just one which could have looked at the conduct of both the police and prosecution lawyers at the same time, testing the claims of one group against those of the other, will be examined later.

10.3 I have dealt with the evidence compiled by the IPCC in considerable detail because the treatment of D7447 and D7448 is critical to any assessment of whether or not there was police malpractice. The HMCPSI investigation, however, focussed on the prosecution's approach to and management of disclosure and although disclosure is a very important aspect of the collapse of the Mouncher trial (a topic to which I will also return later), I can summarise the report of HMCPSI more briefly.

10.4 The HMCPSI review is unremitting in its criticism of the prosecution's management of disclosure and its performance generally. The report makes many adverse findings of which the following 23 are but examples:

(1) The prosecution took too narrow or too analytical an approach to the disclosure test. The prosecution over analysed the potential defence cases, which delayed disclosure of some material that was capable of assisting a defence that had always been apparent from the case papers, but which they believed the defendants would be unwise to pursue. Prosecutors should not be judgmental about the merits of a defence.

(2) The danger of an over analytical approach to disclosure is that instinct, which is such an important part of the disclosure process, can from time to time be displaced or ignored.

(3) When police disclosure officers submitted material that they considered met the disclosure test under cover of E-Catalogues, Haskell decided that a significant number did not include material that needed to be disclosed at the primary stage and ruled that some did not even satisfy the relevance test. The determination of relevance is primarily a matter for the police disclosure team. If the police consider an item to be relevant, prosecutors should be very slow to change that decision. In reality this resulted in further work for everyone as the defence made many requests for additional disclosure to which the prosecution then had to respond.

(4) The narrow approach was also a failure of case management, particularly the lack of supervision of inexperienced disclosure counsel's work. It is important that sufficient resource is devoted to disclosure to minimise the number of minor errors as well as to ensure that all defence themes, including those not articulated but apparent from interviews, correspondence and other sources, are identified and taken into account

when making disclosure decisions. If a defence is revealed in an interview it should be acted upon; it is neither necessary nor sensible to wait for that defence to be raised in a defence statement before it is considered relevant.

(5) As for the four Actie complaints in D7447, all had been withdrawn or rejected and on occasions there was clear evidence to contradict Actie's accounts. This material could have been used by the defence to suggest that Actie was prone to make false allegations against police officers and to show that he was not a reliable witness. In the view of HM Chief Inspector, the absence of credibility of principal witnesses as an explicit theme at the primary stage was wrong. The credibility of the Cardiff Five was always likely to be an issue and because D7447 was clearly capable of undermining Actie's evidence, it should have been disclosed during primary disclosure. The MG6C for D7447 is marked in the column "FOR CPS USE" as "CND" (clearly not disclosable). That assessment was plainly wrong.

(6) As for the other part of D7447 (as erroneously reported by HMCPSI), the statements of William Peter Evans, HM Chief Inspector was "surprised" that these had not been assessed as relevant and included on the MG6C. As will be discussed below, the test for relevance is very wide. Evans' statements had always been relevant because they suggested impropriety on the part of the LW3 investigation team and specifically against the Deputy SIO, DCI Penhale and DCS Coutts. The statements of William Peter Evans should then have been disclosed as soon as it was clear that the integrity of LW3 was in issue.

(7) D7448 was always relevant and as with the statements of William Peter Evans, this material should have been disclosed as soon as it was clear that the integrity of LW3 was in issue.

(8) The problem with the missing D7447 (and D7448) would not have arisen if the correct decisions about disclosure had been taken when the documents were received in 2009.

(9) Haskell decided not to disclose a significant amount of material relating to Stephen Miller's rough treatment of White and his acting as her pimp to finance his misuse of drugs because it was considered to be consistent with the prosecution case in that it demonstrated how important she was to him. On one restricted view that was correct, but it also established a propensity to cause harm to White which was not only contrary to that part of the prosecution case, it was also relevant to the defence contention that Miller had murdered her. Haskell's justification for this approach was that he was not convinced of the truthfulness of one witness who said that White had told him two weeks before her death that some bruises had been inflicted by Miller – a judgmental approach. The defence were entitled to disclosure of this material during primary disclosure because it was capable of undermining Miller's credibility and was consistent with the case developed by the LW1 investigation team namely, that Miller murdered White.

(10) In 2008 a wholesale review of LW3 material previously considered to be irrelevant revealed over 120 items that should have been included on the MG6C, almost half of which fell to be disclosed in the prosecution of the Core Four.

(11) The prosecution continually served as additional evidence material that it had had in its possession for several years, some of it potentially very significant. On most occasions

this material had been listed on the MG6C but some was found in material previously classified as irrelevant or wrongly registered as used.

(12) The piecemeal service of evidence and scheduling of unused material must have been very frustrating for the defence and contributed to a sense that the prosecution was not in full command of the case and the unused material. In a historical case such as this, the prosecution had ample time before charge in which to get to the bottom of the material from LW1 and LW2 investigations and prosecutions. These errors were troubling.

(13) The decision to instruct Haskell as disclosure counsel was taken very quickly and on an unsatisfactory basis, without adequate consideration of the work that would be expected of him. More experienced disclosure counsel and junior counsel should have been instructed so that they could have absorbed more of the responsibility for running the case. This was not a case on which disclosure counsel should have learned his trade during the course of his work on it.

(14) Many of the problems that arose could have been avoided by simply complying with the CPS Disclosure Manual.

(15) The management of the case by the CPS was weak.

(16) The seeds of disclosure failure were sown early in the life of the case. Managers in Casework Directorate and Special Crime Division should have played a more active role at the beginning of the case. This would have given a clearer idea of the resources likely to be needed and should have led to a more considered approach to the selection of CPS staff and counsel.

(17) The CPS lawyer team did not always work together smoothly (as will be demonstrated later in this report, this finding as it was expressed, was something of an understatement).

(18) Some reports to the DPP at meetings known as the Director's Case Management Panel (DCMP) were too reassuring about disclosure and the scale of the disclosure exercise. At one meeting, for example, the DPP was told that the unused material would require a "relatively simple scheduling exercise". DCMP's are only of value to the DPP if the full circumstances, good or bad, are revealed.

(19) A senior CPS lawyer, Howard Cohen, was tasked to provide "strategic oversight" to the case but Cohen and the lawyers who worked with him were left to work out what "strategic oversight" meant.

(20) There were repeated concerns about counsel communicating directly with the police so that CPS lawyers felt unsighted on significant matters. The police and counsel are said to have held a conference that the CPS did not attend, having found out about it only at the last minute.

(21) HM Chief Inspector was "surprised" that the CPS had not employed a caseworker at court during the trial. The effect of this decision was twofold: it resulted in weaker CPS accountability for events at court and it meant that the work of a caseworker would have to be done by counsel and the police.

(22) Inappropriate comments had been made to the Cardiff Five in the presence of prosecution lawyers which had neither been recorded nor disclosed – the D30 material. A close examination of the available material would have revealed that some of the contact was disclosable and that there were no records or notes of other meetings. The prosecution's treatment of the D30 material undermined confidence in the disclosure regime.

(23) As but one example of prosecution intransigence to disclosure, the defence had asked for Gafoor's custody record in advance of his giving evidence. The request had been refused. The custody record was disclosed, however, on the day Gafoor gave evidence. HM Chief Inspector rightly acknowledges that the custody record should have been disclosed as being part of the contact material with a very significant witness who was central to the case. Disclosure would have prevented subsequent, unnecessary work and would have avoided suggestions and thoughts that something irregular had occurred. As one of the defence counsel said to HM Chief Inspector, the refusal to disclose Gafoor's custody record "created the impression of grudging reluctance" by the prosecution to disclose full details of contact with Gafoor. There were other examples of a "grudging" approach to disclosure.

10.5 In the course of my examination of the evidence I have discovered no reason to disagree with any one of the above findings.

10.6 When a case collapses in ignominious circumstances it can be natural to concentrate on the negative aspects only, and that I do not intend to do. It is right that HM Chief Inspector was complimentary of the enthusiasm and work ethic of prosecuting counsel and he emphasised the very large quantity of material which was in fact disclosed. One of his most important findings concerned the police officers and this is at paragraph 10.14 which I will set out in full:

> "We found no evidence that prosecutors or police disclosure officers made decisions for any improper reason. Police disclosure officers were given considerable guidance by Mr Thomas (CPS review lawyer) and Mr Haskell. They made some mistakes in applying the guidance, but these represented a very small proportion of all the disclosure decisions that were made and many were discovered and corrected as a result of the quality assurance exercises. They also submitted many items to Mr Haskell that they considered to be relevant and potentially disclosable, a few of which he decided were not relevant. In our view some of them should have been scheduled. Although the full re-review of unused material after the service of defence statements resulted in significant further disclosure, some of these items should have been disclosed at the primary stage."

10.7 Again, I am not in any sense bound by the finding that there had been no impropriety.

10.8 HMCPSI made a number of recommendations to which I shall later return.

11. Operation Dalecrest

11.1 Operation Dalecrest was an investigation conducted by Devon and Cornwall Police in response to specific complaints made by those police officers who had been the subject of the LW3 investigation. It was not an investigation into the reasons for the collapse of LW3, it was not "directed to investigate why that inquiry failed to result in a successful prosecution" and it "was not concerned, per se, with the mechanics of the Lynette White Phase III Inquiry" except where those broader issues were properly engaged by a relevant complaint.

11.2 The complaints levelled at LW3 were wide-ranging but amongst them, it is the complaints which bear upon disclosure with which I am principally concerned, and Dalecrest identified a number of complaints (58) that could be said to fall within that theme. The complaints about disclosure that Dalecrest received may conveniently be summarised as including complaints: (1) that the disclosure process was not fit for purpose; (2) that there was a failure to record meetings with witnesses/the original defendants; a failure to disclose meetings with the original defendants; and a failure to retain notes of meetings; (3) that there was a failure to list the contents of a box of exhibits from the original trial in LW1 correctly (indicative of broader failing in quality of block listing, review and disclosure process); (4) that there was a failure to disclose an interview with Mr Gafoor, house to house forms, Amiel house to house questionnaire, and the "prostitute book"; (5) that material had been improperly destroyed and that there was a failure to record reasons for disposal of material; (6) that details of witnesses were wrongly withheld from the defence; and (7) that there was failure to comply with the CPIA.

11.3 As will be apparent, there was an overlap in subject matter of the complaints with the civil proceedings: an obvious and perhaps unsurprising overlap in view of, first, the common identity of complainants and civil claimants; and second, the nature and breadth of the allegations raised by specific complaints (including inter alia allegations of perverting the course of justice and misconduct in public office). So too was there overlap with the matters investigated by the HMCPSI in its report and, in one respect, the subject matter of the IPCC report: namely the alleged destruction of IPCC material.

11.4 In recognition of the overlap, the Terms of Reference for Dalecrest required that it await the outcome of the HMCPSI and IPCC investigations before embarking upon any additional investigation of its own (it would not have been known whether the civil proceedings would ever reach trial, or as is often the case with civil proceedings, settle). And as the Dalecrest report frankly acknowledges, the HMCPSI report in particular informed and indeed formed the basis for many of the conclusions it reached. That is not intended as a criticism of Dalecrest: it had a very considerable number of complaints to consider and a measure of proportion was necessary and indeed unavoidable. However, it is true to observe that where that is the case, Dalecrest does not advance the evidential understanding presented by the other investigations.

11.5 There are four aspects of Dalecrest that are, nevertheless, worthy here of note. First, the conclusion that whilst there were "administrative failings within the disclosure process" in the prosecution of Mouncher and others there was no evidence to suggest any criminal activity or serious wrongdoing by any LW3 officer involved in the context of disclosure; second, the conclusion that neither was there any such evidence in relation to any of the array of other non-disclosure allegations that had been levelled at LW3 officers, and that is of course of no

little significance in the context of any broader concerns that might exist in relation to the integrity of the LW3 investigation; third, the identification of the report of opportunities for improvement and lesson learning, a matter which I return to consider in chapter 20; and fourth, the examples of "good practice" including the identification by the SIO at a very early stage of the importance of early liaison with and guidance from CPS/Counsel; the regular consultation of experienced advisers independent of the investigation team; and the structure of supervision and oversight.

11.6 In terms of opportunities for improvement/lesson learning, these were directed at ensuring that SWP ensure that all officers utilise "Major Incident Enquiry Officers Note Books"; that it review record-keeping of contact with victims/witnesses/other agencies; that it review how updated contact logs with victims/witnesses are scheduled; that it review how third party material is identified and processed; that SWP review the way it records, processes and reviews block listed material; that it ensures proper and accurate scheduling of material; and that it considers a full review of disclosure procedures within major crime investigations. This SWP has done, but as will become clear in chapter 24, I recommend that all such matters should be addressed at a national level to ensure consistency and that the best standards possible are maintained.

12. The Judicial Review Proceedings and the Mouncher Investigation Terms of Reference

12.1 On 21 December 2011, solicitors acting on behalf of the three surviving members of the Cardiff Five: Stephen Miller (Mathew Gold & Company) and Anthony Paris and John Actie (Hickman & Rose) collectively referred to as "the claimants", wrote to the then Home Secretary requesting that she establish a public inquiry under the Inquiries Act 2005 into the disclosure process and other events leading to the collapse of the Mouncher trial. On 10 January 2012, the Home Secretary declined the request. The letter of claim was sent on 31 January 2012 and, as previously noted, on 9 March 2012, the claimants issued proceedings for a judicial review of the Home Secretary's decision not to establish a public inquiry. The Attorney General was named as a second respondent.

12.2 It is clear from the letter of claim that police corruption and malpractice was suspected and that the circumstances which led to the abandonment of the trial had been falsely and dishonestly orchestrated by the police:

> "At the very least there must be a strong suspicion that one or more SWP officers, aware that the judge had, in effect, given the prosecution a last chance to show that disclosure was now in order, took advantage of that situation to create a false picture of further disclosure shortcomings."

12.3 The background to the claim can be best summarised by the claim form:

> "…the letter of claim was written within days of the IPCC announcement of the discovery of the four "shredded" files and the announcement of the terms of the HMCPSI investigation". (The claimants sought expedition) "…due to the current on-going investigations which the claimants submit will not meet the State's obligations under Article 3 ECHR … Given that investigations are already underway it is obviously important that the question of whether there should be a public inquiry/the lawfulness of the Defendants' current refusal to hold one at this juncture is determined as soon as possible. Clearly the sooner any public inquiry is instigated the better the evidence available to it will be as recollections will be fresher and there is less risk of documents becoming disseminated and disparate".

12.4 Article 3 ECHR provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" and prohibits, for example, a public authority from treating a person in such a manner.

12.5 The Home Secretary resisted the claim and, on 17 July 2012, Mr Justice Mitting refused the claimants permission to proceed in their claim, for four reasons: first, the Home Secretary was entitled to wait until the IPCC and HMCPSI investigations (already in train) had been completed; second, that together, the IPCC and HMCPSI "should deal with all relevant topics" as the IPCC's ToR were wide enough to permit the IPCC to find out and report what had happened to the missing files (the proximate cause of the collapse of the trial) and to investigate and report upon any deliberate police misconduct in relation to those files and the HMCPSI could deal with "the other disclosure issues that bedevilled the trial", and if it concluded the difficulties were not the responsibility of the CPS and/or counsel, it could say so and the IPCC ToR could be widened to encompass that issue; third, it was not reasonably arguable that the IPCC lacked independence; and fourth, the

two investigations should, subject to the possible widening of the ToR of the IPCC, ensure that the requirements of an Article 3 compliant investigation were met. Mr Justice Mitting further observed that the Attorney General ought not to be joined.

12.6 The application for a judicial review was subsequently renewed. The claimants argued:

(1) That there was convincing prima facie evidence of serious disclosure failings on the part of police;

(2) That it was clear that those failings would not be covered by the HMCPSI or IPCC investigations and that, therefore, there was no need to await the reports of those investigations;

(3) That insofar as the IPCC would investigate such failings, it would be limited to the missing documents which was "only a small part of the difficulties surrounding disclosure that led to the collapse of the trial";

(4) That police misconduct/deliberate failings were not the limit of the claimants' concerns (which extended to a lack of knowledge on the part of police concerning disclosure obligations, lack of sufficient care in discharging those obligations, and/or systemic failings within the police); and

(5) That the IPCC had "elected" not to consider wider matters, and to suggest it would extend its investigation was speculative and, on Mitting J's approach, would effectively constitute a new and third investigation causing unnecessary delay when a "comprehensive" inquiry might instead be held.

12.7 The renewed permission hearing was listed to be heard on 29 January 2013. The claimants' submissions were set out in the skeleton argument dated 17 January 2013 and as might be imagined over a period of more than one year, the judicial review proceedings generated a considerable volume of documents which, moreover, contain repetition or a re-formulation of submissions previously made. The claimants have agreed by the ToR that I am required to have regard to certain core documents and the skeleton argument of 17 January 2013 is the first such document.

12.8 The proceedings were ultimately adjourned to await the outcome of the IPCC and HMPCSI reports which the Home Secretary maintained would be "sufficient to establish where accountability lies" and would "comprehensively consider the events that led to the decision" to offer no evidence.

12.9 Although the two reports were not published until 16 July 2013, they had been made available to the claimants several weeks before publication. It became clear that the reports had not diminished the claimants' concerns and they renewed their submissions as to why, notwithstanding these two earlier investigations, "a public inquiry remains a necessity". A further hearing was held on 6 June 2013, at which the claimants undertook (it would appear in response to a suggestion by Lord Justice Thomas, as he then was) to provide further written representations to assist the Home Secretary in reaching a decision as to whether a public inquiry was necessary. Those further written submissions were set out in a letter dated 13 June 2013 which identified the areas of concern and listed nine issues which it was suggested needed to be investigated because they had not been satisfactorily resolved

in the IPCC and HMCPSI investigations. It also addressed the form that the inquiry should take and its necessary characteristics.

12.10 On 16 September 2013, having considered the claimants' renewed representations, the Home Secretary informed the court of her decision not to hold a public inquiry; a decision which she indicated she would review following receipt of the Dalecrest report. On 3 October 2013, the claimants set out supplementary grounds for judicial review of that decision. The focus of these submissions was directed towards the adequacy of the IPCC and HMCPSI investigations and reports. This is a further document (in fact the third in the list) to which I am required to have regard by the ToR.

12.11 On 10 and 11 February 2014, a preliminary hearing for the renewed application for a judicial review was held in Cardiff. A skeleton argument dated 13 January 2014 was prepared for that hearing and is the second document to which I am required to have regard. The Court requested that witness statements should be made on behalf of HMCPSI and the IPCC and statements were provided by Michael Fuller, HM Chief Inspector of the CPS (dated 27 February 2014) and Sarah Green, Deputy Chair of the IPCC (dated 28 February 2014). Fuller's witness statement is the fourth document to which I am required to have regard (it is in fact dated 27 February 2014 and not 28 February 2014 as described at paragraph 3.3 of the ToR).

12.12 Following the receipt of those two witness statements, in further submissions dated 10 March 2014 (the fifth and final document to which I am required to have regard by the ToR), the claimants summarised their position thus:

> "The claimants have submitted, both in their oral submissions and in their written submissions, that to date there has been no joint investigation that has got to the bottom of went wrong; there has been an insufficient investigation and lesson learning on the part of the police, in particular in respect of the police failings identified in Mr Fuller's report, and there remain outstanding issues to be investigated in light of the IPCC's limited investigation".

12.13 On 21 March 2014, the Home Secretary proposed a settlement to the claimants of a QC led review rather than a public inquiry. That proposal was eventually accepted, and ToR were agreed by the claimants. The ToR require the Mouncher Investigation to explore or consider the following twelve issues:

(1) The "reasons why Leading Counsel for the Crown gave the indication" on 1 December 2011 that "the prosecution can no longer sustain a position maintaining that the court and the Defendants can have the required confidence in the disclosure process";

(2) To "consider how the 227 boxes of documents were overlooked and the contents not considered for the purposes of disclosure in the prosecution. It will also determine whether the reasons for the boxes being overlooked were addressed by the Dalecrest investigation, and if not to carry out such further investigation as necessary to address that matter";

(3) To "cover all questions of resources, performance and conduct" arising from (1) and (2) above "which have not been resolved by the previous investigations", taking into account the five documents, identified above, to which I am required to have regard under the ToR.

(4) To "consider" why the prosecution was abandoned, including in particular the issues set at (1) to (3) above, and having regard to this inquiry's findings on (1) to (3), and the findings of the IPCC, HMCPSI and Dalecrest;

(5) If this inquiry is unable to reach a conclusion on these matters, it will explain why not, and to identify what, if any, further steps could enable such a conclusion to be reached;

(6) To consider what lessons are to be learnt from the process for recording, retaining and disclosing unused material that was adopted in Mouncher;

(7) To consider whether appropriate steps have been taken in the light of the lessons to be learnt and, if not, what further steps should be taken;

(8) To report whether this inquiry has identified information that has not previously been considered by the IPCC, HMCPSI or Dalecrest which should lead to an investigation into any conduct matter on the part of any police officer, and/or has identified information which should be passed to the DPP;

(9) To report whether the investigation been "unable to access any relevant evidence" and if so, why, and whether a public inquiry would have a significantly better chance of doing so;

(10) To identify whether the investigation has been "unable to reach a conclusion" on relevant matters and if so, why not, and what, if any, further steps could enable such a conclusion to be reached; and

(11) To consider, throughout, whether the investigation requires to be converted into a public inquiry. If so, the Home Secretary shall be informed in order that she may consider the position.

12.14 As will be evident from the above, the ToR place the current inquiry firmly in its proper context: it is not a free-standing inquiry; it takes as its starting point the previous investigations, and it must have regard to the specific submissions advanced by the claimants in the judicial review proceedings. It follows, therefore, that there is value in considering what common ground between the two parties is evident from the judicial review proceedings and to consider carefully the issues which the claimants have said were outstanding and required to be resolved.

12.15 The Home Secretary accepted the following nine propositions:

(1) That the events leading to the offering of no evidence in *R. v. Mouncher* gave rise to "very considerable public concern";

(2) That the legal threshold for holding a public inquiry under section 1 of the 2005 Act was met and that accordingly, she had a discretion to cause an inquiry to be held or to decide against doing so;

(3) That it was "necessary" to establish "where accountability lies";

(4) That there were, following the HMCPSI and IPCC investigations, questions not "fully answered";

(5) That a public inquiry may uncover more details of failures that contributed to the collapse of the trial;

(6) That a public inquiry might "achieve a more detailed examination of the police's part in the disclosure exercise";

(7) That there had been a "somewhat less comprehensive investigation" in respect of these aspects;

(8) That it was necessary to learn lessons from the case; and

(9) That the original defendants/claimants were entitled to expect that there would be a fair trial resulting in jury verdicts on the evidence as to the guilt or innocence of police officers involved in their prosecution.

12.16 Nonetheless, the Home Secretary maintained that a public inquiry was unnecessary because:

(1) The matters identified by the claimants had been sufficiently investigated by the HMCPSI and IPCC and together those two investigations were sufficient to establish accountability;

(2) The IPCC and HMCPSI reports evidenced a "thorough", "effective" and "unflinching" assessment of what the prosecution did or did not do relating to the "missing files and the decision to offer no evidence" and the facts had been "satisfactorily uncovered" bearing in mind the limitations of recollection by witnesses;

(3) A public inquiry would be unlikely to achieve anything further and was not the only, or the most appropriate, way forward;

(4) The cost of a public inquiry would be "grossly disproportionate" to its likely benefit to the public given (a) that benefit had already been achieved by work on disclosure in criminal prosecutions; (b) that further benefit would be achieved by the continuing work on disclosure in criminal prosecutions; (c) that an inquiry would be a "mammoth task", comparable to the consideration of the 800,000 documents involved overall in the disclosure exercise in *R v Mouncher*; (d) that a public inquiry would duplicate the work already undertaken by the IPCC and HMCPSI investigations; and (e) that given its scale it would take years to complete and would cost millions of pounds;

(5) The claimants' Article 3 ECHR rights were not engaged or, if they were, had been satisfied. Furthermore, it was "possible" that "further light" would be shed on the case by (a) the civil claims and (b) the Dalecrest investigation although in view of the uncertainty, no weight had been placed on those ongoing investigations.

12.17 For their part the claimants acknowledged and accepted:

(1) That it was appropriate to "[take] into account what the previous investigations have already achieved";

(2) That the work carried out by the IPCC and HMCPSI in their investigations had "assisted the claimants to gain a better understanding of the underlying reasons for the collapse of the trial and the events that led up to it";

(3) That the HMCPSI review had been "thorough" and "very thorough";

(4) That "in particular … the investigation by Mr Fuller on behalf of the HMCPSI was clearly conducted in a thorough manner";

(5) That the HMCPSI report was "extremely informative in terms of the disclosure process undertaken in preparation for and during the trial";

(6) That the HMCPSI report had identified a number of significant failings: "from a CPS perspective had identified failings relevant to the collapse of the trial and lessons to be learned" including a number of significant failings and had carefully considered the roles and actions of the CPS and in the disclosure process;

(7) That the HMCPSI report had "identified some important learning points" and made recommendations as to how similar problems could be avoided;

(8) That a number of matters were addressed "sufficiently" in the HMCPSI report;

(9) That, for example, there was no need for any further investigation to re-visit areas covered by the HMCPSI investigation in relation to "the CPS and Counsel team … at all", save in respect of the events around the decision to offer no further evidence;

(10) That there was "no need to conduct an investigation in respect of the 800,000 documents relevant to the disclosure exercise" as "the terms of reference could be drawn up with specific regard to the particular disclosure failings that were identified during the course of the trial and in the HMCSPI report" and the "focus would be on those documents relevant to the factors that led to the collapse of the trial"; and

(11) That any further investigation or inquiry should concentrate on a "carefully focused list of the outstanding matters that the two investigations had failed to fully investigate."

12.18 Without such further investigation, the claimants contended in their letter of representations, there would remain "issues of fundamental public importance that have yet to be fully investigated" and "it will remain the case that not all failings will have been identified, there will be a lack of accountability, and a failure to learn all that can be learned." Accordingly the claimants sought what they described as a "limited inquiry" focused on the "particular outstanding areas identified by the claimants"; "to investigate the outstanding matters, answer outstanding questions and fully hold those responsible for any failings to account."

12.19 Matters said not to have been "satisfactorily resolved" by the IPCC or HMCPSI were set out at paragraph 86 of the complainants' supplementary grounds of 3 October 2013, reproducing the nine "main outstanding areas" for investigation set out in the representations dated 13 June 2013 made in response to the HMCPSI and IPCC reports. At paragraph 105, these were referred to as "eight substantial matters that remained outstanding and unresolved" and "yet to be investigated and determined". In their submissions, the claimants summarised the IPCC and HMPCSI reports and submitted that the summary "explain[ed] that each of these matters was not in fact covered by those investigations and indeed … in some instances the contents of the reports compounded or increased the claimants' concerns about the circumstances that led to the collapse of the prosecution."

12.20 The letter of representations at page 2, sets out the issues of "fundamental public importance" and suggested that Haskell's role was insufficiently considered (that is not something which emerges clearly elsewhere from the outstanding areas listed):

> "… while Mr Fuller's investigation did consider in depth the actions of the CPS disclosure team, it did not consider in similar depth the actions and roles of disclosure counsel, and only very briefly considered the roles of the police disclosure officers, and then only to the extent that it was necessary in order to consider the actions and roles of the CPS lawyers and staff. It remains the case, therefore, that there has not been a full investigation into the roles and actions of the police disclosure officers, and to some degree of counsel, in the disclosure process."

12.21 In addition, the letter of representations refers to "the gaps and deficiencies we have so far identified in the two investigations".

12.22 The following ten issues are said by the claimants to be outstanding (the wording follows that in the claimants' further representations of 13 June 2013 and supplementary grounds of 3 October 2013):

(1) Why, when and by whom the four copy files (D7447 and D7448) came to be stored in DCS Coutts' office, where they were stored prior to being taken to DCS Coutts' office, and who knew about them;

(2) Whether DCS Coutts did or did not give an instruction that material be shredded or destroyed;

(3) What information was and given to Dean QC between 28 November 2011 and 1 December 2011, and was this sufficient;

(4) Was the information and explanation given to the DPP about the missing files an accurate and sufficient account of the information gathered as part of the inquiries made;

(5) Was the information and explanation given to the court on 1 December 2011 about the missing files an accurate and sufficient account of the information gathered as part of the inquiries made;

(6) What other inquiries and/or steps, in particular what searches, were or should have been conducted prior to a decision being taken to offer no evidence on 1 December 2011;

(7) Police disclosure and other failings that impacted on the collapse of the trial identified by Mr Fuller but not fully investigated, including (but not limited to) (a) the inaccurate and incomplete description of material in schedules; (b) the failure to record meetings with prosecution witnesses; (c) the appropriateness or otherwise of the relationship between the police and prosecution witnesses; and (d) the failure to obtain and disclose third party material and material from the LW1 trials in a timely manner;

(8) Failures in communication and relations between the CPS, counsel and the police in terms of disclosure;

(9) In respect of all the issues included within the scope of the inquiry, the identification of those responsible for any failings; consideration of whether standards of professional conduct have been breached (paragraph 144 of the IPCC report is inadequate in this respect); and the identification of lessons to be learnt, in particular on the part of the police; and

(10) The unresolved conflict between DC O'Connor and Haskell in relation to D7447 and D7448 at the secondary disclosure stage.

12.23 If these were the claimants' principal concerns in 2013 – and to do each of the ten justice, I shall return to them later at chapter 22 of this report – it is nevertheless true that matters have to an extent changed and the claimants are now more informed than they were during the judicial review proceedings. In 2016 the claimants have, in light of the evidence and the judgment in the civil proceedings, submitted in writing that "it is clear" that issues 1 to 6 above "remain largely unanswered"; helpfully, they have set out what they consider to be both the outstanding issues and the outstanding lines of enquiry in relation to those issues. They have not submitted anything in relation to issues 7 and 8 (issue 9 is overarching, and issue 10 fits into the wider story of issue 2). It cannot, of course, be assumed that those issues can for that reason be dismissed, or are an irrelevance, but – in light of the detailed consideration of the police role in disclosure in the civil trial and its treatment in the judgment – the particular approach set out in the 2016 document was understandable and sensible.

13. The Civil Proceedings

13.1 As noted above at paragraph 8.3, I was never in any doubt that it was necessary to wait for the conclusion of the civil proceedings and the judgment therein. Fifteen claimants brought claims for various combinations of malicious prosecution, misfeasance in a public office, false imprisonment and breach of the Article 8 right to respect for private and family life. Thirteen of those claimants were the 13 serving or retired police officers who were charged in LW3 and the remaining two, Adrian Morgan and Erica Coliandris, were police officers who had been arrested in the course of LW3 but had not been charged. The evidence, opening and closing submissions took from 12 October 2016 to 17 December 2016. Those proceedings enabled me to have additional witness statements from a large number of central witnesses to both the LW3 investigation and to the collapse of the trial in 2011. I also had the transcripts of evidence given at the civil proceedings from 22 relevant witnesses including: DCS Coutts, DCI Penhale, Dean QC, Bennett, Haskell, Clements, Thomas, Hart and the five Lead Disclosure Officers at all material times of the investigation (DCI Hill, DS Allen, DS May, DC Rowlands and DC O'Connor). There was then a delay of six months from the end of the civil proceedings to the handing down of the judgment on 14 June 2016. That delay is no more than yet another indication of the huge amount of documents and other evidence which these events had generated over the previous twenty eight and a half years. The task that confronted Mr Justice Wyn Williams was formidable.

13.2 All claims were rejected save for two: Coliandris and Hicks succeeded in their claims for false imprisonment. Coliandris succeeded because the judge found that there were no reasonable grounds for suspecting that she had committed any of the offences for which she had been arrested and Hicks succeeded because by the time of his arrest, there had been a significant change in the law (there now had to be reasonable grounds for believing that an arrest was necessary) and SWP failed to discharge the burden of proving that such a necessity existed. These two findings were based on no more and no less than an objective assessment of the evidence which existed at the time of each arrest; neither good nor bad faith was a relevant factor in either determination. The unsuccessful claimants have not appealed (the time limit for an appeal to be served has long passed) and the two successful claimants have settled their claims without further recourse to the judge.

13.3 A number of the claims and arguments were of a relatively technical nature and my interest was obviously in those other claims (in particular, malicious prosecution and misfeasance in a public office) that sought to establish bad faith on the part of the LW3 police officers, a principal concern, understandably, of the surviving original defendants. In his judgment, Mr Justice Wyn Williams emphatically rejected any suggestion of bad faith on the part of DCS Coutts, DCI Penhale and any other police officer who was considered during the proceedings. That is an important finding especially as the judge had the opportunity of assessing Coutts and Penhale (and other police officers) over many days of cross examination. Mr Justice Wyn Williams found DCI Penhale "very defensive" over the reasons and responsibility for the collapse of the trial and that some of Penhale's answers on this issue were "difficult to accept" but in essence found that none of the core allegations against either police officer had been proved. The judge found that Coutts and Penhale sought to get to the truth of what had occurred during the course of LW1 and that they had encountered "very many difficulties in pursuing that aim".

13.4 The following nine findings are plainly relevant to the Mouncher Investigation:

(1) As to the civil claimants' case that the original defendants were guilty of Lynette White's murder:

> "… weighing everything in the balance, it was much more likely than not that the original defendants and the other persons arrested in December 1988 were "victims" rather than perpetrators of Lynette's murder" (paragraph 478).

(2) There was ample justification for the belief that the Core Four had lied about the original defendants' participation in Lynette White's murder (paragraph 482);

(3) There were reasonable grounds to suspect that the Core Four had been induced to lie about the involvement of the original defendants by the conduct of LW1 police officers:

> "I find it very difficult to understand how the accounts emerged as they did if no police officer was instrumental in what occurred" (paragraph 484);

(4) DCC Cahill, DCS Coutts and DCI Penhale were determined to do all they could to ensure that there could be no public perception that the claimants were being treated in any kind of favourable way:

> "In my judgment, they were almost bending over backwards to ensure there was no appearance of bias in favour of suspected police officers. That was an instinct which was wholly understandable given the history of the case" (paragraph 563);

(5) None of the LW3 Lead Disclosure Officers deliberately suppressed documents which they knew would undermine the case against any of the suspected police officers or which would support the case of any individual police suspect (paragraph 592);

(6) Further on the issue of bad faith:

> "It is inconceivable, in my view, that they [Coutts and Penhale] personally suppressed important documents. Perhaps, more importantly, in my judgment there is no sound evidential base for concluding that Mr Coutts, Mr Penhale or any Lead Disclosure Officer directed any officer who was more junior to hide relevant information from the CPS. I appreciate that it is unlikely that I would have heard direct evidence to that effect during the course of the trial. However, in my judgment, there is no proper evidential basis from which such a conclusion can properly be inferred. Further there is no evidence of any kind which begins to support the view that individual police officers within LW3 deliberately suppressed material for reasons of their own. I accept that it is inherently improbable that every document generated in LW1, Operation Mistral and during the course of LW3 found its way to the CPS before the decision to charge police suspects was made. I cannot conclude from that, however, that there was a deliberate decision by Mr Coutts and Mr Penhale that unhelpful documentation should be hidden from the CPS. This scenario becomes all the more unlikely when it is understood that the documents which are said to undermine the credibility of the core four and/or assist the case of a particular police suspect were disclosed in the criminal proceedings. It seems to me to be most unlikely that Mr Coutts and Mr Penhale directed that documents which undermined the credibility of the Core Four should be withheld from the CPS yet took no steps

to prevent those very same documents being disclosed in the criminal proceedings" (paragraph 594).

(7) By the time the CPS reviewing lawyer and Head of the Special Crime Division, Simon Clements, made the decision to charge the 13 police officers on 27 February 2009:

> "… he was fully entitled to conclude that the test for bringing a prosecution against those suspects was satisfied. He was entitled to conclude that there were reasonable prospects that the Claimants to be prosecuted would be convicted and that it was in the public interest that they should be prosecuted" (paragraph 601).

(8) The circumstances in which D7447 and D7448 were reported as missing were relevant to the claim of misfeasance in public office: it was suggested in the alternative that the documents were either destroyed, or failing that, were deliberately "mislaid" to ensure the abandonment of the trial. The judge recognised that "… to this day, a degree of mystery surrounds the "losing" and "finding of those documents" (paragraph 683) and then made the following findings:

> "First, as a matter of fact, the documents in question were not destroyed. There was no unlawful destruction of those documents and, so far as I am aware, of any other documents which came into the possession of the police. Insofar as the Claimants found an allegation of misfeasance on the factual assertion that documents were destroyed that allegation must fail. Second, it is possible to argue that Mr Coutts did issue an order to Mr Allen to destroy the documents but Mr Allen did not comply with that order. Depending on the circumstances in which the order was given, such an order might constitute misfeasance in public office. In my judgment, however, it is very unlikely that Mr Coutts issued any such order. Why would Mr Coutts direct the destruction of copies of documents when the originals were held safely by third parties? Third, there is no obvious explanation for the difference in recollection between Mr May and Mr Allen about the conversation said to have taken place between them in 2010" (paragraph 684).

The judge then found that:

> "[t]he probability is that the documents were misplaced through human error. Quite how they came to be found, apparently so easily, some weeks after the trial came to an end is a mystery which I cannot resolve and about which I decline to speculate. To repeat, however, the Claimants have failed to establish that Mr Coutts (or any other officer) deliberately destroyed documents in the possession of the police and, that being so, that pleaded allegation of misfeasance must fail" [paragraph 685].

(9) Specifically on the issue of any evidence of bad faith in the disclosure exercise conducted by police officers:

> "In the context of disclosure it would be necessary to demonstrate that the officers involved in the process either deliberately or recklessly ignored their statutory obligations thereby causing significant failures in the disclosure process. Reduced to essentials before misfeasance could be proved in the context of disclosure failings Claimants 1 to 13 would have to prove that LW3 officers deliberately or recklessly suppressed documents which they knew should have been disclosed. There is simply no evidence that the Lead Disclosure Officers or their subordinates acted in this

way. This conclusion is justified by a number of pieces of the evidential jig-saw. First, I gained a favourable impression of all the officers who gave evidence before me on the disclosure issues. Second, without doubt, there was close supervision of the disclosure process by the team of prosecuting lawyers. Mr Haskell was relatively inexperienced but I have no doubt that he had a very sound grasp of the issues and that he was astute to apply the statutory provisions about disclosure in an appropriate manner. However, the evidence which most convinced me that there was no deliberate or reckless withholding of documents which undermined the prosecution case or assisted the defence was that part of the evidence which I heard about a number of documents which came to light shortly before the trial began" (paragraph 689).

13.5 The judge then selected three such documents as examples and I will come back to them in the next chapter.

14. Overview

14.1 The issue of bad faith has so dominated the thoughts and concerns of the original defendants that it should be confronted at an early stage of this report.

14.2 I have had access not only to the evidence obtained by the IPCC, HMCPSI and Dalecrest and to the reports from those inquiries but also to the evidence from the civil proceedings and the judgment of Mr Justice Wyn Williams. I have had the benefit of more material than any of my predecessors who have had to investigate these events and that is not simply due to the fact that I am the last in line, it is because the evidence taken by HMCPSI has not previously been available to anyone outside of the Inspectorate. An application for third party disclosure was made to the CPS for the HMCPSI material during the civil proceedings but it failed due to a successful claim by the CPS of legal professional privilege. This evidence, together with CPS internal documents and advices (also hitherto unseen by anyone outside HMCPSI) provide a clearer insight into the workings of the prosecution team and the circumstances in which the decision to offer no evidence was made. Furthermore, my remit is much wider than any previous inquirer or fact finder.

14.3 Foremost amongst the original defendants' concerns is whether or not the LW3 police officers were themselves corrupt and deliberately engineered the collapse of the Mouncher trial in order to save their fellow SWP officers from conviction and certain imprisonment? The suspicions of Stephen Miller, Anthony Paris and John Actie are understandable not only because of what happened but also because SWP were investigating themselves and that must inevitably cause disquiet and create suspicion.

14.4 After nearly 20 months of considering and evaluating the evidence I am satisfied that there is no evidence of corruption, malice or misfeasance within the LW3 investigation. SWP may not at all times have assembled the most competent and experienced team of disclosure officers and mistakes were certainly made during the document management and disclosure processes, but the disclosure exercise was fundamentally conducted by the police with care and, above all, with probity and good intentions. Document management and disclosure errors were not deliberate and a large number, of course, were those of prosecution lawyers and not police officers. In addition, throughout the investigation, police officers followed the approach and guidance of CPS lawyers and disclosure counsel; police officers cannot be blamed if, on occasions, that approach and guidance were not up to the mark. Furthermore, there is no evidence that the events which led to the abandonment of the trial were in any way part of a much narrower and ingenious plot to achieve that very end. I am satisfied that no documents were suppressed or destroyed to defeat or impair justice; there is simply no evidence to justify such a finding.

14.5 This conclusion has been reached because of many factors which have yet to be set out, they can be found in the remainder of this report, but the principal reason for it is that an investigation of SWP's discharge of its disclosure obligations reveals a very wide and open attitude to disclosure, so much so that police officers were content to disclose all of the LW1 investigative material but prosecution lawyers objected to such extensive disclosure on the ground that it was not compliant with the law. That hardly betrays a restrictive or unhelpful mindset.

14.6 Disclosure errors were not designed to pervert the course of justice; they were the consequence of inexperience, poor decision making and inadequate training, leadership and

governance. Human error leading to disclosure failings must not be misinterpreted as the deliberate suppression of evidence. The meetings behind the D30 documents at which police officers were present, for example, were held in some instances in the presence of CPS lawyers and always in the presence of the solicitors of the original defendants who took detailed notes of the meetings; circumstances which are wholly inimical to disreputable conduct or intentions. A CPS lawyer, Howard Cohen, was tasked with the decision to review the D30 material. The police did not decide in isolation that the D30 material should not be disclosed; the decision was also that of Cohen. As has been said by others in the past, there was no "smoking gun" or "golden nugget" amongst the disclosure failures; there is no evidence that a decision not to disclose was made in respect of material which was of obvious and significant assistance to the defence. The disclosure failures highlighted during the trial were in respect of material that was of fairly moderate assistance to the defence and I believe that through forensic extravagance and skill more was perhaps made of those failures than was merited – something that Bennett described to HMCPSI as being the "Coker QC effect" – though there is no doubt that those failures exposed a disconcerting level of incompetence. Any disclosure failing is obviously worrying and a succession of disclosure failings more worrying still, but where bad faith is being considered, the nature of the document withheld is obviously highly relevant and a sensible starting point.

14.7 There is no evidence, for example, that the "disappearance" of D7447 and D7448 was arranged to sabotage the trial or anything like it. There were no explosive or damaging revelations in either D7447 or D7448 (or indeed in the William Peter Evans witness statements) that would have caused any police officer to remove them from the system for nefarious reasons. The errors which surround D7447, D7448 and the Evans witness statements were the consequence of this material having rightly been given a different status to that of the vast majority of other documents and that was because they were to varying degrees sensitive or thought to be sensitive and one of the third parties who supplied sensitive documents to LW3 required that they should be subject to a firewall. They were treated differently upon their arrival at St. Athan with good intentions and that is likely to have played a part in their being recorded in a manner that was contrary to MIRSAP and HOLMES procedures. They were not stored in the MIR in the normal way, as had been requested, and it is very much to be regretted that, irrespective of rules and procedures, an element of common sense was not brought to bear on their handling and location. These shortcomings will be described in detail below at chapter 18 of this report.

14.8 It was Haskell, not the police, who decided that the two witness statements of William Peter Evans were irrelevant and should not be entered on the MG6C (indeed the police had believed that they were relevant). It was Haskell who decided that the Actie complaints should not be disclosed and it was prosecution lawyers who agreed with the comment that D7447 and D7448 were "CND". It was Haskell who omitted to review the E-Catalogues during secondary disclosure and if he had done so, I have no doubt that he would have discovered that documents were missing and would have insisted on an investigation into why they were missing and would have ensured that any deficiencies would have been corrected, in particular, he would have requested that duplicates be supplied and stored at St. Athan. The close involvement of prosecution lawyers in the management of D7447, D7448 and the Evans witness statements militates against any suggestion of police malpractice in their treatment.

14.9 If wicked minds had wanted to sabotage the trial through the disappearance of D7447 and D7448, then surely the documents would have been destroyed and not merely misplaced? Few could have imagined that a thorough search of St. Athan would not have been conducted once the documents had been discovered to be missing and surely no one would have thought that two occasions could have passed, one in February 2010 (DS May audit) and the second in December 2010 (DC Morris/DC O'Connor secondary disclosure review), when the documents would be found missing but absolutely nothing would be done to replace them? This is an example of fact being stranger than fiction and what actually happened during the LW3 investigation to these two "D" numbered series of documents would have been beyond the imagination of anyone: good, malicious or otherwise.

14.10 At paragraph 12.2 above, it is suggested in the claimants' letter of claim that there must be a "strong suspicion that one or more SWP officers, aware that the judge had, in effect, given the prosecution a last chance to show that disclosure was now in order, took advantage of that situation to create a false picture of further disclosure shortcomings." This "strong suspicion" appears to suggest that a corrupt police plot was hatched post the setting of Sweeney J's test on 28 November 2011, the object of which was to throw the trial by then and only then engineering the disappearance of D7447 and D7448. That suggestion does not bear scrutiny because by 28 November 2011 those documents had already been found to be missing on two previous occasions, the first of which was nearly two years before in February 2010. There is no evidence to establish any bad faith in the handling and management of these two "D" documents and the others connected to them.

14.11 At paragraph 13.5 above, I stated that I would come back to the three documents referred to by Mr Justice Wyn Williams, they are directly relevant to my finding (and to that of the judge) that there was no bad faith.

14.12 The three documents comprised the following:

(1) An attendance note made on 19 January 1989 when Stephen Miller's solicitors visited him in prison. This was another document protected by legal professional privilege that had found its way into the hands of LW3 police officers. This document, as Mr Justice Wyn Williams held, "completely undermined the proposition that Lynette had been murdered by [Jeffrey Gafoor] acting alone. Indeed, if true, it cast considerable doubt upon whether [Jeffrey Gafoor] had been involved at all". The attendance note amounted to a clear admission by Miller to his solicitor that not only had he been present inside Flat 1, 7 James Street at the time Lynette White had been murdered but that Ronald Actie, John Actie, Tony Paris and Yusef Abdullahi had also been in the flat with him. Miller had also told his solicitor that Tony Paris had stabbed White with a "bowie type knife with teeth on the back of it". Miller added that Leanne Vilday entered the room during the attack. This note came into the possession of the police in about late 2010/early 2011 and it was disclosed to the defence in February 2011. This document had true incendiary potential and was in itself capable of causing irreparable harm to the prosecution case; it was in a different league to D7447, D7448 and the William Peter Evans witness statements which, of course, were not disclosed.

(2) The Rees QC taxation note or "Assessment of Case". Much has already been written about this at chapters 6 and 7 above. Like the Miller solicitor's attendance note, this was of considerable assistance to the defence and was obviously disclosable. The CPS

had given boxes of its correspondence and other documents to the police for their contents to be assessed for the purposes of disclosure. DC Rowlands first saw the Rees QC note on 15 January 2011 and he rightly considered that it was extremely important because it undermined a fundamental part of the prosecution case. DC Rowlands wrote a report about the note which was seen by the then Lead Disclosure Officer, DC O'Connor, who referred the document to Haskell who then directed its immediate disclosure. A clear example of the disclosure process working in accordance with the rules. The boxes which contained the Rees QC note were in fact delivered to the police in July 2010 and although the box in which the document was found was not examined for another six months, there was no evidence of any bad faith being responsible for that delay. As Mr Justice Wyn Williams held at paragraphs 705–707:

> "I am conscious, of course, that there was a considerable delay between an officer of LW3 first raising as an action the obtaining of files relating to [Gafoor] from the CPS and the receipt of those files. No doubt that is regrettable. However, there is no basis for inferring any improper motive to that delay. It could hardly be suggested that any officer in LW3 or any lawyer within the CPS could have foreseen that a CPS file containing evidence relating to JG would contain a case assessment prepared by [Gafoor's] leading counsel.
>
> There was also a delay of some months before the CPS files were assessed once received by the LW3 officers. No doubt, too, that is regrettable but it has no bearing on the issues in this case. The plain fact is that once a police officer discovered the case assessment it was drawn to the attention of Mr Haskell and disclosed very promptly.
>
> The events surrounding the disclosure of this document, as I find them to be, are completely inconsistent with the deliberate withholding of exculpatory material."

The Rees QC taxation note, was, for obvious reasons, described by Bennett as the "the single most obviously disclosable document in the unused material" and Dean QC said that it "represented what in disclosure terms could have been a ticking time bomb".

(3) LW3 police officers made a number of attempts to persuade Vilday to consent to the disclosure of all of her medical records over a considerable period of time. Initially Vilday refused but ultimately gave her consent and the officers then discovered a psychiatric report following an assessment of Vilday on 15 August 1990. In that report was a reference to Vilday having told the psychiatrist that she had witnessed Lynette White's murder. Again, this was highly relevant material which could be used to good effect during the cross-examination of Vilday to undermine the prosecution case. Upon receipt of the report it was disclosed.

14.13 These are not isolated examples. There are numerous incidents of the police receiving obviously pertinent and, to the defence, useful documents which were disclosed. SWP's open attitude to disclosing all of the LW1 investigative material is also relevant. There is simply no evidence, as Mr Justice Wyn Williams said at paragraph 710:

> *"… [of] an orchestrated campaign, driven by Mr Coutts and/or Mr Penhale and/or by the Lead Disclosure Officers, to suppress exculpatory material."*

14.14 I would add that there is also no evidence of any single LW3 police officer of whatever rank going rogue and acting on his or her own to pervert justice by deliberately withholding helpful evidence from the defence or by destroying it.

14.15 As has already been mentioned, the nature of the material not disclosed cannot be ignored. It is difficult to conclude that bad faith was the reason for the failure to disclose some material when that material was of much more limited utility to the defence than material that was in fact disclosed. Furthermore, the existence of some of the material not disclosed must have been known to the defendants. For example, as will be seen, a document received from PSD and not disclosed related to complaints from some of the defendants (Thomas Page, Michael Daniels, Peter Greenwood and John Murray) and it is more than likely that the defendants would have known about the substance, if not the detail, of the complaints from their fellow police officers: Carole Evans, William Peter Evans, Joy Lott, Erica Coliandris, John Williams and Adrian Morgan. The most relevant of the documents from the IPCC were, of course, the two witness statements from William Peter Evans (husband of Carole Evans) of which, again, it is more likely than not that the defendants would have had some knowledge. It is unlikely in the extreme that the failure to disclose documents which were known to the defendants (or might have been known to them) would have been based on malice.

14.16 Too many errors were made and the management of the disclosure process was at times weak, but on occasions it is worth reflecting that the disclosure exercise was operated with good intentions. As but one example of this is the fact that more than 1,000 documents were disclosed during primary disclosure. Whatever their aptitude or experience, I believe that the disclosure officers wanted to do the right thing but the system at times broke down and relevant documents were either not registered or disclosed. A primary cause of these failures is that a particular part of the document management system was fundamentally flawed: it could not adequately cope with sensitive third party material.

14.17 Those important findings having been made on all of the evidence, it is to the evidence that I shall now turn.

15. The Circumstances in which Counsel were Instructed

15.1 To ensure independence, CPS Wales declined to accept the case and so it started under the control of CPS Casework Directorate at Ladywood House, Birmingham. In January 2006 the case was transferred to CPS Casework Directorate in London following the setting up, in September 2005, of three new divisions within the CPS. The new division then responsible for this investigation was Special Crime Division (SCD) of which the head was Carmen Dowd. SCD did not have a Birmingham office hence the transfer of the case to London.

15.2 Concern has been expressed by Dean QC and a number of police officers (Coutts and Penhale in particular), that from the outset, the CPS failed to grasp the complexity, gravity and enormity of the Mouncher investigation and prosecution. It is also believed that because it was pejoratively held as being a "provincial" or "out of London" case, sufficient care and attention was not paid to it by CPS HQ in Ludgate Hill in central London.

15.3 Dean QC to HMCPSI when interviewed on 3 December 2012:

> "… I don't think there was much awareness, I mean, speaking for myself, I had in general terms heard of the Lynette White case without necessarily being conscious of its name, and I think the same was probably true of people like Carmen Dowd, but at Ludgate Hill I think it wasn't regarded as much more than an important case to South Wales, not of national importance. And that was certainly the impression I got in terms of her dealings with the case. But, as I say, I am working on very limited evidence in that. And there wasn't very much involvement from the CPS hierarchy, if I can put it that way."

15.4 And as an example of how the scale of the case was misjudged, Dean QC in the same interview:

> "… [The instruction of Bennett] was very much dictated by how Ian Thomas at that stage saw the case. And one of the things that Jim Bennett will be able to tell you about in much more detail than I, is that Ian Thomas thought the whole thing could be wrapped up in a very short amount of time indeed. You know, that it would be a project of a year or two, rather than effectively getting on for 10 years … he did not see the case for what it was."

15.5 The allegations of provincial discrimination are robustly denied by the CPS but there is evidence that tends to suggest that there may be some support for the belief that the Core Four and the Mouncher investigations and prosecutions were not given the funding and attention they merited.

15.6 Prosecutions of police officers are conventionally and rightly regarded as being amongst the most difficult and significant to prepare and present. Multi handed police corruption cases inevitably offer an even greater challenge and prosecutions of 13 police officers are not only extremely rare but must be categorized as being amongst the most difficult of all criminal cases to prosecute, especially when based on events going back to 1988. The allegation that 13 police officers put their heads together and agreed to manufacture and manipulate evidence against five men for murder goes to the very heart of our criminal justice system. I have no doubt that throughout the relevant period, this investigation and prosecution should have been considered by the CPS as being amongst the most difficult and important of all the prosecutions in its list of notable cases and that all necessary resources should have been directed towards it.

15.7 The purpose of LW3 was clear from the very beginning and that although it was to involve two distinct stages – consideration of the Core Fore first and then the police officers – it should always have been regarded as *one* investigation even if, for evidential reasons, the second stage was not eventually prosecuted. That meant, in my view, that the prosecution team should have comprised from the beginning a senior silk and a senior junior progressing to a four counsel team once the disclosure exercise for the Core Four was about to start and particularly when the investigation into the police officers was underway.

15.8 What in fact happened was very different to that imperative. At a meeting on 9 July 2004, the decision was made to instruct junior counsel and on 16 December 2004, and therefore whilst the case was still at CPS Birmingham, Ian Thomas instructed James Bennett as the first and then only prosecution counsel in the case. This was after Chris Enzor of the CPS had authorised the instruction of Bennett. Bennett was called to the Bar in 2002 and, in my view, was far too junior for such an important role.

15.9 Dean QC was not instructed as trial counsel until October 2005. He had earlier (3 June 2005) been instructed to advise on a discrete issue involving a potential conflict of interest concerning one of the barristers instructed by the defence. Dean QC justifiably enjoyed a high reputation but at the time he was instructed, he had only been in silk for two years. Dean QC explained to HMCPSI the circumstances in which he had been instructed, he said that Ian McIlroy of the CPS had happened to instruct him in the discrete conflict of interest point and that he was then instructed in the case itself:

> "So, my instruction was accidental in that sense. But again, it's a measure of how the case was viewed, that no silk was instructed from the outset, and that they came to me, and at the time I was a relatively junior silk, 2005, so I was two years as a silk, whereas actually, if they'd had in mind what the case would become, he [Ian McIlroy] would have gone to, probably Treasury Counsel, probably someone more senior than me."

15.10 Haskell was instructed as disclosure counsel in July 2007, he had been called in 2004.

15.11 Ian Thomas (it seems together with Ian McIlroy) had been responsible for instructing Dean QC and Howard Cohen for instructing Haskell.

15.12 I requested any document that sets out the reasons for the selection and instruction of counsel or the criteria which were applied to those decisions but have been informed that there is little such material. In the course of interviewing Dean QC, an HMCPSI inspector revealed that the Inspectorate had not discovered "much concrete evidence about the criteria by which any counsel was instructed" and that such decisions had never been "thought through properly from the outset". Dean QC agreed and added that in his opinion, Bennett and Haskell were "too junior for the roles they had".

15.13 As for Bennett, the only evidence that has been disclosed is a note of Ian Thomas dated 5 April 2006 (therefore 16 months *after* he had been instructed) which was prepared for a DCMP. The only criteria which were applied to what appears to have been a decision to continue instructing Bennett were the following:

- "Has been briefed regularly as junior by HQ Casework Directorate of Birmingham. He has been involved in complex lengthy trials."
- "Has not practised in South Wales."

- "Location – Case originally controlled from Birmingham office and James Bennett is based in Bristol which is geographically situated to reduce unnecessary travel by Police, CPS and Nicholas Dean QC."

15.14 At this stage, all that I would add is that being 2002 call, Bennett could not have been instructed in many "lengthy trials" nor that regularly as a junior by HQ Casework Directorate.

15.15 As for Dean QC, the same Ian Thomas note of 5 April 2006 reveals that the following criteria were applied (again *post* instruction):

- "His experience of dealing with high profile complex casework – He was a shadow Treasury Counsel at the Central Criminal Court and has regularly been instructed by HQ Casework Directorate."
- "His location – Although based at 7 Bedford Row, he works predominantly in the Midlands and this case was originally from Birmingham."
- "He has no regular practice and connection with defence or prosecution in South Wales – This was a critical factor due to the large number of counsel in the case."
- "Recommendation – Discussed with Chris Enzor and it was agreed that his clear and incisive mind as well as his ability to identify and focus on the crucial issues were paramount in a case of such size."

15.16 For Haskell there is the following note of Howard Cohen dated 23 July 2007, which was based on information provided to Cohen (Haskell being a name previously unknown to him):

> "Counsel [Haskell] has been used a number of times in this case for minor appearances at court and, as such, is partially familiar with the case. He is in the same Chambers as the main junior counsel, who is prepared to assist him to make him more familiar with the case, despite him being on leave for a further three weeks."

15.17 On any analysis, those were not sufficient grounds for the instruction of counsel in a position as important as that of disclosure counsel in this particular case. Being in the same chambers as Bennett was of little, if any, relevance and Bennett was not doing anyone a favour by promising to make Haskell "more familiar with the case"; it was his duty as junior counsel to do so. Disclosure, in this of all cases, was always going to be a critical element in the preparation and as the quotation at the front of this report reveals, DCS Coutts and, no doubt the CPS, must at all times have been aware that disclosure was an especially vulnerable part of the prosecution case and that it should have been dealt with accordingly.

15.18 Haskell was later instructed as junior counsel and this was positively encouraged by Dean QC in a note dated 12 November 2008: "I would hope that James Haskell could be instructed now as second junior in the case. James has proved himself over many months to be extremely hardworking and he has made himself an invaluable member of the team in his work on unused material [in other words disclosure]."

15.19 A four counsel team would have permitted the lower two, numbers three and four, to have concentrated on disclosure for as long as was necessary and if the more senior of the

two, the number three, had been about ten years call, then someone of Haskell's call might have been suitable as the number four, though I would still have suggested that it would have been prudent to have instructed a more senior member of the Bar. Experience of both prosecution and defence work counts for a great deal when disclosure protocols have to be drafted and implemented and decisions have to be made. That necessary level of experience was not available to Haskell and in my view the prosecution suffered as a result.

15.20 HMCPSI reported as follows at paragraph 5.40:

> "We were told that it is common practice in parts of the CPS to instruct very junior counsel, sometimes referred to pejoratively as "baby counsel", to act as disclosure counsel. This is not advisable, particularly in large cases, where substantial experience of Crown Court trials is necessary. The additional cost, if any, would be repaid by the savings resulting from fewer challenges to disclosure decisions. The temptation for defence teams disproportionately to challenge the decisions (or advice) of very junior counsel should not be underestimated. We were told that some defence counsel appeared excited at the prospect of cross-examining Haskell."

15.21 That comment appears to have been based, in part, on the evidence to HMCPSI of Ian Thomas. Thomas had said that he should have played a much greater part in the disclosure exercise but that Carmen Dowd had not permitted him to do so. Thomas said that Dowd had wanted a "baby barrister" to conduct the disclosure exercise and that Cohen had regularly used "baby barristers" for that purpose.

15.22 It seems clear that financial considerations were responsible for the instruction of Haskell and the failure to instruct a fourth counsel. Clements gave the following answer to HMCPSI in a written response dated 2 October 2012:

> "It would be easy, with the benefit of hindsight, to cast doubt on Mr Haskell's ability to fulfil the role of disclosure junior. In my view that would be an unfair proposition and would ignore the fact that at all times he was part of a team. Certainly it may be possible to point to aspects of the case where a more experienced practitioner may have been able to use the benefit of greater experience to highlight issues earlier. In this context though it must be recognised that the practice of selecting a relative junior counsel to act as disclosure junior is a common one. Equally, whatever the size of the case a realistic assessment must be made about the cost of instructing a more senior practitioner. For example, if one of the outcomes of this review is that in general this is a role that must be filled by a more experienced practitioner then consideration will have to be given about how that will be remunerated: would a practitioner of ten years' perform this role for the fees currently on offer?"

15.23 If a practitioner of ten years' call was required for the role then one should have been instructed and remunerated adequately. And a little later, Clements in the same response:

> "Question 16 asks about lawyer resource. I approached this issue by looking at how the case was resourced overall, rather than simply how many counsel were instructed. Certainly I did consider very seriously whether a second silk was needed – but I was also conscious of the cost that would involve, and I was aware that it would not be easy to persuade the DCMP (who required prior consultation before any such decision was made) or those responsible in the CPS for the management of fees: not that this would have deterred me from seeking a second silk if that is ultimately what I thought was required."

15.24 When Bennett was interviewed by HMCPSI, an HMCPSI inspector rather revealingly summarised the disclosure position to Bennett as follows:

> "Mr Coutts said, 'the only thing this case was going to fail on was disclosure' and the CPS was quite clear they wanted disclosure counsel and wanted baby barristers as they were cheap. What do you think of that approach?"

15.25 Bennett replied that although it was normal to instruct someone of Haskell's call for the role of disclosure counsel, he accepted that that was not the right approach and that more senior counsel should have been instructed. Bennett added, however, that in his opinion, such is the nature of disclosure work that mistakes can never be eliminated whatever the call of disclosure counsel.

15.26 In view of the scale of the case and the considerable workload and responsibilities increasingly being placed upon him, in March 2009 Dean QC requested that a second silk or a very experienced junior should be instructed. That request was denied.

15.27 To HMCPSI, Dean QC said that no one at the CPS had ever told him that cost was a factor in the decision not to instruct a fourth counsel but he accepted that it was difficult to imagine that there could have been any other reason. To HMCPSI, Ian Thomas said that there were budgetary concerns within the CPS and that Carmen Dowd had "fears about the money". Thomas's note of 5 April 2006 also shows that the CPS had to consider whether Dean QC should be instructed under the High Cost Scheme or the Very High Cost Scheme: it chose the former. That meant that after the police officers had been charged, the differential in fees paid to Dean and Bennett was remarkably low – Dean was then remunerated at £110 per hour and Bennett at £90 per hour. That differential did not reflect the marked difference in their respective responsibilities, experience and ability; it was not a sensible way to build and remunerate a team of what should have been exceptional practitioners to prosecute one of the most difficult cases in England and Wales.

15.28 When I saw Dean he accepted that he should have tried harder to enlist a fourth member of the counsel team and to HMCPSI he had said that he very much regretted not pushing for changes in the number and experience of the counsel team.

15.29 At paragraph 5.42 of its report, HMCPSI sought to compare the composition of counsel in the original murder trials, LW1, with that of LW3:

> "The contrast between the collective experience of the counsel team in LW3 and the team in LW1, which by definition, had less material to manage, and arguably fewer challenges to deal with, is stark. The LW1 team was led by an experienced Queen's Counsel supported by two juniors, one of whom took silk shortly before the first LW1 trial."

15.30 That comparison is both valid and instructive. Furthermore, and as another worthwhile comparison, in the 2015 civil proceedings in Cardiff before Mr Justice Wyn Williams (where liberty was not at stake), on behalf of the Chief Constable of South Wales a four counsel team was assembled for the nine week trial: the leader was called in 1994 and took silk in 2011 and the three juniors were called in 1996, 2004 and 2009; a very different structure to that of the team of counsel in the Mouncher prosecution. Two factors are of note: first, that in the civil proceedings, although disclosure was a significant burden on SWP it was not as onerous as that on the CPS in the criminal proceedings and second, that the duration

of the civil proceedings was markedly less than that of the criminal. Notwithstanding those two critical differences, a four counsel team was still regarded as necessary for the civil trial.

15.31 From material received from the CPS, it is clear that by the spring of 2009, a fourth counsel was actively being considered. In a briefing note from Cohen to the DPP dated 27 March 2009:

> "In anticipation of an eventual trial, we are giving consideration to the instruction of a fourth counsel, who will link the work undertaken by Nick Dean QC and Jim Bennett, thereby taking some of the advocacy pressure away from them. Nick Dean QC has suggested some names, which will be considered in due course."

15.32 Those names and others were considered and eventually a single name was chosen as being appropriate to bring into the prosecution team. In an email from Clements to Cohen and others dated 21 April 2009:

> "We have not finalised our view on a second silk. We want to see what happens at the preliminary hearing and find out what pleas (if any) are indicated.
>
> I think we need a second silk given that there are (at present) 15 defendants. It is simply too many for one silk – and Nicholas Dean agrees. We would probably divide the defendants and the significant prosecution witnesses between them. Hence for example the suggestion that we instruct a woman silk as two of our Core Four (Vilday and Psaila) may respond better to such an advocate.
>
> So in summary thoughts are still embryonic but in principle we agree – at the moment – that we will need a second silk."

15.33 On 25 September 2009, Dean QC wrote an advice entitled "Fourth Counsel and General Progress". Dean QC was of the opinion that the most likely outcome was that the trial would remain a single trial against the 15 defendants (indeed, Dean wanted it to remain a single trial because if it was divided into two or more trials, the prosecution case would lose "strength and coherence"). Dean QC rather optimistically began the advice by stating that, "I do not believe there is any real controversy over whether fourth counsel should be instructed". He then accepted that if the indictment was divided into a number of separate trials then the need for a fourth counsel might be removed, depending, of course, what that division would be. But on the basis that the prosecution desire for a single trial was upheld, then Dean was adamant that a fourth counsel was essential. At paragraphs 13 and 14 of his advice:

> "If it is accepted that there is more than enough work likely to be required fully to justify instructing fourth counsel, who should that be? There is at the moment an imbalance of experience in the current team of counsel with a gulf of 20 years or so between me and Jim Bennett. Whilst I have the highest regard for Jim Bennett and James Haskell and every confidence in their abilities a more experienced member of the team would add balance and gravitas. There are good reasons for suggesting female counsel be instructed. A number of the more important witnesses are women who might respond better to examination in chief and re-examination by female counsel. Is it permissible these days to say that a female perspective might also give us some better insight into the behaviour of some of the witnesses?

For my own part I think that it would be preferable to instruct a junior silk – again the seriousness of the case certainly justifies two silks. I recognises though that identifying a suitable junior, female, silk is not easy and also that there are additional costs involved. Certainly a (very) senior female junior could fulfil the role I have envisaged and set out. I have previously suggested a number of names but I can reconsider or submit further suggestions if required."

15.34 The need for a fourth counsel was clearly set out and it must be remembered that the indictment was not severed until 14 March 2011 and then into only two trials of which the first would be against 10 defendants. Two conclusions follow: first, the trial even as severed, still required four counsel because of the trial and disclosure work that would be necessary and secondly, the trial was then due to start only two months away on 9 May 2011 and March was far too late to consider instructing another counsel; the decision had to have been made many months before.

15.35 The enthusiasm for a fourth counsel began to cool. On 25 September 2009, Cohen sent Clements an email:

> "I have considered the issues raised by Nick Dean in his Advice and consider that, at this stage, the instruction of a fourth counsel is a little premature. I would like to know exactly what role each counsel would play in the case, which defendants they would deal with, and could they take over from each other as the case may be."

15.36 Then in a "DCMP Update" dated 17 November 2009, it was noted:

> "At the request of the leader in this case, consideration has been given to briefing a fourth counsel. A decision has been taken that to do so at this stage would be premature. It has been decided that we will await the result of the PCMH and any subsequent dismissal and severance arguments that may follow, before making a final decision on this point."

15.37 I have sought full disclosure from the CPS of all documents on this topic and that is the last in date and, therefore, there appears to have been no further consideration. The decision to wait for any applications for dismissal or severance was wrong, it put off the time at which any decision could be made to such a late stage that the lateness became determinative of the issue: by the time the decision would be made, there was never going to be enough to instruct a fourth counsel and thus the issue was in fact resolved without any further discussion.

15.38 In my view the answer is clear, a four counsel team was necessary. The more senior two (either two silks or a senior silk and a very senior junior) responsible for preparation, legal argument and presentation of the evidence, the remaining and more junior two responsible primarily for disclosure with the more senior of the two being about 10 years' call. That is what the prosecution should have arranged and it was a false economy to have done otherwise, not only for the reasons articulated by HMCPSI, but also because a failure to discharge disclosure obligations can result in the collapse of a prosecution. The CPS should have made a much greater effort adequately to fund and manage this case. The CPS has an extraordinarily wide range of responsibilities from the prosecution of relatively minor offences in the Magistrates' Court to cases such as this, but if it cannot prosecute the most challenging and significant of criminal trials with sufficient competence then changes are required.

15.39 It would be very easy to make a scapegoat of Haskell but that I refuse to do because such a finding would be unfair. There is no doubt that his commitment to the task of disclosure counsel was extremely high and that he impressed police officers and lawyers alike with his industry and ability. Haskell is a talented barrister but in my view he was then too inexperienced for the role he was given. The HMCPSI report, for example, is rightly critical of a number of decisions he made but it is not his fault that he was instructed. Young barristers are desperate for experience and will rarely, if ever, decline instructions in momentous cases. The fault lies with those who instruct them to perform roles above their level of competence and, more importantly, experience. Haskell simply did not have the experience to envisage the width and extent of the potential areas of interest to the defence and as HMCPSI concluded, too much was expected of him. It is also likely that when Haskell was first instructed he could not then have imagined the size of the task ahead. He did not have the experience to deal with the scale of the disclosure exercise on his own although he may have been competent as the fourth counsel under the tutelage of a second disclosure counsel of markedly greater call.

15.40 Due to Bennett's lack of experience there were concerns about his ability to take a reasonable share of the work in court, thus increasing the workload and pressure on Dean QC. To HMCPSI, Dean QC accepted that with hindsight, the CPS should probably have instructed leading counsel more senior than himself. The CPS's selection of counsel can often be used as a gauge to determine how seriously the case under review is being considered, in this particular case the message to the outside world was not one to engender confidence, especially with regard to disclosure, and the defence sought to take full advantage of that.

15.41 HMCPSI at paragraph 10.10:

> "The counsel team did not have sufficient collective experience for the very unusual burdens placed on them by a case that was extremely difficult to prosecute. Where very junior counsel are instructed, the burden on leading counsel is greater. Mr Dean QC himself was a relatively new Queen's Counsel, but we doubt whether anyone could have led such an inexperienced team in such a voluminous and challenging case with the degree of supervision and management required. It is a pity that more attention was not paid to his repeated requests to instruct an additional experienced junior."

15.42 I would add to the above that one of the advantages of experience and seniority is that it is those very attributes which can be used to good effect in persuading others to follow advice. Dean QC has readily accepted that with hindsight he could and should have done more to ensure that a fourth counsel was instructed but this episode reflects badly on the CPS's perception of the case and its ability to manage it.

15.43 It would not be right, however, to leave this part of the report without making it clear that praise was lavished on all three counsel for their contribution to the prosecution. I have already referred to the undoubted commitment of Haskell. As for Bennett, Dean QC was very complimentary of Bennett's industry and written work and as for Dean QC himself, DCI Penhale wrote the following about him:

> "I didn't think he [Dean QC] deserved any criticism. He had done such an outstanding job for the prosecution throughout. In fact I did and continue to believe that there would never have been a prosecution if it was not for his skill and hard work."

15.44 Save for the last few days of the trial, DCS Coutts has also been extremely complimentary of Dean QC's dedication and ability.

15.45 Seniority does not of itself guarantee ability but this prosecution team was prone to error and I cannot believe that the relatively junior call of all three counsel, Bennett and Haskell in particular, was merely coincidental in the preponderance of those errors.

15.46 So far I have considered counsel only, but all was also not well with the CPS lawyers. Ian Thomas complained to HMCPSI that Carmen Dowd would not permit him to do the work on disclosure that he considered necessary (he had wanted to spend three to four days a week in Wales) and that complaints were still made on those occasions when he did go to Wales. Thomas was of the view that at the outset CPS SCD was not enamoured at either the size or the potential cost of the case and displayed little enthusiasm for it. He added that Dowd had wanted to find a reason for abandoning the case. He said that Dowd had wanted a "baby barrister" to take his place on disclosure and, indeed, when Thomas was transferred to another department of the CPS in July 2007 due to ill health, Haskell was instructed to perform Thomas's disclosure role.

15.47 For her part, Dowd told HMCPSI that the case appeared to be being used as an excuse for absenteeism from the London office and as an excuse for not working on other cases. Dowd also agreed that she had possibly expressed a view to the DPP that the case should not be prosecuted.

15.48 Dowd has later suggested to me that there was a disconnect between her and what was happening in the case, she has said that it was very difficult to understand where the investigation was and where it was anticipated to go, she blames others for an inability to articulate those facts to her. Now, she does not recall preventing Thomas from ever going to Wales and says that there were no problems in resourcing the case, "The problem encountered was establishing what was required as we were kept at arm's length". It is difficult to understand how any head of department could be kept at arm's length from such an important case or would permit such a state of affairs to continue. Dowd also says that she does not think she would ever have categorically stated that the case should not be prosecuted because she did not have sufficient knowledge to have reached such a conclusion but she accepts that she would have expressed her concerns about the investigation because, "… it was a difficult case to prove, and there were uncertain variables which were difficult."

15.49 In January 2006, another CPS lawyer, Howard Cohen, was assigned to work on the case along with Thomas but as a clear indication of the lack of insight and direction and the inability to decide how the case should be managed, Cohen was given the role of "strategic oversight", a role of which neither he nor anyone else had ever heard before. Even HMCPSI found the job description difficult to understand and that its lack of meaning led to "serious confusion about the ultimate responsibility for decision making and case management". Cohen and Thomas were left to work out what "strategic oversight" meant. Cohen eventually concluded – once Thomas had left – that he should take the greater responsibility for disclosure and he concentrated on that role which had little if anything to do with "strategic oversight" but at least it was a role for him to perform.

15.50 HMCPSI at paragraph 5.22:

> "The poorly defined and difficult relationships between members of the CPS team absorbed a great deal of energy and may have contributed to some of the errors that damaged confidence in the disclosure process and the approach to the disclosure test."

15.51 There is clear evidence that from the start, the CPS failed to comprehend the scale and complexity of this case and it is disappointing that such an important prosecution was managed inappropriately.

16. The Decision to Prosecute and the "Dysfunctional" Prosecution Team

16.1 There were two quite distinct prosecutorial decisions to be made: first, should the Core Four be prosecuted for perjury and second, should one or more police officers be prosecuted for perverting the course of justice? It might be thought that the first of those two decisions was relatively straightforward, but it was not.

16.2 There was agreement as to the strength of the evidence against the Core Four but division within the prosecution team as to whether or not it was in the public interest to prosecute them because notwithstanding the gravity of their crimes, they were, on the Crown's approach, victims of bullying and calculating police officers and they would be essential witnesses in any prosecution against the police officers. There was an argument, promulgated by counsel and the police officers, that in the exceptional circumstances, the public interest was better served by not prosecuting the Core Four in order to secure their assistance as witnesses. Contrary to the advice of counsel, the CPS senior reviewing lawyer, Ian Thomas, decided that it was in the public interest to prosecute the Core Four and he signed the MG3 (the charging decision) which had been approved by the DPP. Before the decision was made, Dean QC wrote a short note indicating that he had changed his mind and was then of the opinion that it was in the public interest to prosecute the Core Four. I have no doubt that that was the correct decision. Psaila, Vilday, Grommek and Atkins were charged with perjury on 26 February 2007. As adverted to above, however, even this decision was considered far from simple in this complex and ever demanding case.

16.3 In 2007, Chris Newell was the principal legal advisor to the DPP and his assessment of the merits of prosecuting the Core Four and the impact such a prosecution may have on the overall case was as follows:

> "The future of the case is fraught with difficulties; but I am still of the view that to do nothing, in relation to what was undoubtedly an appalling miscarriage of justice, would be unacceptable. With no lack of foreboding, I agree that the four should be charged."

16.4 The DPP commented on Newell's advice as follows:

> "I continue to have serious concerns about this case. However for the reasons set out by Chris Newell, I approve this step."

16.5 Once the decision to prosecute the Core Four had been made and the remaining three of them had been convicted and sentenced (the last to be convicted was on 27 October 2008 and all three were sentenced on 19 December 2008), attention turned to the original team of investigating police officers who had been arrested in a total of 10 phases starting on 13 April 2005 (for the details of the 10 phases see the chronology at Appendix 1). The decision whether or not to prosecute them was always going to be a difficult one to make because strong arguments could be made either way. The logic in support of a prosecution was compelling and can be briefly summarised as follows:

- As already set out in detail above, the Core Four had lied and their lies (especially the timing and pattern in which their lies had unfolded) suggested that their lies had been coordinated and that, therefore, they had either acted amongst themselves for no discernible motive or had been manipulated. Manipulation was the much more likely

explanation on the evidence and the only plausible candidates for that manipulation were the investigating police officers.

- Three of the Core Four had pleaded guilty to perjury and been sentenced to prison. Any suggestion that they had in fact told the truth during the LW1 trials was overwhelmingly likely to fail on this ground alone.
- The fact that there was no scientific evidence of any kind against the Cardiff Five.
- The lack of any sensible motive for Miller visibly harming Lynette White.
- The lack of any sensible motive for Miller enlisting any help at all but especially that of men he did not know or did not know well.
- And, of course, Gafoor: his guilty plea; the terms of the mitigation delivered on his behalf; the scientific evidence against him (and no one else); and the evidence in general which suggested that he and he alone had murdered White.

16.6 Against that compelling logic and persuasive evidence, however, was other evidence that tended to suggest that the Cardiff Five were either involved in Lynette White's murder or at least present when she was murdered. This came from a number of sources of which the following seven are but examples:

- Stephen Miller was an important prosecution witness and although the Court of Appeal had ruled that his confession was inadmissible against him as a defendant, it remained admissible against him as a witness. All 13 hours of his police interview tapes were played to the jury in the Mouncher prosecution and that meant that the jury heard Miller not only confess to the murder but also implicate the rest of the Cardiff Five. However unsatisfactory the circumstances in which that confession had been made, it was always going to be a powerful part of the evidence in favour of the accused police officers.
- Jackie Harris was the partner of Yusef Abdullahi for some 8 years from about 1980 to September 1988. They had had two children together. Harris's evidence was an odd mixture but can be summarised as follows: from what she said there was no doubt that Abdullahi hated Lynette White and that he had told Harris that he had been in the room when White was murdered. Many questions were asked in exploration of whether what Abdullahi had told her was the truth or not. On the one side, the evidence ranged from a letter that Harris had written to Vilday in which Harris had stated, "I know Dullah is guilty"; to Harris accepting that Abdullahi had said that he knew who the murderers (note murderers plural) were; to Harris suggesting that Abdullahi could be very violent and was "more than capable" of murdering White; and finally, to Harris saying that she would go to her grave believing that Abdullahi was at the murder scene when White was killed. And on the other side, to first, an acceptance that Abdullahi was intoxicated from alcohol and drugs when he made the confession to being in the room and second, to "I don't believe for one minute that Yusef was actually in that room and partook of that murder". Confusing, yes, and there were obviously points to be made either way, but it is not difficult to see what impact this evidence may well have had on the Mouncher jury. Confessing to a murder in which the confessor had no involvement is not usual behaviour.

- Harris also agreed that Vilday had told her that she had seen Abdullahi at the murder scene and that Harris had subsequently written to Vilday stating that Vilday was "doing the right thing" by giving evidence for the prosecution in the murder trial.

- When preparing for the committal proceedings, Miller agreed that when giving instructions to his solicitor (privilege had again been waived) he had accepted that he was in the room at the time Lynette White had been murdered. And later, that his four co-defendants had also been in the room.

- Miller also accepted that during a prison visit he had told his girlfriend, Deborah Taylor, and Teresa Sidoric that he had been in the room.

- Miller had also told a prison officer that he had been in the room when White was attacked.

- And finally, the instructions Gafoor gave to his solicitor and counsel that there were or might have been others involved in the murder which, if accepted by the jury, would in itself have provided a significant impediment to a conviction.

16.7 Not all of the above, of course, was known to the prosecution team at the time the decision to charge was made but Dean QC and others have said that they would still have made the same decision even if they had then known about all of the evidence. In my experience it is highly unusual for a prosecution to have so many inconsistent statements and contrary indicators to guilt within the evidence.

16.8 When interviewed by HMCPSI on 3 December 2012, Dean QC revealed his thoughts about the progress made by the defence during the trial and the likely outcome:

> "If you think about it, you know, the fact that Gafoor had no discernible, sensible connection with any of the original defendants, that he was, on any basis, the murderer, actually means that there must have been a conspiracy of the broad type that we've described … I am very conscious that this is two-edged, because if we say it's obvious that Gafoor was the lone killer, the accusation then is that you've closed your mind to the possibility of others being involved – which isn't true because anyone who looks at the evidence in this case can't, in my view, sensibly suggest, on the basis of the evidence that there is, that it was anybody other than Gafoor on his own. And that, of course, was the central tenet of the prosecution case, and ultimately we failed because, failed in that, I think, because William Coker did a very effective job of putting them back in the frame in a way that, I mean, it has relatively little to do with disclosure failures, and is one of the reasons why actually, I think, that the verdicts would probably all have been not guilty at the end of the day, even if we'd got beyond half time and got a jury to consider the verdicts. But it was all a chimera, you know, there isn't, all of the theories put forward by, very convincingly put forward by William Coker, stand very little scrutiny."

16.9 Or as Bennett said to HMCPSI, William Coker QC "… was a master at exposing problems".

16.10 The Code for Crown Prosecutors contains a two stage test, the first is the evidential stage. The test in place at the time was as follows (the test today is similar):

THE EVIDENTIAL STAGE

5.2 Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

5.3 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant's guilt.

5.4 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

CAN THE EVIDENCE BE USED IN COURT?

a. Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

IS THE EVIDENCE RELIABLE?

b. Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant's age, intelligence or level of understanding?

c. What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?

d. If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?

e. Is the witness's background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?

f. Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness.

16.11 The second stage is the public interest stage.

16.12 If reached, the second stage was inevitably going to be satisfied and so the principal task for the CPS was to decide whether there was sufficient evidence that an "objective, impartial and reasonable jury" would be "more likely than not to convict the defendant of the charge alleged" and that was always going to be a difficult question to answer.

16.13 If indicted, the defence tactic would be to turn the trial as much as possible into a rerun of the original murder trials and notwithstanding the clear position in logic against the police officers, it is obvious from just the above seven examples that there was sufficient evidence available to the police officers to suggest that the original defendants may have been guilty or at least in the room (which would have been enough to have defeated the prosecution case).

16.14 The CPS took great care over the decision and eventually, on 2 March 2009, the MG3 was signed. The decision to prosecute had been taken by Simon Clements. The police, counsel and Simon Clements were of the opinion that 13 police officers and two civilians should be prosecuted for offences of conspiracy to pervert the course of justice and perjury and the CPS reviewing lawyer, Gaon Hart, concluded that there was not a realistic prospect of conviction against any of the police officer or civilian suspects. There is, of course, nothing unusual in lawyers disagreeing when difficult decisions have to be made, what was different here, regrettably, was the acrimonious nature of the dispute.

16.15 As for the decision to prosecute the 15 defendants, it was far from clear cut, yet the decision to prosecute could not be described as wrong. There was, on one view, a strong case against them and applications to dismiss the charges by eight of the police officers were rejected by Sweeney J at the end of 2010. Furthermore, Wyn Williams J found that Clements:

> "…was fully entitled to conclude that the test for bringing a prosecution against those suspects was satisfied. He was entitled to conclude that there were reasonable prospects that the Claimants to be prosecuted would be convicted and that it was in the public interest that they should be prosecuted."

16.16 I do not disagree with that finding, all that I would add is that in my view the decision whether or not to prosecute was perhaps more marginal than was accepted at the time and that is principally due to the curious body of evidence summarised above and the fact that the credibility of the principal prosecution witnesses was always going to be low. At the time the decision to prosecute was made, it was appreciated that this evidence could and almost certainly would be used by the defence to suggest that those originally charged with murder were in fact guilty. It is important to consider the burden and standard of proof: all the police defendants had to do was show that the Cardiff Five *may* have been guilty or at least *may* have been in the room at or about the time Lynette White was murdered – once either of those propositions had been established, the prosecution case would collapse on the main charge. This was always going to be a very difficult case to prosecute but that was not, of course, reason in itself to reject it. A prosecuting authority that is not prepared to take on difficult cases is plainly not fit for purpose.

16.17 As for the Core Four, two particular decisions were made: the first was to prosecute the four of them and the second was later to discontinue the prosecution of Atkins on the

ground that two psychiatrists had found him unfit to be tried. There was disagreement in respect of each of those decisions.

16.18 As to the first, the disagreement was well mannered, the second anything but.

16.19 Thomas was firmly of the opinion that there was a realistic prospect of conviction against the Core Four though he was aware of the unquantifiable risk that a jury would have some sympathy for them. He disagreed with counsel's view on the issue of public interest. Thomas accepted that it was a legitimate public interest to take into account the effect the decision to prosecute would have on the Core Four's willingness to cooperate with any subsequent prosecution of police officers, but he nonetheless concluded that it was in the public interest to prosecute them. As already stated, Dean QC later agreed with that assessment and following the approval of the DPP, the Core Four were charged. Sadly, some months after that decision, Thomas was moved to another position within the CPS because of ill health and on 7 September 2007 he was replaced as reviewing lawyer by Gaon Hart. This brought about a change in approach and atmosphere.

16.20 Hart believed that Thomas had taken a "back seat" and had permitted the police and counsel to take the lead role which he said was for the CPS alone to perform. Hart has said that this was one of the issues he had been asked to address from the outset.

16.21 The first decision of substance Hart took was in the summer of 2008. Both the defence and prosecution psychiatrists had agreed that Atkins was unfit to be tried and this was raised at a DCMP on 9 July 2008 at which it was decided that it was not in the public interest to continue the prosecution against Atkins. Atkins was so informed by a letter written two days later. Bennett's opinion had been sought but the decision had been taken without any involvement from either Dean QC, who was away, or the police. At a meeting of 17 July 2008, when the full prosecution team was present, Dean QC and the police forcefully disagreed with Hart's decision and criticised it for having been taken precipitately and without due consultation with them.

16.22 Later, when the decision whether or not to prosecute any police officers or civilians was being considered, there was again a disagreement between Hart on the one side and the police and counsel on the other.

16.23 Both of these disagreements were acrimonious as the following examples amply demonstrate (my emphasis):

- At the meeting of 17 July 2008, Hart alleges that Coutts repeatedly shouted "furiously" or "ferociously" at him over his decision to offer no evidence against Atkins.
- Hart alleges that Dean QC was instructed to advise on a discrete matter concerning two of the police officers, yet Dean QC went "beyond his instructions" and reviewed the Atkins decision, for which, Hart wrote "we will be asked to pay".
- Hart sent an email to Clements on 21 July 2008 in which he complained about Dean QC acting beyond his instructions and claimed that Dean QC's analysis of the medical evidence was wrong. Hart added: "Why counsel continues to maintain this stance is more an example of his <u>disingenuous concurrence</u> with officers that since I came on board, decisions have gone out of the hands of officers and counsel and into the hands

of the CPS." Hart has complained that Dean QC and Coutts acted like leading and junior counsel who made the decisions in the case.

- As to the prosecution of the police officers, Hart was of the opinion that there was not sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge and that, therefore, the evidential stage was not satisfied. Counsel and the police officers disagreed. Hart wrote an advice setting out his views on the strength of the evidence. In that advice he accused those in favour of a prosecution of reversing the CPS two stage test to suit their own ends: "The public interest in a prosecution is so great that it has led some to a zealously righteous emphasis on speculation and theory and a distortion of the prosecution code to identify public interest as the primary test." Counsel and the police officers firmly denied that allegation and Dean QC wrote that "writing off the views of others as the product of "zealous righteousness" is no substitute for reasoned dispute".

- Hart even proposed instructing an independent silk to review the evidence and to give an opinion as to whether any police officers should be charged. That proposal was rejected on the basis that it was "novel, unorthodox and for a number of reasons did not seem to be something that should be pursued – at least for the present."

- The CPS became concerned at the relationship of counsel and the police to the CPS. At a meeting on 12 November 2008, Dean QC and Bennett were reminded that they were instructed by the CPS and not the police and that it was Division policy not to share counsel's advices with the police. Dean QC "vehemently" disagreed with that policy and believed that the police should be involved throughout. He explained that the police did not trust the CPS because the police did not believe that the CPS had taken this case as seriously as it should have done. The police were then brought into the meeting and Dean QC asked Asker Hussain, of SCD, to explain this policy to the police. DCC Cahill, the ACPO overseer, has observed that the atmosphere had been "icy".

- In a briefing note dated 4 December 2008 for a DCMP, Hart and Cohen wrote, "The lawyers in this case have significant concerns regarding leading counsel's 'objectivity' and 'independence' from the police. His advices and actions have been undermining and critical of the CPS. They appear to demonstrate dissatisfaction with the reviewing lawyer's perceived 'interference' in the decision making process which he previously controlled."

- At a preliminary DCMP on 10 December 2008, Hart accepted that there was a "polarisation of views" and an "unhealthy tension" within the prosecution team but stated that he was concerned that the CPS did not embark on a prosecution that was flawed from the outset. He added that the case had never been strong but was "hugely important to the people of Wales, South Wales Constabulary, and the IPCC: in addition to the wrongly convicted."

16.24 It is perhaps not surprising, that counsel for two of the complainants in the civil proceedings sought to milk these circumstances for all they were worth and began his cross-examination of Hart in a manner that attempted to accentuate Hart's perceptive abilities:

Q. … In October 1987 when you were an under-graduate at the University of Manchester, you advised your mother that she should not go on a caravan holiday because there would be a hurricane, is that right?

A. I did, yes.

Q. And she passed on your advice to the BBC weather forecasters and that night Michael Fish infamously told the nation a woman had rung the BBC and said she had heard there was a hurricane on the way but if she was watching, don't worry, there isn't.

A. Thank you, but I am enjoying every minute of this. You mean my mother didn't believe me, yes.

Q. 20 years later, you were appointed the reviewing lawyer on the R v Psaila case, were you not?

A. Yes.

Q. And your ability to predict a storm again showed itself rather better than some of those around you in that investigation. Is that right?

A. I wouldn't necessarily put it that way but thank you.

16.25 The advocate's art of understatement is not dead.

16.26 Hart was concerned about the credibility of the Core Four and the issue of whether or not Gafoor had committed the murder on his own and, in particular, about the ability of the defence to divert the trial through Gafoor and the other evidence of participation by others (and this was before the John Charles Rees QC taxation note had been discovered). Hart was more than justified in having those concerns.

16.27 It is only right that it should be recorded that Dean QC and Coutts do not accept the criticisms of Hart and Cohen, they wanted to work with the CPS as part of one team and found the fractious atmosphere unhelpful and contrary to everyone's interests. Language and sentiments of the type underlined above are highly unusual in a prosecution.

16.28 The dispute over the Atkins decision was about a judgment in the past that could not be undone but the dispute over the charging of police officers was about a decision that had to be made in the future and it had to be resolved. Dean QC and Bennett wrote a long advice as did Hart in response. On 25 February 2009, Simon Clements convened a case conference for lawyers only. Clements indicated that he agreed with the assessment of Dean QC. Hart maintained his view that there was not a realistic prospect of conviction: the difference of opinion lay principally in the conflicting views as to the credibility of the Core Four. Resolution between the two opinions proved impossible.

16.29 On 27 February 2009, DPP Keir Starmer QC chaired a DCMP at which he decided that it was his personal opinion that there was a realistic prospect of conviction but in the light of the disagreement between leading counsel and the reviewing lawyer, the DPP directed that Clements, as Head of Division, should have responsibility for the charging decision. Clements subsequently concluded that there was sufficient evidence to provide a realistic prospect of conviction against each of the 15 suspects (13 police officers and two civilians) on each

prospective charge. Hart stood down as the reviewing lawyer and he was not replaced until September 2009 by Michael Jennings.

16.30 On 2 March 2009, Cohen signed the MG3 (the charging decision) and District Judge Daphne Wickham issued summonses against those to be charged to attend City of Westminster Magistrates' Court on 24 April 2009 and thus the prosecution of Mouncher and others began.

16.31 I have no intention of investigating and resolving the disputes between the CPS lawyers, counsel and police. That relationships became so acrimonious was unacceptable and all must carry some responsibility for that but the breakdown had nothing to do with the collapse of the trial and I can therefore see no purpose in taking this further. I mention this episode as an illustration of the fact that when the layers of this prosecution are unpeeled, it is often the case that not everything is as it should have been.

17. The Circumstances in which the Trial Collapsed

17.1 It was clear before the trial began that the integrity of the investigation was an issue and any doubt must have been removed when at an early stage of the trial, an application was successfully made to exclude DCS Coutts from the courtroom. Coutts was to be a witness and would be cross-examined about events to which other (and earlier) witnesses would be giving evidence; the defence did not want Coutts to be able to tailor his evidence to meet that of other witnesses whose evidence he would otherwise have heard. Contrary to the beliefs of a number of police officers, the application to exclude Coutts was opposed by the prosecution. It later became clear that in addition, the integrity of the disclosure exercise would itself also be called into question. As already stated, the trial of Mouncher and others commenced on 4 July 2011 and was terminated five months later on 1 December 2011.

17.2 To the three surviving original defendants, the collapse of the trial is unquestionably the most perplexing and troubling of all the Mouncher events and no doubt the public share their bewilderment and concern. Although the critical moments that directly brought about the end of the trial span but a few days, the detail required to understand what happened is intricate and wide ranging. To satisfy the justifiable demands of Stephen Miller, Anthony Paris and John Actie, it is necessary to explore that detail and consequently, this shall be the longest section of the report.

DISCLOSURE DEVELOPMENTS DURING THE TRIAL

17.3 From the outset, both prosecution and defence had obviously been aware of the importance and scale of the disclosure exercise and, no doubt, of its potential for bringing an end to the proceedings if deficiencies were exposed. A number of high profile trials have collapsed due to the Crown's inability to discharge its disclosure obligations: see, for example, paragraph 64(i) to (iv) of the Disclosure Review of Lord Justice Gross, more of which below. As but two examples of the size of the particular disclosure exercise in the Mouncher prosecution: first it is estimated that about one million pages of material had to be considered for the purposes of disclosure and second, from primary disclosure to the start of the trial, there had been more than 4,300 defence requests for disclosure of documents which had been described on the MG6C schedule of unused material as "Clearly Not Disclosable" (CND). During the first five weeks of the trial, there had been more than 500 requests for disclosure, which resulted in the disclosure of approximately 30 further documents.

17.4 Notwithstanding the number of disclosure requests, which had all been made out of court, disclosure had played little part in the pre-trial preparatory stages before Sweeney J.

17.5 Once a defence statement has been served, the defence may apply under section 8 of the CPIA for a court order requiring the prosecution to disclose material, normally material which has been scheduled in the MG6C and marked CND. The frequency, or otherwise, of section 8 applications should provide a reliable test of the disclosure exercise: the greater the number of section 8 applications, the greater the lack of confidence the defence may have in that exercise and, of course, by making the applications before the judge, the judge is made aware of any potential disclosure inadequacies or problems, in itself a considerable advantage. Here, however, there were remarkably few section 8 applications. Mouncher, who through his lead counsel William Coker QC led the assault on disclosure once the trial had begun, made none. Of the remaining defendants, only Powell, Daniels and Massey made

section 8 applications and then only in very low numbers. The scarcity of such applications, however, was grossly misleading because as will become clear, the defence went on to submit that they had no confidence in the disclosure exercise and sought to expose its inadequacies during the trial process itself rather than before. It is notable that each of the very small number of section 8 applications which had been made before the trial had failed. The main complaint pre-trial concerned a very discrete area involving a number of floppy discs from the (by then) antiquated "Auto-Index" system which was used during the original murder investigation. This has no relevance to the disclosure issues that arose during the trial.

17.6 When Dean QC was interviewed by HMCPSI on 3 December 2012, one of the interviewing HMCPSI inspectors observed that the absence of pre-trial section 8 applications was "insidious" because the defence would have known that if more such applications had been made, they too would have failed. Dean QC did not dissent from that observation. The HMCPSI inspector asked whether it would have been possible for more to have been done to "head them off" by placing disclosure requests before the judge but Dean QC replied that there was no forensic mechanism which either the prosecution or the judge could have used to compel the defence to make a section 8 application. Dean QC said that the approach of the defence both before and during the trial had been "tactical", designed to be a slow process of attrition to undermine the disclosure exercise and to make the defence appear reasonable and the prosecution unreasonable. Dean QC candidly admitted that the tactic was an effective one and that it had even undermined his confidence in the disclosure exercise. I will return to the suggestion that this was a "tactical approach" and to the importance of section 8 applications later in this report at chapter 19.

17.7 The cumulative effect of the defence constantly chipping away at the disclosure exercise and highlighting its inadequacies was such that on 28 October 2011, before the prosecution had closed its case, the jury was sent away for what was intended to be three weeks, for the judge to hear evidence as to the effectiveness and reliability of the disclosure procedures in order to decide whether the prosecution had become an abuse of the court's process and to hear submissions of no case to answer. DCS Coutts, DC O'Connor (or Acting DS as he was by then), Howard Cohen, DS May, Simon Clements and Matthew Gold (solicitor for Stephen Miller) gave evidence between 9 and 14 November 2011 and submissions were then made by the defence for a stay of the proceedings. This application was based on the premise that the court could no longer have any confidence in the Crown's ability to discharge its disclosure obligations.

17.8 Amongst the numerous failings brought to the judge's attention, the one which principally concerned him was the lack of disclosure of meetings between sometimes the police alone and on other occasions the police together with the CPS with either the Core Four or the original defendants. As early as 1 September 2003, the Cardiff Five had been designated as victims in the LW3 investigation in accordance with the Victims' Charter. Later, the Core Four were afforded a similar status. Such categorisation was always going to be problematic because it required the police to have close contact with individuals who as well as being described as victims were also vital prosecution witnesses who were, to one extent or another, vulnerable and suggestible. In addition, a fundamental contention of the defence case was that the Cardiff Five were guilty of Lynette White's murder and furthermore, the credibility of the Core Four was always going to be very low because three of them had pleaded guilty to perjury. Contact between the prosecution and these two groups was always going to be challenging and should have been limited and carefully recorded because

anything said at these meetings concerning the trial, however indirectly, was likely to be disclosable in whole or in part. On 8 September 2011, Mr Justice Sweeney announced that when at the Bar, his policy when prosecuting was, "almost to disclose every contact with a witness". This had not been the policy hitherto amongst the LW3 disclosure lawyers and this caused the prosecution to disclose all such contact material that it then had. The documents recording contact with witnesses in this particular case were known as "D30" material because of their general identification by that single "D" number on the MG6C. There were additional variations to that designation: "D30 Plus" and "D30 Plus Plus" but for present purposes, the entirety of this material can conveniently be referred to simply as "D30".

17.9 The system for keeping adequate contact records between witnesses and the CPS and the police was poor. At primary disclosure, the D30 material had been marked as CND.

17.10 Predictably, the defence believed that this must be an error and pressed for disclosure, though not, significantly, through a section 8 application. The prosecution maintained its stance on D30 material and continued to affirm that all should have confidence in the integrity of its disclosure exercise and in its decision not to disclose. Indeed, on 21 November 2011, Coker QC submitted that when the CPS had been requested to disclose D30 material, it had replied:

> "The police have always been aware of their disclosure obligations in respect of contact with all witnesses, and indeed the police in this investigation have gone to unprecedented lengths to ensure that all such contact is transparent and properly recorded."

17.11 That statement turned out to be wholly erroneous.

17.12 Pressure from the defence in relation to D30 material continued throughout the trial, eliciting on each occasion the same response from the prosecution. By September 2011, however, prosecuting counsel began to realise that records of contact were in some instances inadequate and in others, more worryingly, non-existent. Such efforts as were made to fill the gaps were not made with sufficient urgency.

17.13 When the judge was eventually informed that there was a problem with the D30 material, he complained that it should have been drawn to his attention earlier. The prosecution continued to maintain that full disclosure had been made.

17.14 Timing was then critical and it did not favour the prosecution. On 2 November 2011, the prosecution served its submissions on the abuse of process argument, and reiterated its claim that the court could and should continue to have confidence in its disclosure exercise. But the next day, it was discovered that the notebooks of Howard Cohen, which had been in the possession of the CPS throughout and which had never been reviewed for disclosure, contained relevant notes of meetings at which he had been present with the original defendants and their lawyers (and on occasions with their lawyers only). These notes were more revealing of such contact than those which had already been disclosed. Copies of Cohen's notes were then disclosed. Cohen gave evidence on the *voire dire* before Sweeney J on 10 November 2011 and when cross-examined he revealed that the copies of the notes which had been disclosed did not appear to be complete. He was correct. A scanning error was responsible for some of the notes not being copied and, therefore, not being disclosed. This error added to the growing impression of incompetence.

17.15 Matthew Gold (solicitor for Stephen Miller) and Kate Maynard (solicitor for Anthony Paris and John Actie) had been asked to disclose a list of meetings with police officers and/or the CPS. Both solicitors did so, but it was not until much later that a request was made for their notes (it would appear on the basis that they were considered likely to attract LPP and that the notes taken by the CPS could more easily be obtained and would suffice). On 19 September 2011 Gold emailed Clements as follows: "I have been asked by Matt one of the SWP officers to make a list of all meetings I had with SWP officers. The request has been outstanding for a long time and I haven't got round to it – work time pressures etc. do I still need to do it in light of my letter/statement, especially if I am not called to give evidence." Clements replied "No need to compile a list – that work is being done as part of the contact logs work". In fact, there was, as DS Jones identified, a "need" and Gold was therefore asked to provide notes to complete the gaps for two meetings, and thereafter, when he came to court to give evidence, to provide further notes. Maynard also provided her notes of meetings, when asked, at a late stage. SWP should have requested the notes and pressed both solicitors harder for their release at a much earlier stage; it was the fault of SWP and not that of the solicitors. Sweeney J was aware that the Core Four had themselves made an abuse of the process application which although unsuccessful may have relied in part on the relationship between them and the police and he requested all information relevant to the Core Four. This was disclosed on 21 November 2011 and it revealed that material relating to the meetings between the Core Four and the police had also been marked CND on the MG6C for the Core Four. The judge then asked Haskell to make a witness statement touching upon the following issues (the questions are taken from the transcript):

(i) What errors does Haskell accept he has made?

(ii) What procedure, if any, was in place to ensure that everything that should be disclosed was disclosed in advance of the trial in relation to each witness who was to be called by the prosecution?

(iii) Was there any and, if so what, disclosure procedure adopted in the run-up to each witness being called to double-check that everything that should have been disclosed in relation to that witness had been disclosed, and, further, what, if any, procedure existed for the daily review of disclosure decisions in relation to each witness as their evidence proceeded?

(iv) To what extent, if at all, was leading counsel involved in the disclosure procedure in relation to witnesses, whether before trial or during the trial in the run-up to their evidence or during their evidence?

(v) How did it come about that nothing or very little of D30 and D30 plus or D30 plus plus, as it has been called, was not disclosed until it was?

(vi) At what stage was it recognised that records in relation to meetings with any of the original surviving defendants were incomplete? Precisely what steps were taken and when to pursue perceived gaps and why was the existence of perceived gaps not brought to the court's attention before it was?

(vii) What is the explanation for the disclosure of some parts but not all of the material in the prosecution's possession relating to the prosecution of the so-called Core Four?

(viii) Why did the prosecution apply for the resolution of the disclosure issue to be postponed until the conclusion of the prosecution case, particularly when set against the background of the extent of the admitted errors?

(ix) May the court please be reminded of the evidence which deals with how each of the Core Four actually came in the end to attend court and give the evidence that they did?

17.16 The judge emphasised that this was "the prosecution's final opportunity to make it absolutely clear to me what the answers to those questions are".

17.17 By the following day, 22 November 2011, Haskell had completed his witness statement. Coker QC submitted that the prosecution had known about the inadequacy of contact records before the trial had commenced and yet whenever requests for D30 material had been made, they were met by the stock CPS response that "nothing disclosable arises from that contact". The police had first been aware that contact records were not complete in 2010. The complaints were first, that the CPS response was plainly misleading and second, that the Crown called its most important witnesses (the Core Four and the original defendants) knowing that in respect of them, the disclosure exercise was not complete. Sweeney J announced that the time had come to draw a line and that the Crown should have no further opportunity to provide further explanations. The judge said that he now had to decide the state of the disclosure exercise and whether or not he could have confidence in it. He remarked that he had to determine whether events had "gone beyond the pale" and that if they had, there was then "only one course" he could take. He added:

> "… the line now being drawn, I propose to take Mr Haskell's statements, as it were, at face value for the purposes of the first part of what I have to decide, and having identified the scale of failures and the reason for the failures, inevitably I then have to come to the consequence of the failures and the extent to which matters can be put right or not put right, but that is in itself somewhat dependent on the scale of the failures as I identify them to be."

17.18 On 23 November 2011, submissions of no case to answer were made (no ruling was given) and they were then followed on 28 November 2011 by the application for a stay.

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17.19 Matters came to a head on 28 November 2011, long after the jury should have returned. Dean QC strenuously fought his corner and accused the defence of having adopted a tactical approach "to manoeuvre this case to a stay". Neither the defence (understandably) nor the judge were impressed with that contention. Dean QC's argument was that the late disclosure of additional D30 material could be dealt with by way of admissions and that, in any event, it would not have made any material difference if it had been disclosed at the appropriate time. The judge kept returning to the D30 material and the Crown's inadequate and at times, misleading treatment of it. Dean QC was unceremoniously given a hard time by the judge:

> "The significance [of D30 material] at the end of the day is a matter for me to decide, and at the moment I am puzzled, to put it mildly, at the prosecution's contention that none of this is central whereas, quite apart from [the defendant] Mr Seaford's case statement, which spells it out, it has been an obvious issue at least to the court from a very early stage in

these proceedings, and therefore to suggest that details of contact in particular between the prosecution and the Core Four, on the one hand, and the prosecution and the original five, on the other hand, was anything other than central to the issues in the case is at least from my perspective a very strange submission to be making."

17.20 And later:

"Mr Dean, let's not shilly around the point. I would like to know in words of one syllable, please, why the court – let's forget the defence – in circumstances where the proceedings were delayed in relation to disclosure issues, when the position was absolutely clear that the nature of the investigation and its relationship with Mr Miller and others was a live issue, why the court was not informed straightaway of what the prosecution have known for a long time, namely that the records of contact were incomplete and that there had been some attempts to complete them, which had failed thus far?"

"… this is really not rocket science. This [the D30 material] is an issue which, although you don't regard it as a central issue plainly, I am bound to say it seems to the court to be a central issue, because of the involvement with the group who might be described as the most important two groups of witnesses in the case, and one would have thought that in order to examine contact the first thing you would do is have a chronological list of when contacts had taken place so that you can then, as it were, test the whole of the material, because very often it's the juxtaposition of two meetings which make it blindingly obvious that there is disclosable material, which might not be obvious if one is looking at it all in an entirely disjointed, non-chronological fashion, and at the moment I see no evidence that even such a list existed up until one was put together post-16th December or – 16th September or thereabouts."

17.21 Mr Justice Sweeney had no doubt that the fact that the records of contact were incomplete was itself disclosable. Coker QC was quick to respond and explained the prejudice which had been caused by the inadequacies of the prosecution disclosure exercise:

"Although one regrets to say it, Mr Dean and the disclosure team, based on the submissions that have been made orally and in writing, remain unconverted to what I think most instinctive prosecutors would say is the right approach to disclosure, erring on the side of disclosure, erring on the side of relevance."

"Therefore it is difficult to have confidence as to the future and confidence as to disclosure in particular areas, such as the way in which the core four ended up pleading."

"The prejudice here is that we have lost on the basis of the late disclosure of the D30 material, the opportunity to make a potentially decisive impact in cross-examination, one which could never be retrieved or recreated, not least now, because the core – the original defendants' solicitors have been tipped off. One of them has been called to give evidence. We know from recent contact material that they are aware of the development, and they are difficult witnesses to control in any event. Some of them say they didn't have the opportunity to say all they wanted to say anyway. We drew your Lordship's attention to Mr Gafoor's return to the witness box for perfectly understandable reasons, who took the opportunity to give a new piece of evidence that we were able to deal with, but there's no guarantee we could do the same with the core four or the original defendants, and it's a very difficult decision for Mr Mouncher to make. They left the witness box, we respectfully submitted, with the defence case, if anything, stronger rather than weaker. The hardship,

> we submit, particular hardship of belated disclosure rather than non-disclosure is that the defendant knows what might have been, had the prosecution discharged its disclosure obligations properly.
>
> We submit a way of testing fairness is this. This is obviously an adversarial process. The defence's disadvantage is the prosecution advantage. It is, we submit, an affront to a sense of justice if the prosecution gain what is potentially a significant advantage over the defence through breaches of the rules, whether inadvertent or otherwise, which were designed specifically to ensure that the defendant did have a fair trial, the fairest trial achievable in the circumstances.
>
> This is a trial which presents the defence with difficulties anyway, given the passage of time, the missing documents, loss of memory, and given that the issue that is being run now, advanced now, which we submit has gained considerable momentum, small pieces of fine, circumstantial difference make the difference just as moments in cross-examination make the difference."

17.22 The judge was concerned about the potential prejudice to the defence because the critical prosecution witnesses had been called and the "moment had gone". Furthermore, at the time these witnesses were called, the prosecution failed to inform either the defence or the court that contact material was missing. The judge was highly critical of the fact that if it had not been for the efforts of the defence, the defence would never have known that contact material was missing.

THE JUDGE'S TEST

17.23 The prosecution case had plainly reached a precarious stage. The judge decided that a relatively simple "litmus test" of the disclosure exercise would be to examine it through the use of the E-Catalogues. He explained his approach as follows:

> "Amongst the various things I have to decide is whether the disclosure regime has been fit for purpose and thus whether I can have any confidence in the latest assurances that all is now well and there is nothing more that can come out. Obviously if I did not have confidence in that proposition, then that would be the end of the matter. It seems to me that, whilst I have not made up my mind yet as to whether I have confidence in that proposition or not, one way in which it can be readily tested is by an examination of the documents that have been identified as worthy of consideration as being disclosable but which have been decided not to be disclosable and have not yet been disclosed, because if there is any category of documents which is going to point up most quickly whether there is further material or not beyond mere assurances that there is no such material, it's that, as it seems to me, unless you can identify some other way of identifying a body of material which is capable of being tested against your proposition."

17.24 The defence were not able to identify a simpler or more effective test and so the prosecution was ordered to scrutinize the E-Catalogues and to identify from them those occasions on which material had been described by a police officer as disclosable or potentially disclosable but which a prosecution lawyer had decided not to disclose. It would have been obvious that the primary responsibility for reviewing the E-Catalogues had been that of Haskell and that this exercise was therefore directed at evaluating his performance and reasoning.

17.25 It was not expected that there would be a large number of such documents and the Crown was confident that given the rest of the afternoon and evening, it would be able to have all relevant material from the E-Catalogues at court by the following morning for the judge and the defence to review. The judge had emphasised that even if the Crown "passed muster" in this test, that would not necessarily mean that the disclosure process had been fit for purpose. Although unsaid, it must have been obvious, however, that if the Crown failed to "pass muster", such failure would be fatal to its case. The court adjourned at 12.45pm to sit again at 12 noon the following day.

17.26 The precise details of what followed are not always agreed, but there is no doubt that over the course of the remainder of that day, significant irregularities were discovered in the management and disclosure of documents that caused the prosecution to abandon its case.

17.27 During the afternoon of 28 November 2011, the prosecution embarked upon the exercise ordered by Sweeney J, this involved work over the next five hours or so at the prosecution room at court and when the court closed for the evening, continued until the early hours of the next morning at Cockett Police Station.

17.28 The exercise itself had a number of aspects:

- First, the material which prima facie fell within the scope of the Sweeney test and so required to be reviewed by the prosecution had to be identified. Although he believes he may have been excluded, I am satisfied that Haskell was physically present and may – at most – have helped in the collation of the material, but I am satisfied that (rightly) he took no part in the review.

- Those documents subject of an E-Catalogue which had *not* been disclosed were the documents Sweeney J wanted to test and they could only be identified by first checking all of the E-Catalogues. Haskell had his set of E-Catalogues at court and they were contained in three files: two yellow and one black. Dean QC, Bennett and Clements had a file each and they started to read them. Their work was based on the essential understanding that the three files contained all of the E-Catalogues.

- Second, HOLMES was examined to "ensure that the same document had not since been disclosed anyway as a result of other enquiries or requests." For it was only if the document had throughout been withheld from disclosure to the defence that it fell within the scope of the judge's test. Every time a document was identified as "having a decision not to disclose" DS May and DC O'Connor completed a check to ensure it had not been disclosed since; this created a "definitive list" of documents which fell within the judge's exercise.

- Third, if following the HOLMES check it was established that the material had not been disclosed, the underlying material was recovered in order that it could be reviewed.

17.29 Had the exercise been conducted properly, those carrying it out, and later, the defence and Sweeney J, would have been able to evaluate Haskell's decision making.

17.30 I have inspected Haskell's three original lever arch files of E-Catalogues. The first (fuller) yellow file is labelled in handwriting on its spine "MG6E James' copy" and contains E-Catalogues for the period 16 December 2008 to 25 June 2009; the second, also a yellow file, is marked "MG6E James copy (2)" and contains E-Catalogues for the period

25 June 2009 to 4 January 2011. The third, a black lever arch file is marked "James' MG6E Material (3)" and contains E-Catalogues for the period 5 January 2011 to 21 March 2011 (with, surprisingly, two from 2009). The three files were recovered from the main part of the prosecution room at Swansea Crown Court, boxed (in Box 78), and taken to St. Athan following the collapse of the trial.

17.31 As the E-Catalogue exercise continued at Cockett Police Station, the three files must have been taken from court on 28 November 2011 to Cockett police station late on 28 November, and brought back to court the following day.

17.32 Upon inspection of the three files of E-Catalogue:

- The E-Catalogues appear to be Haskell's own record of his decisions; he has signed each one.
- The E-Catalogues appear to span the full time period for the disclosure exercise including primary and secondary disclosure.
- A number of the E-Catalogues are marked by sticky flags/tabs (consistent with the exercise of collation and review at court and later at Cockett Police Station).
- There can be no doubt from the three files themselves and from all of the surrounding evidence, that the three files were regarded as containing the full and complete list of E-Catalogues; no other source of E-Catalogues was considered let alone examined.

17.33 As to other police officers, Coutts had been excluded from court and was not present and Penhale had left court at some point in the afternoon "whilst the exercise was being undertaken" to attend a medical appointment in Cardiff at 4.15pm.

17.34 Dean QC says it was "very intensive work" and no doubt it was. The pressure on the lawyers must have been considerable; never far from anyone's thoughts must have been the belief that any irregularity or any inappropriate decision by Haskell would be likely to be fatal. Both DS May and DC O'Connor describe a sombre mood amongst the prosecution lawyers. DS May in his statement of 31 January 2012:

> "From Nicholas Dean QC's body language it was obvious to me that there were several examples of documentation coming to light that would merely add more fuel to the fire and cause further doubt over the disclosure process as they had not been disclosed despite being brought to the attention of counsel."

THE MISSING DOCUMENTS IDENTIFIED

17.35 It is possible from an inspection of the E-Catalogues to get some sense of how far advanced the E-Catalogue exercise was when there was discovery of the missing documents. In the file in which the missing documents had been recorded (yellow file "MG6E James Copy (2)"), there were 50 coloured tabs marking pages which fell within the judge's exercise before the reader had reached the E-Catalogue which contains three pages on which there are descriptions of four documents; there are only two tabs after that.

17.36 No one is able to be precise as to timings but Dean QC said to HMCPSI that at some point in "the afternoon" he came to "consecutive entries in the E-Catalogues relating to a

series of four documents" – actually files of documents. Dean QC describes the documents correctly (as far as the E-Catalogue is concerned) as three Actie complaints, plus a further complaint concerning LW3 officers (in other words, the "statement of complaint", as it is described on the E-Catalogue, of William Peter Evans).

17.37 When compared to the other E-Catalogues he had reviewed, this particular one was unusual. An E-Catalogue should identify in its leftmost column the HOLMES reference number for each item put forward by a police disclosure officer to Haskell as being potentially disclosable. In this instance, in the leftmost column, the four files or documents were simply numbered 1, 2, 3 and 4. Dean QC recalls: "the reference numbers given for them (or lack of them) seemed odd."

17.38 It follows that it was Dean QC who was considering the yellow file in which the missing material had been catalogued, and he is of course correct to say that the numbering was unusual. Inspection of the relevant file shows that this was the only occasion in that file in which documents had been submitted without a HOLMES reference number.

17.39 From DS May's experience of HOLMES, he interpreted the numbering of 1 to 4 as being not just an oddity but suggestive of the fact that the material "had not actually been registered in the MIR at the time of the assessment". Had the documents been registered, they would have had "D" numbers and those "D" numbers and not the "holding" numbers of 1 to 4 would have been put on the E-Catalogue.

17.40 Dean QC added: "The files had never been disclosed which meant within the exercise being carried out the judge would need to inspect the material in order to decide whether the decision making had been sound … [that] might itself have been problematic".

17.41 Dean QC requested the documents. He notes: "The system in operation meant that the material should easily have been able to be retrieved (it should have been held electronically and in hard copy) even though the reference numbers given for them (or lack of them) seemed odd."

17.42 What follows, regrettably, is mired in confusion due to a lack of care in identifying documents and the making of a number of assumptions.

17.43 Dean QC does not identify "the material" he requested and a note of caution may be necessary as to the weight which should be attached to the accounts of others as to precisely what material was requested. First, in his civil witness statement, and near-contemporaneous briefing note, Clements says it was: "In the course of putting together the documents for the overnight exercise required by the judge it was discovered that the documentation for these IPCC/John Actie complaints could not be located amongst the police papers." If that is right, Clements had in mind a request for documents 2 to 4 of the E-Catalogue and the subsequent discovery that the D7447 material was missing; but is silent on the Evans witness statements and D7448. Second, DS May, in a witness statement given to the IPCC, appears to recall that both D7447 and D7448 were requested: "copies of D7447 (complaints by John Actie from the IPCC) and D7448 (Files in relation to civil claims against South Wales Police) were requested." However, that would appear unlikely given Dean QC's initial request: for although there is evidence of an enquiry made of PLSD, as will become clear it was an enquiry made not for *D7448*, which did not feature on the E-Catalogue and so did not fall within the judge's exercise, but for the William Peter Evans statements which were erroneously thought to be part of D7448. And when it transpired

that those statements formed no part of D7448 and were not held by PLSD, D7448 was not, then, requested. Third, and in similar vein, DC O'Connor has also said that it was established that documents 1-4 were "not registered in the MIR at the point of assessment and referral to [Haskell] but were subsequently registered as D7447 and D7448." He has also said that copies of "D7447 and D7448 were requested" because "an E-Catalogue had been submitted [by Rowlands] in relation to them". Again, that reference to D7448 is incorrect. Fourth, neither Dean QC nor Clements refer to the civil claims material which comprised D7448.

17.44 From all of the evidence I have seen, I am satisfied that the most logical and likely course of events is that Dean QC, having reviewed the E-Catalogue, simply requested items 1 to 4 be researched and recovered; and subsequent events support that conclusion.

17.45 The fact that the E-Catalogue contained no references to any form of HOLMES registration or identification, did not prevent DS May and O'Connor from fulfilling that request, at least in part. The search facility on HOLMES would have allowed ready searching by name. Logically, they would have searched for "Evans" and "Actie" or similar and seen what results were returned. It is likely that the following occurred. First, because as I have established the William Peter Evans statements were never registered on HOLMES, plainly it would have been impossible for them to find the first document on the E-Catalogue on HOLMES. Second, as that problem did not apply to the other documents on the E-Catalogue, they were able to identify items 2 to 4, the Actie complaints material, as comprising part of the registered D7447.

17.46 Because the prosecution was only interested at this stage in material on the E-Catalogue which fell within the judge's exercise, I am satisfied that no request would have been made to research the civil claims material that was D7448: it was not on the E-Catalogue.

17.47 How then did D7448 become involved at all? The answer lies in simple error and assumptions made in attempting to make sense of the fate of item 1 of the E-Catalogue. The error (itself connected to earlier errors in the processing of the material) was that it did not occur to anyone that the William Peter Evans statements had never been registered on HOLMES and it was considered that they did, or later may, form part of D7448. The following chain of thinking, though mistaken, was not unreasonable in the circumstances: First, because item 1 was included alongside items 2 to 4 (part of D7447) on the E-Catalogue, and because all four documents were identified unusually on the E-Catalogue, there appeared to be a link between item 1 and D7447. Second, and in view of that fact, item 1 was likely to have been registered around the same time as D7447. Third, just as item 1 and items 2 to 4 appeared linked, there would in May's mind have been a link between D7447 and D7448 from his February 2010 conversation with Allen which if not immediately recalled would have been recalled as the events unfolded. Fourth, there was a link between item 1 and D7448 in that item 1 referred to William Peter Evans and D7448 to his wife Carole Evans. Fifth, although D7448 made no reference to William Peters Evans, it was more likely that the fault lay with the description of D7448. That view is reinforced by subsequent events, accounts, and the checks that it is now known were made.

17.48 First, the scanned Impact Marcom database was analysed to see if there was an electronic copy of D7447 or D7448, but of course there was none, and as is now known the material had been identified as missing in February 2010 when DS May was conducting his audit of material which required to be scanned.

17.49 Second, DC O'Connor made a call to St. Athan to see if the material could be located. A number of points may be made here to set the scene. First, the reference to the location of D7447 and D7448 on HOLMES suggested that the documents may not be at St. Athan and were instead located with the IPCC and PLSD. Second, St. Athan was a relatively compact space and the MIR, where such material should have been stored, was ordered in such a way that such material where available could be readily identified. Third, it would not have been uncommon for a request to be received at what was after all the investigation's headquarters at St. Athan for material – whether exhibits or other material – to be identified and made available at court; Kingsbury has said that on occasion that would happen as frequently as several times a day. Fourth, at that stage, there would not have needed to have been any significant involvement from the CPS or counsel in the formulating or making of the request of Kingsbury. Fifth, it would be a mistake to read too much into the use of the word "search" because it covers a wide spectrum of meaning from brief inspection on the one hand to a comprehensive search on the other.

17.50 On the afternoon of 28 November 2011, DC Kingsbury was on duty at St. Athan with DC Kelly Frazier. References to Carole Williams' possible presence at St. Athan are mistaken; I have discovered that she was on annual leave and not at St. Athan that day or the following days. It was DC Kingsbury who answered the call from DC O'Connor. Kingsbury does not recall making any formal note of the call in a telephone memo, his MIR day book, or in any other place and no note has been identified. O'Connor made no note either. There is therefore no available note of the request, or of what if anything O'Connor or Kingsbury were asked to do.

17.51 Kingsbury does, nevertheless, recall five relevant matters about the request. First, the request came in the late afternoon, although he cannot recall precisely when. Second, he was asked to locate a "document". Third, he was asked to locate a document from the "incident room" by which he means the MIR. Fourth, he was given a four-digit HOLMES document number. He believes that he would simply have jotted down the "D" number on a slip of paper, as had become his practice in answering such requests. Fifth, he was informed that the "document" related to a complaint file involving John Actie. I should make this observation: although – perhaps counter-intuitively – it does not necessarily follow from a police officer's reference to "document" that it means "one single document" as the singular is often used to describe a quantity of material registered under a single HOLMES reference number, I am satisfied, in particular from the matters above, and the matters to which I turn below, that Kingsbury was given one reference number and that the reference number was D7447. At that stage, the D7448 link might not yet have been appreciated.

17.52 DC Kingsbury recalls that in response to that request he took the following steps. As will become apparent, I am not satisfied that his recollection is entirely accurate, but the position overall is clear enough.

17.53 First, he went to the relevant (numbered) lever arch file in the "files room" (in fact an alcove in the MIR containing shelving) at St. Athan. I have touched upon the order of St. Athan and if "the document" was available, it should have been either there physically filed in a clear plastic sleeve in a lever arch file (they were kept in numerical order), or if the document was too large, its location there referred to. DC Kingsbury believes that he discovered there was a notice within the plastic sleeve in the file indicating that the document was in a numbered box and that he took this to mean that the document was too big for the lever arch file.

17.54 I do not doubt that DC Kingsbury performed this check, as he describes, but it should be observed that inspection of the original lever arch file that contains documents between D7446 to D7723, and in which D7447 and D7448 would ordinarily have been located (or, if too large, their location at least referred to), reveals the following. First, the index to the file describes D7447 and D7448 respectively as "Document from IPCC Re Complaints by N9 Actie" and "Files Re Civil Claims Against South Wales Police". Second, the index indicates the locations of the material so registered as respectively "Held by IPCC" and "Held by Legal Services". Third, there is in the plastic sleeve, no notice.

17.55 Second, he went to the "numbered box" indicated in the lever arch file. This, he recalls, was located on either the floor or on the lower shelf area of the documents area within the MIR and it was the box that should have contained D7447. He recalls looking at the index of the contents of the box where he found "a written endorsement on the index stating that the document could not be traced." However, in view of three matters in particular, I am satisfied that Kingsbury is mistaken in this aspect of his evidence. First, the box in which D7447 was received (and to which D7448 was added) at St. Athan and in which those documents were ultimately found was not a numbered box of the kind Kingsbury describes: it was not a heavy duty cardboard box which had the box number clearly written on it; in fact as is known from inspection of the box, it bore no box number at all. Second, the box was not, as I explain in chapter 18, likely ever located in the MIR, let alone in the appropriate alcove in the MIR. Third, inspection of the box reveals no written endorsement on any index or elsewhere to the effect that any document could not be traced. Whilst there is no reason to consider Kingsbury is not faithfully describing his general practice of document location, it cannot have been what he in fact did in relation to D7447. This view is only reinforced by the fourth matter below, which I am satisfied is the only explanation that makes sense of these events.

17.56 Third, DC Kingsbury tried, he believes, to locate "the document" by inputting the "D" number into the HOLMES system. As he explains "This would give an indication of when the document was last assessed and at what disclosure phase."

17.57 Fourth, he believes that he also checked the lever arch file of secondary disclosure audits for that phase (what he calls the "disclosure catalogue") and accepts: "This may have been where I found the written entry that the document could not be traced". He believes that reference may not have been in the index to a numbered box at all, but in the print out in which DC Morris circled and endorsed the location of D7447 and D7448 as being respectively with the IPCC and PLSD. As I have said, I consider that this is not only the most likely but in fact the only sensible explanation.

17.58 This entire process would have taken no more than 10 minutes.

17.59 Once he had taken those steps, DC Kingsbury made a phone call back to the court to report that first, the file was not in its expected location in the MIR; and second, that there was information indicating it had been missing previously.

17.60 DC O'Connor says this call back from Kingsbury was only a short time after his initial call and that it was not a complete surprise to him to learn that the files were not in their expected location in the MIR. Indeed, at that stage, it would have been apparent to O'Connor: first, that D7447 had not been scanned; and second, that D7447 was recorded on HOLMES as being located at the IPCC. Now, added to that, and as relayed by Kingsbury, there was evidence in the form of the Morris endorsements on the secondary disclosure

catalogue that the material had not been located at the secondary disclosure stage (there was no tick alongside the relevant document number which would have indicated the material had been reviewed).

17.61 O'Connor did not leave matters there: in the course of the same telephone call he asked DC Kingsbury to take a further step. There is no note of what was said, and O'Connor does not say whether it was of his own initiative or upon request, but as Kingsbury records in his IPCC witness statement, he was asked to "have a quick look around the MIR", Kingsbury adds "mainly to see if anything was out on desks". There was obviously recognised to be a possibility that although the material might well not be in St. Athan at all, it was worth at least checking the obvious places that the material might be if not stored where it should have been in the MIR alcove. By both parties to the conversation, the request was understood to entail and, given the timing of Kingsbury's further call to Court can never have been more than, only a brief inspection. In fact, Kingsbury has told me that in addition to looking in the MIR, he believes he also looked in the Outside Actions Room and the Lead Disclosure Officer's office (i.e. the offices from which the secondary disclosure exercise had been conducted and therefore the obvious places in which documents might, conceivably, have been left out on a desk for example). He adds that as Exhibits Officer, he knew the material would not be located in the Exhibits Office as he had previously conducted an audit of the content of the room, and the room was secure. O'Connor does not suggest he asked Kingsbury to do anything more than that which Kingsbury has described and Kingsbury is adamant that he was not instructed to search St. Athan and makes plain that he did not conduct anything that could be considered as a search of the premises generally, that is to say, a comprehensive search. And of course, as is well-known, he did not find anything.

17.62 In view of the fact that the IPCC box containing D7447 and D7448 was later found in DCS Coutts' office, something DC Kingsbury had been told by the time he came to make his witness statement to the IPCC, he adds that he did not look in Coutts' office in St. Athan, and he observes that Coutts' office would be "the last place" he would "consider looking for a document that should have been stored in the MIR".

17.63 DC Kingsbury cannot be blamed for not conducting any fuller search than the brief inspection he conducted. No one has suggested they asked Kingsbury to conduct any form of comprehensive search and there was no expectation on DC O'Connor's part that any such search would be conducted.

17.64 DC O'Connor reported back to the prosecution team by then based at Cockett Police Station that the documents had not been found. I am satisfied that he did so, but in the absence of any available note it is not clear precisely what was said at that point by DC O'Connor or by others. What appears to be clear, however is that no comprehensive search for the material was directed. In view of the suggestion of a belief in particular by Dean QC and Bennett that, by 1 December 2011 at least, a comprehensive search had been conducted at St. Athan, I must return to the issue of the search later in this chapter. At this stage, I simply observe that no one has said in any of the various accounts, statements or reports that they specifically gave, received, or were informed about an instruction in terms to conduct a comprehensive search of St. Athan. And, of course, other than DC Kingsbury's brief inspection, there is no evidence that a comprehensive search was ever conducted.

17.65 The reason for that, I am satisfied, is that there was none, and to understand why that might be, it is necessary to consider DS May's recollection of a conversation he had with DS Allen 18 months earlier about the self-same material.

DS MAY'S RECOLLECTION OF HIS CONVERSATION WITH DS ALLEN

17.66 At some point in the afternoon of 28 November 2011 – it cannot be precisely ascertained but Dean estimates the time as being between 5pm and 6pm – DS May realised that D7447 and D7448 were the same documents that he had been unable to find during his audit as Office Manager on 24 February 2010; the same documents that he had discussed with DS Allen on that same day; the same documents that he recalled had been shredded; and the same documents that had caused him to ask Carole Williams to record the location of the originals on HOLMES. May's recollection of these events and in particular his recollection of shredding is, without doubt, the single most important occurrence of the 28th and its consequences were far reaching.

17.67 It is not clear how much of that history DS May was immediately able to call to mind, or precisely what he communicated to the prosecution room at court. The best evidence of what DS May told others comes from three near-contemporaneous sources. First, Clements in his briefing note wrote that DS May "remembered being informed by another officer, DS Allen, that instructions had been given that the documents should not be retained in the MIR, and that after they had been considered for primary disclosure he had been told they had been shredded." Second, Dean QC explained to the judge in chambers on 29 November 2011 that in the course of discussing what might have happened to the documents, DS May "indicated" to Dean at about 5pm or 6pm, "that he had a recollection that there had been an instruction to shred material given at some point in time by Mr Coutts". Third, and in similar vein, Dean in his advice dated 29 November 2011 to the DPP stated that DS May: "recalled being told that at some stage the SIO, Mr Coutts, had given an instruction that some material should be shredded."

17.68 In his later witness statement to the IPCC dated 31 January 2012, DS May stated that his initial recollection on 28 November 2011 was that DS Allen had told him that the documents had either been "returned" or "shredded" but in view of the accounts of those to whom DS May reported, I am not satisfied that he did recollect or communicate the possibility that the material had been returned. The only message those at court were receiving from DS May was that DS Allen had told him that the documents had been destroyed.

17.69 The information from DS May, Dean QC has observed, "of course immediately rang alarm bells". If the material had been "shredded", it followed that it had not been "retained in the investigation" which was, Dean QC observed, a breach of paragraph 5.1 of the CPIA Code. Clements adds (my emphasis): "This was the first time me or counsel had been made aware that <u>any</u> documentation that had come in to the MIR had been destroyed rather than retained as required by the Codes of Practice."

17.70 May was, of course, not the only officer present at Court on 28 November 2011 to have had any relevant involvement with D7447 and D7448. And it is notable that, in stark contrast to DS May's realisation, DC O'Connor has never suggested that he then had a clear recollection of his own, and more recent, involvement with the same material, in December

2010 (eight months after May's involvement in February 2010) or that he communicated anything of it. This is relevant to an issue I return to in chapter 18 namely whether O'Connor had ever reported the D7447/D7448 issue to Haskell in December 2010. In view of the fact that Haskell was present at court, and later at Cockett, on 28 November 2011 when the issue arose it might be considered to be more than a little surprising that O'Connor did not at the very least say something to Haskell about it then: yet he has never suggested that he did so. What makes it more surprising is the suggestion DCI Penhale made in his witness statement to the IPCC that DC O'Connor raised a general concern about Haskell but when asked to give specific examples O'Connor gave none. But in addition to that issue, his own involvement, of which he also made no mention, may well have informed his view of whether the material was likely to be at St. Athan. I do consider it likely that O'Connor would have recalled something of D7447 and D7448.

17.71 When it was apparent that the enquiries at St. Athan had failed to bear fruit, attempts were made to obtain the original versions, or a further copy, of the missing material identified on the E-Catalogue.

17.72 It is known that in the course of the afternoon, calls were made to the IPCC, the PLSD, and the PSD. In relation to documents 2 to 4 of the E-Catalogue, the Actie complaints (part of D7447), DS May spoke to Chris McCoy at the IPCC. In relation to item 1 of the E-Catalogue, the William Peter Evans witness statements, DC Frazier spoke to the PLSD. And, later, also in relation to item 1, DCI Penhale spoke to Superintendent Lynch at PSD. The precise timing and sequence is not entirely straightforward but the overall position will become clear when I deal with these calls, and other communications in a little detail below.

17.73 At some point in the afternoon DS May called McCoy of the IPCC. In view of other known timings – in particular Kelly Frazier's phone call to PLSD in relation to the William Peter Evans witness statements – it is likely that the call was made at around 4pm.

17.74 First, May explained that the judge had ordered the production of material including files relating to the Actie complaints. Second, May requested a further copy. Neither May nor McCoy suggests there was any reference to the William Peter Evans statements and that is because for reasons I have already explained, those statements were erroneously assumed by the prosecution team to have been part of D7448 and therefore to have come from PLSD. If it were suggested that McCoy should have nevertheless provided the Evans witness statements, that would be misplaced. First, he was simply responding to the request he had received, which was for Actie complaints. Second, there was not a box of material already to hand at the IPCC that contained both Actie complaints material and the William Peter Evans witness statements. As I will explain in the next chapter, they had always come from different sources at the IPCC.

17.75 In addition to the enquiries made by DS May of the IPCC, and at around the same time, DC Kelly Frazier made enquiries of PLSD. From a telephone message form I have seen, it is clear that DC Frazier made the first telephone call at 4pm. As the form records she spoke to a secretary and "requested documents for LW3 trial – statement Peter Evans in files (D7448) to be found". Over the next hour three emails followed. The first was at 4.11pm from Frazier to the secretary, copied to O'Connor, subject "Urgent Files". The email read:

> "Hi
>
> We urgently require the following:

FIVE FILES WHICH RELATE TO CIVIL CLAIMS BROUGHT AGAINST SOUTH WALES POLICE BY JOHN MURRAY, CAROL EVANS, MICHAEL DANIELS, ERICA COLIANDRIS AND ADRIAN MORGAN IN 2008. THE CLAIMS ALLEGE FALSE IMPRISONMENT AND PERSONAL INJURY. EACH FILE CONTAINS DOCUMENTS INCLUDING A CLAIM FORM, CONSENT ORDER AND CORRESPONDENCE BETWEEN THE PARTIES. ALL CIVIL CLAIMS HAVE BEEN STAYED PENDING THE OUTCOME OF THE CRIMINAL PROCEEDINGS.

Any problems contact Kelly Frazier 0792…….

Or Disclosure Officer ADS Gary O'Connor 0758…….

Internal 64987"

17.76 At 4.22pm, Kelly Frazier sent a further, follow up email, on this occasion only to the secretary:

"Hi,

Further to the below, the judge requires the statement of a Mr Peter EVANS re: a complaint against Mr John Penhale, Gary Jeffries and other Police officers. He is the husband of Carole Evans, so it may be in that file. If this could be scanned to me by email that would be great.

Cheers

Kelly"

17.77 And at 5.04pm, it would appear following a further telephone call for which there is no form, Rachel Davies a lawyer at PLSD who had been in a meeting responded to Frazier as follows:

"Kelly,

As discussed, the statement of complaint made by Peter Evans would be held with PSD. I trust that you will therefore contact PSD accordingly.

As to the other files noted in your email, these are held by Legal but you have confirmed that you do not require these documents.

Regards

Rachel"

17.78 The above telephone call and three emails are significant for three reasons. First, as providing further confirmation, if it was needed, of the confusion that had set within the prosecution team about the D7448/Evans link: at 4pm, Frazier requested "statement Peter Evans in files (D7448)" and at 4.11pm she requested D7448 copying and pasting the HOLMES description to enable PLSD to identify the material. Second, it would appear that at some point between 4.11pm and 4.22pm, DC Frazier or a member of the prosecution team at court realised that the description of D7448 did not include the William Peter Evans witness statements; that it may not have been obvious to PLSD why it was

considered those statements would be within the five files ostensibly concerning unrelated others; and that the rationale should be set out: one of the five files related to his wife, and so as the email stated, it "may be" in that file. Third, as soon as PLSD confirmed that the William Peter Evans witness statements formed no part of D7448, LW3 did not request that D7448 be made available as an original or further copy. No doubt the reason for that was D7448 did not form part of the judge's exercise and therefore was not considered to be of central relevance; but it was a surprising view to have taken given the link to D7447 and that fact it was a further "document" that appeared to be missing. For reasons I come to below, it was important that D7448 be retrieved if only so that the prosecution team could have all relevant material to hand when it sought to understand what had gone wrong.

17.79 Once Frazier had reported back to court, it would have been clear that just as one set of enquiries, of PLSD, had reached an end a new set was required. It is no coincidence that no sooner had Frazier relayed her news that Penhale received, at about 5pm, what he has described in his IPCC witness statement as the first of a succession of calls. As to what he was told, in his evidence in the civil trial, DCI Penhale said: "When it first came to me […] it was that two boxes couldn't be found and I made inquiries immediately because they were a box held by Professional Standards and a box held by the IPCC. I made inquiries and very quickly the original documents were transported to Swansea." I am satisfied that what is meant is that two sources of material were identified rather than two boxes and those were: first, the IPCC and the Actie complaints (which I have already addressed); and second, the PSD and the William Peter Evans witness statements.

17.80 In relation to the latter, Penhale says he spoke with Superintendent Mark Lynch who was the deputy head of PSD. Lynch, asked about the matter for the first time more than six years later, unsurprisingly does not recall the conversation, but does not suggest there was none, and on other available evidence I am satisfied that he did receive such a call. The "original documents" were "secured" and "arrangements were made for them to be delivered to the [prosecution] team". Although Penhale does not specify the material, David Jenkins who worked within PSD confirms that Lynch asked him, Jenkins, to recover the original (he recalls two) William Peter Evans statements from the PSD files and to copy them. To the best of his knowledge and recollection, this was the only material sought or recovered from PSD by LW3 in the period 28 November to 1 December 2011. I return to recovery of the material below.

17.81 Meanwhile, in relation to the Actie complaints material, DC Arthur Kingsbury met Chris McCoy at 5.20pm (the time comes from Kingsbury's pocket notebook). Because of the urgency, they met in the car park of the IPCC's offices in St. Mellons, Cardiff where McCoy handed over an Iron Mountain box and its contents (given the shortness of time, originals rather than copies).

17.82 Given the urgency McCoy and Kingsbury understood there to be, it is unsurprising that neither made any note of the contents of the box (and nor is there any other available note). But it has this unfortunate consequence that no one has identified precisely what material was received at Cockett Police Station from the IPCC: and if it were to be assumed that it must have represented an identical copy of the material that had been in the box received at St. Athan in the summer of 2009, in other words the missing material, that assumption too would be wrong.

17.83 DC Kingsbury must have left St. Mellons, Cardiff with the original IPCC material, soon after 5.20pm and it is about 45 miles or 60 miles to Cockett by road, depending on the route. At about 6.15pm, as the court was closing for the evening, the prosecution team was required to vacate its room and so it moved to nearby Cockett Police Station, which was only a mile or so away. Kingsbury's pocket notebook does not have the time he delivered the material to the police station but it is likely to have been, as O'Connor has said in his IPCC and civil witness statements: "just before 7pm". And I am satisfied that O'Connor is correct in stating that the material was received at Cockett Police Station and not at court.

17.84 As to what the prosecution team was doing at Cockett Police Station, Dean QC has said the team continued first its "scrutiny of the E-Catalogues" and second "the investigation into the whereabouts/fate of the missing material". Of those two parallel exercises, I am satisfied that it was the missing material that came to consume much of the team's attention. I observe that inspection of Haskell's files of E-Catalogues reveals that, up until the E-Catalogue listing items 1-4 (the William Peter Evans witness statement and Actie complaints material), every document that fell within the judge's exercise was assiduously marked by a flag. Thereafter, that is not so: there are only two further flags in the file and not every example that required to be flagged was flagged.

17.85 Kingsbury did not remain long at Cockett Police Station once he had delivered the box of original IPCC material. Kingsbury has said and I accept that he was not asked about his brief inspection at St. Athan, and no one sought to explore with him any further possible steps that might be conducted upon his return, or in particular directed any search. He has said there was no discussion about searching and no direction to search. Instead, within a matter of minutes of delivering the material he was on the road back to St. Athan.

17.86 As the evening progressed, Kingsbury would be called upon twice more to collect further material and deliver it to Cockett Police Station. The first time was to recover PSD material; the second to recover further IPCC material. I return to both below.

17.87 Dean QC inspected the contents of the box of original IPCC material Kingsbury had just delivered. As I have indicated, there is no record of its contents, but from everything else that is known it is possible to say with confidence that the box contained the Actie complaints files JA/1, JA/2, JA/3 (JA/3 is in fact three files) and JA/4 and two VHS video cassette tapes: the first entitled "CCTV Re complaint J A Actie" and the second entitled "07/07/05 CDFF. BAY". What the box did not contain, but was listed on the index to the box, was JA/5. From a post-it note attached to the index and showing ticks for each of JA/1 to JA/4, no doubt made in the course of seeking to reconcile the box index to its contents, this appears to have been apparent to the prosecution team, and it is clear that contact was made with Kingsbury to recover "further documents" from the IPCC. Something else was apparent to Dean QC from his inspection, as he would explain to the judge on 29 November 2011: "that had the material been looked at in secondary disclosure (or later) it would have been (or ought to have been) considered to be disclosable".

17.88 Over the next two hours, and as the evening unfolded, several significant phone calls were made. The times cannot always be identified with precision but the overall sequence and effect is clear. First, Dean QC called DCI Coutts. Dean QC does not time the call, but Coutts says it was in the evening which must be correct and that he, Coutts, was at home. Neither Dean QC nor DCI Coutts made a note of what was said. If it was unfortunate that Dean QC especially did not make a contemporaneous note of this call, he did report

the conversation to those present and in particular Clements who was making a note on his computer to incorporate into his briefing note; and what was said is not in dispute.

17.89 Second, Dean QC called DS Allen from DC O'Connor's mobile phone. Dean QC says this call was made after his call to Coutts and that accords with Clements' briefing note dated 29 November 2011. Dean QC made a rough manuscript note which times the call to Allen at 8.06pm and so the call to Coutts was at some point before 8.06pm. Allen did not make a note.

17.90 Third, at or about 9pm, DCI Coutts called Dean QC and again, neither party made a note of the call.

17.91 Fourth, shortly, before 10pm, Dean QC and Clements spoke. Clements made a note, as before, which was later incorporated in his briefing note dated 29 November 2011.

17.92 Fifth, and "as the evening progressed" Penhale spoke twice to Coutts. He does not in his IPCC witness statement provide a time for either of the two telephone calls, and nor does Coutts, who recalls only one call. In the course of the evening, Penhale had also received a number of calls from Cockett Police Station to update him.

17.93 Some four years on when Dean QC came to give evidence in the civil trial, he could recall only one call with Coutts (the second one at about 9pm) and had no recollection of the earlier call he had made to Coutts. Dean accepted, however, that there may very well have been two calls; others have recalled the earlier telephone call; and I am satisfied that Dean and Coutts spoke earlier in the evening (and I am satisfied that this earlier call can be timed with some confidence as being around 8pm). Furthermore, Dean was able to remember that there were in fact two calls with Coutts in his written response to the IPCC.

17.94 It is clear that both calls were brief.

17.95 DCS Coutts, in a witness statement made to the IPCC, suggests that during the first call, Dean QC asked if he had ever given any instruction to "shred or destroy" case material or copies of case material. Coutts' response was unequivocal:

> "On the evening of 29 November 2011 I was contacted at home by Mr Nicolas Dean QC, without him going into any detail, he asked me if I had ever given any instruction to shred or destroy case material or copies of case material. I responded that I had never given any instruction to shred or destroy case material, copies or otherwise. He informed me there was an issue with the absence of copies of complaints material and stated that he was unable to discuss the matter further with me. He told me not to attend court the following morning and that I would be updated by DCI John Penhale".

17.96 Coutts does not suggest that Dean QC told him not to talk to anyone about the matter and I observe that it might be thought surprising to have done so when it is known that he told Coutts that Penhale would be in contact.

17.97 In the past, when he could remember it, Dean QC has said very little about the first telephone conversation with Coutts other than to confirm that Coutts denied that he had ordered or suggested the shredding or destruction of any material. And indeed, there appears to have been little else said.

17.98 Clements, DS May and DC O'Connor were present at the time of the first call between Dean QC and Coutts. Each has given a brief account of what, as reported by Dean, had been said. It is not suggested that the call was conducted on loud speaker or that those present otherwise would have been able to hear what Coutts said but what he said was not controversial. May and O'Connor, I observe without criticism, made no note and Clements' briefing note deals with the call only succinctly and is plainly not verbatim:

> "Leading counsel then asked that DS Allen be contacted to ascertain if he recollected such a conversation about destruction of the IPCC material. In the meantime leading counsel had spoken to DCS Coutts who said that no such instructions had been given by him."

17.99 If, because of the way it has been expressed, Clements' briefing note might be read as suggesting that Coutts was specifically asked about "the IPCC material", I am not satisfied that is so or in fact that Coutts was provided with any detail other than that there was an issue, generally, as to the whereabouts of unidentified "complaints material". In any event, I am more than satisfied that the material in issue was not identified to Coutts with any degree of precision.

17.100 That view is supported by the accounts of DC O'Connor and DS May. DC O'Connor says Dean QC called Coutts to ask if Coutts had ever given an instruction for material "to be destroyed": there is no suggestion that "IPCC material" was specifically identified. In similar vein, DS May says, in his IPCC witness statement: "Contact was also made [...] to ask [Coutts] if he had ever given an instruction for material to be destroyed / shredded, the response was that no such instruction had ever been given."

17.101 The reason for the brevity of the conversation and the paucity of the information provided was not, I am certain, borne of any malicious motive or an intention to mislead Coutts. Indeed, having made the decision to speak directly to Coutts (the wisdom of that decision is a matter to which I return later), Dean QC's concern about becoming embroiled as a potential witness was understandable. But it had these unfortunate consequences: there was no scope for any considered discussion between Dean and Coutts of the position; no opportunity for Coutts to clarify with Dean the nature of the material missing; and no opportunity for Coutts to provide such informed assistance as he might have been able to provide.

17.102 As I have observed, Dean QC told Coutts that Penhale would be in touch and the first time that evening Penhale and Coutts spoke is likely to have been following the first Dean/Coutts call. Coutts says three things of note. First, he was "briefed" by Penhale "as to the issues in respect of the absence of copy material". Second, Penhale "confirmed that the originals of the material had been provided to Mr Dean and the Prosecution Team" that evening. And third, Coutts requested Collette Paul be updated.

17.103 Any briefing Penhale was able to give Coutts would necessarily have been imperfect and that is because Penhale was not present at Cockett Police Station on 28 November 2011 and was reliant upon the limited information communicated to him in the course of the calls he received that evening: principally, he has said, from O'Connor. Penhale accepts he was "puzzled" and that is hardly surprising: from all the evidence I have seen it is highly unlikely, given that others were unsure, that he can have had straight in his mind exactly what "material" was said to be missing or to have been destroyed. It is important nevertheless to consider the nature and extent of his puzzlement, because Penhale was the conduit of any information to Coutts. For example, first, Penhale says it was made clear to him that

the missing material "had been properly scheduled": although that was so in relation to D7447 and D7448, by the time Penhale had become involved at about 5pm, it was plainly not so in relation to the William Peter Evans witness statements. Second, he says as far as he was concerned the material "still existed in its original form with the third parties who had provided it": it is correct that the "originals" of the material were with the third parties, although as would become relevant, not necessarily in the same "form". Penhale's account of the conversation is nevertheless significant for the following reasons. First, as might be expected it suggests Penhale was able to inform Coutts at least of the allegation that "some material had been destroyed" on Coutts' instruction and that "DS May had a recollection of DS Allen […] telling him that certain material had been destroyed on the instruction of Mr Coutts". Second, it confirms that Coutts told Penhale, just as he had told Dean QC, that he would "never have requested any material be destroyed." Coutts therefore shared Penhale's puzzlement. Third, and attempting to make sense of what might have happened, Penhale says he even suggested to Coutts a possible explanation: that Allen might have asked Coutts what to do with PSD material, and in view of its sensitivity Coutts might have said the originals should be retained by PSD, "the schedule" marked accordingly, and "no copies should be retained at the incident room". Whilst accepting he "may well have" said that the copies should not be retained (the originals being with the third party provider), Coutts had at that stage no positive recollection of such a discussion with Allen.

17.104 As for the call Dean QC made to DS Allen, if it were thought that the existence of a note would necessarily exclude room for doubt about what was said, that regrettably is not so. In his response to the IPCC's questions, Dean QC produced a typed version of the note he had made of this call which reads as follows:

> "*@ Cockett*
>
> *8.06pm sp. Mark Allen*
>
> *Does rec shr – SIO. With J.L. to IPCC*
>
> *- copies. SIO sd. docs 2b shred when*
>
> *looked at. Will mk. st. am.*"

17.105 Dean QC subsequently interpreted his note as follows:

> "At Cockett Police Station, spoke to Mark Allen at 8.06 pm. He does recollect shredding on instructions of SIO. He had gone with John Lane (another officer) to the IPCC where they had obtained copies of some material. The SIO had said the documents were to be shredded after they had been looked at. He will make a statement in the morning."

17.106 The note is far from a verbatim record of the conversation (one which Dean QC would later say was "relatively brief") and although the note does not include every word of the conversation, or Dean's impression of what he was being told, it is plain from other contemporaneous evidence that Dean QC did not consider Allen's recollection to have been particularly strong. As Dean QC would explain to the judge the following day, 29 November 2011 (qualifications/limitations underlined by me): "[T]o a certain extent, prompted by what I was able to tell him, he [Allen] was able to give me some vague information about some recollection of having been told to shred documents". Hardly there

a suggestion that Allen had agreed unequivocally that he had received an instruction to shred material, far less that he had shredded material.

17.107 It is of course very difficult, if not impossible, to reconstruct both sides of the conversation with each of its nuances, at this remove of time. Five essential features of the conversation and its circumstances are, however, clear.

17.108 First, and this in my view is the proper starting point to an understanding of the controversy that has arisen in relation to the conversation: whatever the uncertainties as to the material in question, even on his own account Allen has accepted in his IPCC and civil witness statements that he communicated to Dean QC a vague recollection of a conversation which was with Coutts and which was about the shredding of material. Against the backdrop of May's recollection, and the fact that material was missing, even vague confirmation of such recollection would no doubt have been received by Dean as significant, however inexact or imprecise the detail.

17.109 Second, there were a number of factors that were not conducive to the provision by Allen of a clear or reliable account: the circumstances in which Allen was receiving the call two years after the relevant events, out of the blue, unprepared, and without the relevant material or any relevant material in his hands. He had left LW3 on 4 December 2009, and with the brief exception of the conversation with DS May 18 months earlier in February 2010, he had had no further involvement in the investigation. It is not a surprise that he said in his IPCC witness statement: "The call was unexpected and took me completely by surprise."

17.110 Allied to that, Allen was off duty and had consumed "several glasses of wine", which he was perfectly entitled to have done, and although there is no suggestion that Dean QC was told this or should have detected it (or that Allen was intoxicated), and although in his evidence in the civil trial Allen made it clear that what he had said to Dean QC was not in consequence unreliable, he would be forgiven in all of the circumstances if his recollection in general, and especially of particular documents, had been somewhat vague. Indeed, in his interview with HMCPSI, Dean QC said that not only had he formed the impression that Allen's recollection was vague, but also that Allen himself had <u>said</u> that his own recollection was "vague".

17.111 And also, this would not have been a lengthy and open conversation. It was, I am satisfied, like the Dean/Coutts conversation a relatively brief and closed conversation for the same reasons but in consequence of which Allen had little appreciation of the relevant "context" or "purpose" to these questions, or the allegation that had been made.

17.112 Third, the conversation was conducted against the backdrop of Dean QC's inspection of the Actie complaints material contained in the original IPCC box that Kingsbury had delivered to Cockett. As I come to below, Dean QC could not by the time he spoke to Allen have seen any material from PSD (it was yet to be recovered), and no material had been recovered from PLSD. As a result, it is highly likely that Dean had formed the view that it was the Actie complaints material to which the Allen/Coutts conversation related. I am equally satisfied that this is not the material that Allen had in mind and that his vague recollection related not to that material but to other material. Allen in the civil trial said he believed he made it "quite clear" to Dean that the material he had in mind was not material "in respect of any documents that was subject of the disclosure process". However, he said nothing

of this in his 29 November 2011 witness statement and I am not satisfied the position was made clear to Dean.

17.113 Fourth, it was not the principal purpose of the telephone call to elicit an account, the principal purpose was for Dean QC to ask DS Allen to make a witness statement. Indeed, DS May, who overheard the Cockett end of this conversation, said that the purpose of the call was "to request a statement concerning his [Allen's] recall of events". And Dean QC told the judge on 29 November 2011 that he had asked Allen first, to consider overnight carefully what he could remember; second, to consider whether he had access to documents that might help him to be more specific; and third, to make a statement to inform him precisely what the position was. In the event that statement was not available when Dean QC saw the judge and it is obvious that Dean decided not to wait for it.

17.114 There is another important guide to what Dean QC said since it is near contemporaneous and that is Clements' briefing note. The relevant part of the briefing note – in fact, reflected in Clements' civil witness statement in materially identical terms – suggests that Dean QC told Clements four things about the call. First, that Allen "confirmed that it was his recollection that such an instruction had been given by DCS Coutts." In a statement made to the IPCC, DC O'Connor has said that Dean QC reported: "DS Allen had told him that he had shredded copies of the material". Second, that Allen "recollected going to the IPCC with DS Lane and being told that the IPCC had made copies of the complaint papers so that the police could examine the original files but take away with them copies of relevant documentation." Third, that Allen recalled DCS Coutts saying "something along the lines of that once the documents had been considered" they should be shredded "as the IPCC held the originals." And fourth, that "DS Allen was asked to make a statement in the morning."

17.115 I must return to the issue of what material Allen may have had in mind when he spoke with Dean QC on 28 November 2011 in due course. Two discrete issues should be resolved here. The first is whether there was a timescale for Allen's witness statement. In a witness statement made to the IPCC, Allen stated: "There was no timescale." And in his civil witness statement: "He [Dean QC] did not stipulate any timescale as to when the statement was required". It may very well be true that no precise time the following day was identified, but I am satisfied that Dean QC informed Allen that he should carefully consider what he could recall overnight with a view to making a witness statement in the morning. It is included in his contemporaneous note and both Dean QC and Clements are clear about it. Common sense dictates that the witness statement must have been required for the following morning at the latest.

17.116 The second is whether Allen was told not to discuss the conversation with anyone: "Mr Dean concluded the conversation explaining that […] I should not talk to anyone about our conversation." Dean was asked about the issue more broadly in the civil trial, and whether it was "likely" that Dean QC had told Coutts not to speak to anyone about the matter. Dean QC said it was "very difficult" to venture a view, that he did not recollect doing so, that he could not "think that he would" do so (he would not "necessarily" have thought he was "in a position to do so"), but that he may have said to the "other officers" not to speak to Coutts. I am satisfied that is the most likely position.

17.117 It is important at this stage to return to Kingsbury who, as I have said, was asked that evening to collect material from PSD. Kingsbury is not able to assist as to the material he collected: he was not told, and would not needed to have been told, what the material

was and it was provided in a sealed slim A4 envelope (which, he recalls, appeared to hold only paper sheets). I am satisfied that the material can only have been the William Peter Evans witness statements and having collected them, Kingsbury delivered them to Cockett Police Station at 8.30pm (as his pocket notebook records) before setting off for the second time to St. Athan. This is important because assuming Kingsbury's pocket notebook to be correct, and I am satisfied that it is likely to be correct, Dean QC had not received the William Peter Evans statements at the time he spoke with either Coutts (for the first time that evening) or Allen (for the only time).

17.118 According to Clements' briefing note, Dean QC left Cockett Police Station after he had called Allen and Coutts. Dean QC says that he left the police station at about 9pm and that before he left, "all (police, counsel, CPS) discussed the position we were in both as regards the E-Catalogues and concerning the missing material". No decision had been reached about whether the case "could continue", and the review of the E-Catalogues was "well advanced but not yet completed".

17.119 Outside the police station, as Dean QC was sitting in his car about to drive home, Dean QC spoke with Coutts again: this was the final time they would speak before the decision was made to offer no further evidence. The call received by Dean was likely to have been at some point between 9pm and 9.15pm. Dean QC recalls Coutts called him "to ask [...] what was going on". Dean QC responded that he "wasn't able to speak to [Coutts] about it and needed time to think about the situation we were in". As before, Dean QC was concerned that he might be "drawn in to a position where [he, Dean] might have to give evidence" and in view of his stance, expressed to Coutts, it is unsurprising the call was only short.

17.120 Two final calls that evening are relevant. The first is a further call from Penhale to Coutts, which is likely to have been made by Coutts following the second Dean/Coutts telephone call. Penhale says Coutts mentioned he had a "brief and what he considered, bizarre conversation" with Dean, who had pointed out he was "unable to discuss the matter with him": "bizarre", Penhale explained in the civil trial, because Coutts could not understand what was happening. Although an hour had passed since the first conversation, Dean had remained steadfast and Coutts – although accepting in the civil trial he could "understand... completely" Dean's concern about becoming a witness – must have felt firmly in the dark.

17.121 The second is a call Dean QC made shortly before 10pm to Clements in which he told Clements of Coutts' call. As Clements' briefing note explains: "At about 9:50 pm Mr Dean contacted me to let me know that DCS Coutts had contacted him as he had been leaving the police station and Mr Dean had told him that he could not discuss matters with him until the morning." In the event, Dean QC did not speak to Coutts the following morning, and in chambers on 29 November 2011, the judge acknowledged the sensitivity of any contact between Dean QC and Coutts and said that there should be none without defence agreement until matters had been finally resolved. The conversation between Dean and Clements then turned to wider matters and "the particular problems our work on 28 November had thrown up."

17.122 In his evidence in the civil trial, Dean QC added that by the time of this final call of the evening with Clements, he had had "a chance to reflect" on "what had happened that day" and he and Clements agreed "to speak about it again the following morning". Clements' briefing note provides the detail:

> "Mr Dean and I then discussed our present position. We both agreed that in the light of the information received today about the possible destruction of documents that neither of us had been made aware of hitherto that serious consideration needed to be given about whether or not the Crown could continue to pursue the case. Whatever the motivation for the destruction it meant that no proper record was kept of the documentation actually provided by the IPCC, and therefore exactly what was assessed by the disclosure officer and disclosure counsel. There also appeared to have been a failure to conduct a proper review of the complaints by way of secondary disclosure after receipt of the defence case statements given the fact that there was no documentation in the possession of the team at the time that exercise was carried out."

Then this (my emphasis):

> "<u>We agreed that dependent upon what was included in the statement from DS Allen</u> it may become necessary to see the judge in the morning of 29th November to explain the position and to indicate that we needed to appraise the DPP personally of the current position and our view that the Crown could no longer provide the judge with the assurances that he was seeking in relation to the disclosure process. Indeed we considered that the information provided by DS May of itself was something we needed to make the judge aware of in the morning."

17.123 The following observations may be made about the Clements briefing note and what it reveals about the state of the minds of the two most senior lawyers in the prosecution team and the seriousness of the position reached by the evening of 28 November 2011. First, although Clements refers at one point to the "possible" destruction of documents, it is clear from the remainder of the note, and the other available evidence, that there was a settling acceptance that material had in fact been destroyed. Second, the note recognised the possibility (or in the circumstances even inevitability) that the motives of Coutts and Allen would be impugned.

17.124 There were two further problems which the note identified and in relation to which Allen's or Coutts' motives were immaterial. First, no "proper record was kept of the documentation actually provided by the IPCC" and so it could not be said with any confidence what in fact originally had been physically received at St. Athan and what in fact had been reviewed at the primary disclosure stage. Some police officers to the IPCC questioned how valid a point that really was as the documents received were no more than identical copies of material that had been retained by the provider. That question may be an understandable one, but it is clear in my view that Dean QC and Clements' concern was entirely valid. As I have explained, there was no conclusive record of what had been received by LW3 from the IPCC in 2009; and the contents of the box of material received on 28 November 2011 were not the same. Second, the material which had originally been received, had not been available to be reviewed at secondary disclosure. In view of the disclosure protocol, which required all material to be reviewed for the purposes of secondary disclosure, and the repeated assurances which had been given to the court that secondary disclosure had been efficiently and comprehensively conducted (and had thus acted as a quality assurance check for the entire disclosure exercise); this too was a significant problem.

17.125 Where all this left the prosecution late on 28 November 2011, Clements and Dean QC were agreed. First, although the view was not communicated to the police or to those at Cockett, a provisional view (and I would add, a strong provisional view) had formed that

"the Crown could no longer provide the judge with the assurances that he was seeking in relation to the disclosure process". Second, the course ultimately determined by the prosecution to be appropriate was "dependent upon what was included in the statement from DS Allen". Third, whatever Allen's statement might contain, "the information provided by DS May of itself was something we needed to make the judge aware of in the morning."

17.126 It would be wrong, however, to imagine that all prosecution work simply stopped at 9pm. Others remained at Cockett Police Station after Dean QC had left, and indeed Bennett has said that work continued "into the early hours of the morning". In particular, the review of the E-Catalogues not only continued but appears to have expanded from an exercise in identifying instances where Haskell had taken a narrower view than the police disclosure officers to instances where he had taken a wider view.

17.127 At 11.50pm (the time recorded in his pocket notebook), Kingsbury met McCoy for the second time to collect "further documents". These were documents contained within a red lever arch file marked JA/5 and as McCoy would later explain were documents that had not been "contained within the [original IPCC] box when it was handed to Arthur Kingsbury" earlier that day. As before, Kingsbury delivered the material to Cockett Police Station, and although he did not record the time it would likely have been between about 12.30 and 1am.

17.128 Following this second delivery, Kingsbury went home and he booked off duty at 1.30am (this time is again from his pocket notebook).

17.129 When May had completed his duties at Cockett Police Station he went to St. Athan. The reason for doing so was to see if he could locate an entry in his MIR notebook which might confirm his recollection about the conversation with Allen. It is likely that Bennett thought that in addition to finding his notebook, May was also going to search St. Athan for the missing documents but any such assumption was mistaken, and May is clear that he did not conduct any search. Once he had found his notebook, and the reference to "shredding" having been confirmed, it might have been odd for May to have then embarked upon a search of St. Athan for documents which were considered not only to be missing but to have been destroyed; and he did not.

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17.130 The following day, Tuesday 29 November 2011, Dean, Bennett, Haskell, Clements and a small number of police officers met at Swansea Crown Court. The judge and defence knew nothing of the events of the second half of the previous day and would have expected, in the course of that morning and certainly by noon (when the case had been listed in court), to have received disclosure of every document that had been submitted on an E-Catalogue but had not been disclosed.

17.131 The precise timing and order is again not always straightforward and the following may not be in perfect sequence, but the overall picture is clear.

17.132 At 8am, Penhale arrived at court where he met Clements, Bennett, and Haskell. Penhale, as I have noted, although in telephone contact the previous day with at least Coutts and O'Connor, and possibly also May, had not been present either at court or later at Cockett Police Station on the 28th as the dramatic events had unfolded, and has more recently said that when he "went to bed [on the evening of the 28th he] had no idea that this issue was

case threatening": he believed – not unreasonably given his limited involvement – that this was simply "another disclosure challenge" to be overcome amongst the many that had gone before. He has said he asked those present at court on 29 November, and in particular Clements, for an update and was told that they would wait for Dean QC who, in the event, joined soon after (probably soon after 8am given the timing of subsequent events). It is plain from what followed that May, if he was not also already there by 8am, arrived at about that time as did O'Connor. As will be apparent below, events undoubtedly moved swiftly (I am satisfied, in all the circumstances, rather too swiftly) and in my view more time should have been taken to address the implications of the developments overnight and at court that morning. Penhale's broader concern about the speed of unfolding events is therefore one that is understandable, and one to which I must return below at relevant stages in the chronology. It would in my view be a mistake, however, to read into every step in the chronology a significance that is not merited. Clements' decision to await Dean's (imminent) arrival at court before any discussion about the position in which the prosecution was left has been criticised but was plainly understandable.

17.133 With May's arrival at court, and in light of his overnight discovery at St. Athan, the prosecution team now had in addition to his recollection of shredding, a near-contemporaneous note. The note, which will be examined in more detail in the next chapter is as follows:

> "D7447 + D7448 contacted DS Mark Allen @ PSD – he stated that both docs were copies of info held by IPCC + our legal services. James Haskell had looked at D7447 and decided it wasn't relevant to our enquiry so Mark shredded them (they were scheduled on the MG6C phase 13). With regards D7448 the complaints include Carol Evans whose husband had made official complaints against SIO and others – SIO instructed Mark to get rid of them so he shredded them. Originals are with IPCC + legal services, Holmes updated."

17.134 It is important to appreciate that the note does not in fact record that Coutts had ever given an instruction to Allen to shred anything. The instruction, as per the note, was for Allen to "get rid" of D7448 which subsequently, according to the note, Allen decided to shred. By the time this conversation had been reduced to writing in May's notebook, it was, of course, hearsay in that it had passed from Coutts to Allen and from Allen to May, and we have to be careful about the weight that can safely and properly be attached to the note and, in particular, in considering the actual language employed and the room for confusion. The note, as it was interpreted by the prosecution on 29 November 2011, however, has to be viewed within the context of the events of the previous day when May had asserted that he believed that Allen had told him that he (Allen) had been instructed by Coutts to shred or destroy the documents. Those words must have remained in the forefront of the minds of those who had heard them and are likely to have influenced the reading and interpretation of May's note when seen the following morning.

17.135 At court on the morning of 29 November, there was further discussion about the effect of the note which can only have confirmed and hardened the strong provisional view reached the previous evening by Dean QC and Clements. Penhale says he "was left in no doubt that the case was now considered to be over" and ACC Paul has supported that view – Penhale called her at approximately 8.40am, left an answerphone message, and they spoke "just after 9am". If the fate of the prosecution, and the decisions to be made, seemed (understandably) to be inevitable and unavoidable to Dean and Clements, the

feeling of others (expressed most strongly by Penhale) is equally understandable, namely that a cold *fait accompli* had been presented, and that more time should have been afforded to assimilate the information, digest the consequences, and fully to react. Bennett has summarised the position thus:

> "Prior to going to see the judge, Mr Dean QC and Mr Clements led the discussion on whether the prosecution could continue to assert that it had complied with its disclosure obligations. The police and IPCC did not dissent from the provisional view of Mr Dean QC and Mr Clements that the DPP should be consulted about whether or not to continue with the case. Neither the police nor the IPCC asked that more time be taken, that further searches be carried out to locate the missing material or were providing any explanation for what had happened."

17.136 That the police and IPCC did not do either of these things is not surprising. The events of the previous afternoon and evening were – as was unassailably clear to Dean and Clements in particular – the "final straw" and the available information that morning at court provided no hope, and no prospect, of redemption. Dean and Clements, of course, had had more time than others to consider just how dismal the position was, and for the implications to settle, but for others, receiving the message that the case was over would undoubtedly have come as something of a shock. The discussion at court that morning is relevant for a further reason. Penhale says it became apparent to him that Dean QC had spoken with DS Allen the previous evening and had requested a witness statement from him first thing in the morning. With Dean's permission, Penhale called Allen to ask when the witness statement would be ready, and he then, he says, reported back to Dean QC what Allen told him.

17.137 Allen times the call at 8.19am and says that Penhale asked for his statement. Second, Allen says he explained that he needed time to consult his pocket note book and "any other documents" he could find to assist his recollection. Third, Allen, who was by then feeling panicked and worried asked whether he was in some sort of trouble. Fourth, Penhale said something to the effect of: "This is the culmination of other problems with disclosure and this was 'the straw that broke the camel's back'". Fifth, Penhale said that he could not offer Allen a witness interview; and sixth, he needed Allen's statement by 9am that morning for court.

17.138 It was, Penhale told the IPCC, only a "short call" and his account of the conversation is substantially similar. In similar vein to the first and second matters set out above from Allen's account, he asked Allen where the statement was that had been requested by Dean and Allen replied that he had been looking for his relevant pocket book and was yet to find it. Penhale does not include mention in his own statement of the "final straw" comment but it is one Penhale accepted in the civil trial he could easily have made, and I am satisfied given similar reference in his IPCC witness statement that he did make that comment. According to Penhale, he explained that time was very important and that Allen should just prepare a statement based on his memory of events. Finally, and I observe, potentially of considerable significance, but not mentioned by Allen in any of his accounts:

> "Without any prompting from me he (Allen) said words to the effect that upon reflecting on the conversation with Mr Dean the previous evening he now believed that the material that this conversation with Mr Coutts related to was a document prepared by Chief Superintendent Tim Jones the head of our professional standards department. I explained

to DS Allen that I had not rung him to interview him as a witness and he was to provide a witness statement as soon as possible with his recollection of the relevant event."

17.139 Allen does not accept that he made reference in that conversation to any document prepared by Chief Superintendent Tim Jones. In my view, however, it is significant that, as both Allen and Penhale agree, Penhale said he could not offer Allen a witness interview. On Allen's account, in which the above passage recalled by Penhale finds no reflection, there is no obvious reason for Penhale to have made that comment at all. What would make sense of it, however, would be an unprompted statement of the kind Penhale describes and I am satisfied that it is likely that Allen did make such a statement. If it had been fully appreciated (and I am satisfied it was not: this is a matter to which I must return below), the effect of this statement was that the material discussed with Coutts was not any of the items 1 to 4 of the E-Catalogue or either of the "D" numbers D7447 and D7448 which were of interest to the prosecution from 28 November 2011: it was apparently a different document entirely, prepared by Chief Superintendent Jones, head of PSD.

17.140 Penhale says that immediately following this call, he reported to Dean QC what Allen had told him. He told the IPCC that Dean QC appeared not to be interested in what he relayed to him, or the timescale for DS Allen's statement. Penhale elaborated in the written comments he gave to the IPCC following advance sight of the IPCC report. He said:

"The conversation I had with DS Allen and his response was reported to Mr Deane [sic]. DS Allen was clearly saying that the material he was relating to was not what Mr Deane had questioned him about the previous evening (and claimed that DS Allen had agreed with). Why Mr Deane was so disinterested in this and why did he not wait for the arrival of DS Allen's statement? Does such a document exist from Chief Superintendent Jones during this period?"

17.141 As I will come to below, there was indeed a PSD/Jones document which may well have been the one DS Allen had in mind yet, remarkably, no one then or later sought to identify it, and no one asked Jones about it. In the civil trial some years later, Dean QC was cross-examined about Penhale's account:

Q. He [Penhale] says this: "It [Penhale's report to Dean QC of his conversation with DS Allen] did not appear to be of any interest to him, nor did the timescale for DS Allen's statement." On the face of it, he is saying what you'd now say on the following day, on the Tuesday, that DS Allen was actually having a different recollection in relation to the documents. That would be fundamentally important in terms of issues about integrity and what documents would have been or may have been loss?

A. But it remained the case that DS Allen had told me that he had a recollection, a vague recollection of something of that sort having happened, that I would have had to have reported on any basis. I think that DS Allen at a later stage said that he had no recollection of saying anything of the sort to DS May as well.

Q. Yes, but that's not the question I'm asking you. You see, here we have something which could have been seen as an update or an amendment as to what the recollection was, and that would be potentially important in terms of any applications you would make to the trial judge, because it might go to the issue, for example, whether in fact there had been a destruction of documents at the instruction of DS Coutts or not?

A. Well, I'm not sure that the word important is correct. It would have been something to take into account of course.

Q. And did you take it into account?

A. I frankly can't remember.

Q. Because if it's what happened, the conversation Mr Coutts related to was a document prepared by professional standards, so the face of it nothing to the point in relation to the documents which may have been, you understood, destroyed or shredded?

A. No, I've no recollection at all of professional standards being mentioned or anything of that sort.

Q. I see. So do you agree with Mr Penhale when he said it did not appear to be of any interest to Mr Dean, this conversation he had with Mr Allen?

A. No, I don't agree with that at all.

Q. Did it play any part in what you said to Mr Justice Sweeney?

A. I can't recall.

17.142 There can be little doubt that Penhale reported back to Dean QC. Whether, as Dean QC recalls, he asked Penhale to chase or, as Penhale recalls, he requested Dean QC's permission to speak to Allen as I have set out at para. 17.136 (and in all the circumstances, the latter is more likely) it would have been very peculiar for Penhale having spoken to Allen not to have then reported back at all.

17.143 As to what Penhale reported, it is likely that Penhale would have told Dean that he had told Allen to make his statement as soon as possible. I also consider it likely that he said something of Allen's latest recollection. I am not, however, satisfied that when reporting back, Penhale can have made the position as precise and clear as was necessary to impress upon Dean QC the significance of the development. Indeed, Penhale acknowledges that: "The significance of what he (Allen) said to me was not immediately apparent other than there was a great deal of confusion over this sequence of events". In the circumstances, Penhale's lack of appreciation was understandable, indeed it has taken a very long time since to recognise the importance of what DS Allen had said. The apparent haste with which events proceeded on the morning of 29 November no doubt contributed to Penhale's feeling of confusion, and as I explain below, it would undoubtedly have been better if further time had been sought: not because further time would necessarily have altered the ultimate course taken (indeed I am satisfied it would not have done), but because first, it may have resulted in the emergence of a clearer picture and therefore a better informed decision; and second, although the ultimate decision was not for the police, it would have permitted a period of considered reflection, communication, consultation and deliberation by the full and extended prosecution team; and avoided the sense held by some of (at best) being swept along by rapidly moving events or (at worst) being deliberately marginalised at a stage at which it might have been felt more convenient to place the blame on the police than the lawyers (a matter to which I must return in due course).

17.144 Any impression of lack of interest on the part of Dean, if such there was, in relation to Allen's latest account is likely to have been the product of the following. First, it is likely that Dean QC had formed the view, having that morning seen May's note, that whatever Allen now recalled, the note could not have been clearer: it was clear as to shredding, that the documents shredded were D7447 and D7448, and that the originals of the documents were with the IPCC and PLSD. Second, it was unlikely there was anything Allen could say which would improve the position: the exercise and enquiries of 28 November had thrown up a number of further problems for the prosecution. Third, if anything, the suggestion of an overnight change in Allen's account was yet a further problem (it did not sit easily with May's note); and, critically, the latest recollection was certainly not a development that presented any hope of a different outcome. As Dean QC observed in the civil trial:

> "… it remained the case that DS Allen had told me that he had a recollection, a vague recollection of something of that sort having happened, that I would have had to have reported on any basis."

17.145 Both May and Dean had 18 months apart believed they had received a similar, and similarly alarming, message from Allen, namely that material had been shredded on the instruction of the SIO, and whether that material was D7447, D7448, the William Peter Evans witness statements, or other material, the case had reached the point of no return and no remedial action of whatever kind could now save it. That, I am satisfied, was the prosecution's view.

17.146 But the episode is not, as I have observed, without significance on the question of whether the prosecution acted precipitately or should have done more. I return to this below but at this stage observe first, that at the very least, *any* suggestion of a new account and its implications ought to have been explored. Second, and in any event, I am sure that the prosecution should have waited for Allen's statement before reaching any preliminary conclusion and before giving any explanation to the judge; potentially it was a vital piece of the puzzle. And third, the implication of what Allen was saying is that his recollection would be assisted by seeing his relevant pocket book and in particular, the originals of the documents which were now assumed as having been shredded. Although his notebook was of little assistance, time should have been taken to permit Allen to inspect all the material which had been delivered by the IPCC, and by PSD. Time should also have been taken to request and recover the original of D7448 for Allen also to inspect. Although the material from the IPCC could never have been exactly reconstructed (there were no records of what precisely had been copied) more is better than less and at least Allen could and should have had the opportunity of examining the then best possible evidence of what D7447, D7448 and insofar as different items 1 to 4 of the E-Catalogue comprised. Much is made of the fact that the disclosure exercise was especially difficult because it involved over one million pages of documents. In this of all cases, care should have been taken to ensure that police officers had the best possible opportunity to scrutinize the evidence before committing themselves in a witness statement. And time should have been taken for a full conference between the full prosecution team, including ACC Paul.

ARRANGEMENTS TO SEE THE DPP

17.147 It is instructive that at the same time as arrangements were being made to see the judge in chambers, arrangements were also being made to see the DPP. It is of course unlikely that such arrangements would be set in train in such circumstances if the view had not been formed that the prosecution was no longer tenable. But whatever the views of Dean QC

and Clements, such was the importance and sensitivity of the case that the decision to offer no further evidence could not finally be made without the DPP's blessing.

17.148 Within probably no more than 20-30 minutes of Dean QC's arrival at court, and within minutes of Penhale's chasing call to Allen, Clements sent an email to the private secretary to the DPP. Sent just before 8.30am the email confirms that Clements and Dean QC were of the view that the prosecution could not properly continue:

> "Leading counsel, Nicholas Dean, has asked that he and I have an appointment as soon as possible with the Director. Yesterday afternoon we uncovered a serious disclosure issue in the case that we feel puts us in position where we can no longer proceed with the case. Before that decision is finally taken we need to inform and consult the Director about what has happened. In practical terms as we are both in Swansea if we are to do that face to face it may have to be first thing tomorrow?"

17.149 Within a quarter of an hour of that email, the DPP's private secretary had responded (8.45am):

> "The Director should be able to do telephone call at 14.30 today or face to face meeting pretty much any time tomorrow?"

17.150 No doubt given the nature of the case, and the significance and seriousness of the prospective decision, a telephone conference was not considered to be appropriate and a meeting was later scheduled for the following day, Wednesday 30 November 2011.

17.151 At 8.57am, Clements responded, copying in the then CPS Head of Communications:

> "Thanks very much – could I please keep both options until counsel has seen the judge. Please find attached my up to date briefing. Could I please ask you to distribute to anyone else, including DCMP members, that you feel needs to see it, including AGO? Please call if you need anything more."

17.152 The "briefing" to which Clements refers in that email was his briefing note to which I have already referred. It was one of two critical documents submitted to the DPP, the other being an advice drafted by Dean QC and Bennett and sent by email later that same day. These two documents are obviously important documents because although the DPP was familiar with the case, having been kept abreast of its progress at the DCMP meetings, and so was aware in broad terms of the various challenges it had faced, these two documents represented the latest and most focussed summary of the relevant developments and issues that had only very recently emerged. It would be expected, no doubt, that the DPP would rely heavily on them in making the decision he was now to be invited to make.

17.153 I consider the contents of both documents later when dealing with the meeting with the DPP on 30 November 2011. For now, it is to be noted that the briefing note recorded nine facets of the "up to date" position and provides an important reflection of the position the prosecution had reached shortly before 9am on 29 November. Although in Clements' name, it also reveals, no doubt, the contributions of others and principally those of Dean QC.

17.154 First, the appearance of what had happened was "appalling", a description that would later find reflection in an early draft of Dean QC's speech to deliver on 1 December 2011.

17.155 Second, DS May and DS Allen were in the process of writing their witness statements.

17.156 Third, it was apparent from DS May's note that the position was in fact worse than had been understood the previous evening in that "it is clear that a deliberate decision was taken to shred a volume of material": in other words, there now appeared to be no scope for accident or mistake. Dean QC would later express the point thus: "The decision to dispose of documents was itself deliberate". In other words, the prosecution team proceeded on the basis that the May note was correct and that documents had been "disposed" of, by which Dean QC meant destroyed.

17.157 Fourth, that decision, the decision to shred, was not itself recorded or notified to the disclosure team or counsel or the CPS.

17.158 Fifth, and it is a concern that I have already referred to, it was now impossible to know what the copy material consisted of. Dean QC:

> "[the] fact that the material had been destroyed meant that it was impossible to say for certain whether the material retrieved from the IPCC was in fact the exactly the same material that had been reviewed and then shredded."

17.159 Sixth, because the decision was not recorded it was impossible to guarantee that other similar decisions had not been made. Dean QC would later express the point this way:

> "That the decision to destroy the material was not recorded, particularly given to whom it related, meant that it would be impossible to give meaningful re-assurances that no other material had been treated similarly and impossible to give meaningful re-assurances that other potentially important instructions about the treatment of unused material had also not been recorded".

17.160 Seventh, these events, from the perspective of the defendants, cast doubt upon the very integrity of the SIO and the disclosure process.

17.161 Eighth, although Dean QC held no doubts about the honesty and integrity of the SIO, if asked by the judge, as would inevitably happen were any attempt now made to defend the position the prosecution was in, he would have to concede that the defendants could not have confidence in the disclosure process and possibly no confidence in the integrity of the investigation itself.

17.162 Finally, Dean QC was attempting to see the judge as soon as possible that morning.

17.163 It was not only reasons three to eight in the Clements briefing note that would extinguish all hope that the prosecution could properly continue; Dean QC would later give six further linked reasons. First, the decision to destroy material "came to light by pure chance." Second, the decision "involved not only the SIO [Coutts] but also the officer who was at the time the Lead Disclosure Officer [DS Allen]." Third, "The subject of most of the shredded material was one of the original defendants [Actie], one of the men with whom the police were alleged to have had an inappropriate relationship". Fourth, "The material was in fact disclosable, if not in primary disclosure then certainly in secondary disclosure." Fifth, the "fact that the material had been destroyed after primary disclosure meant that it could not have been re-reviewed in secondary disclosure – this against assurances repeatedly given by leading counsel that all material had been re-reviewed for secondary disclosure." Sixth,

"What DS Allen seems to have said to DS May also raised concerns about his treatment of irrelevant material." These were all valid observations and their collective impact damning.

17.164 As Dean QC wrote later in his causes of collapse document, "The decision to inform the judge that the disclosure regime could no longer be defended was inevitable in the light of the discoveries of 28 November." As to the timing of that decision, it has been suggested that the audience with the judge was deliberately brought forward (a suggestion which has further fuelled a feeling of undue haste). That suggestion, however, would appear to stem from a misunderstanding, namely that when, on 28 November, the judge had adjourned for the day, the court was to sit again at 12 noon on 29 November. What the suggestion misunderstands is that the judge and defence would on the morning of 29 November have expected to have received the E-Catalogue material to review, and more importantly, as I have observed, Dean and Clements had understandably decided on the evening of 28 November, based on the information then available to the prosecution, that it would be necessary to see the judge much earlier the following morning and not to wait until noon (the reasonableness of this decision can only have been reinforced by May's note).

JUDGE IN CHAMBERS

17.165 As to what was said to the judge in chambers, in the absence of the defence legal teams, there is a transcript so there can be no doubt about what took place. Present were the judge, Dean QC, Bennett and Clements. Dean QC began his application for an adjournment at 9.30am and said as follows:

> "MR DEAN: My Lord, thank you for seeing me in chambers. I have made the defendants and defence representatives and those who are here aware of my application to be heard before you and indicated in broad terms that what I am about to raise is not directly a disclosure issue but an issue that's really of integrity, and that nothing that I am going to say now won't be repeated in more expansive form in due course, and obviously these matters are now being recorded.
>
> My Lord, the position is this. The e-schedules, the documents that are submitted to Mr Haskell, in which he records a decision whether or not to agree with the disclosure officer's assessment, were examined during the course of yesterday afternoon. One of the documents was – a series of documents, four in total, which I was looking at in the schedules, seemed to be recorded in a way that was unusual, because they didn't have a D number or any other usual mechanisms for identifying what they were. They are described, and they were IPCC files relating to complaints made. Three of the files relate to complaints made by John Actie.
>
> Now the nature of the complaints is not evident from the schedule itself. So, checking, I discovered that these were documents that had not been disclosed, and so in accordance with the task we were carrying out yesterday I called for the original documents so that they could be set against the schedule for a judgment to be made as to the integrity – the correctness of otherwise of the decision not to disclose.
>
> That immediately threw up this problem, that there didn't appear to be such documents held. The nature of them, as I have indicated, was clear, and so I asked that they – the originals be recovered from the IPCC, but in the course of discussing what may have happened to the documents Mr May indicated to me that he had a recollection that there

had been an instruction to shred material given at some point in time by Mr Coutts, the Senior Investigating Officer, and, as my Lord might imagine, the use of the word "shred" in this capacity gave rise to some considerable concern.

Now this was about 5 or 6 o'clock yesterday evening and we had to decamp from here at about 6.20 to Cockett Police Station to carry on work. The IPCC files arrived about the time we were leaving court.

The files themselves, when one looks at them, are complaints made by John Actie of various nature, fairly innocuous stuff. The material could – I emphasise could – be said to cast some potential doubt upon his credibility, largely because he didn't pursue these complaints.

However, having received the material, I wanted to investigate further how it could be that documents could have been shredded, and ultimately made contact with Detective Sergeant Allen, who was the Lead Disclosure Officer at the time I think.

MR JUSTICE SWEENEY: Yes.

MR DEAN: To a certain extent, prompted by what I was able to tell him, he was able to give me some vague information about some recollection of having been told to shred documents, and I asked him to overnight consider carefully what he could remember, consider whether he had access to any documents that might help him be more specific, and to make a statement to inform me precisely what the position was.

I may say that I have not discussed these matters in any detail with Mr Coutts. He is aware of the, as it were, query, but no more than that.

That seemed to me to be serious enough, for reasons which I will turn to and which are no doubt obvious, but this morning Detective Sergeant May had access to his notes kept at a time when he was Office Manager, and he has, in fact, recorded that he was told in terms that there had been an instruction to shred certain material, and he was able to give reference numbers, and it is that material that I have referred to, the IPCC material and one other document.

Now plainly a decision to shred material should have been recorded. The position, of course, is all the worse for this, that since the material was shredded seemingly after an initial review of it and a review in which Mr Haskell had said that the material should be looked at again after defence case statements were received, the material so far as I would have been concerned, and obviously I wouldn't have been aware of these specific files, ought to have been considered in secondary disclosure, not just because it was specific to John Actie, but also because all material was being re-reviewed.

It purports to have been, but it does not seem to me that it could have been, because it was no longer present, and indeed there is now no way of knowing whether the material recovered from the IPCC is the same material that was initially reviewed or not. It may have been added to; it may have been subtracted from.

The long and short of this is that I cannot I think say, since this decision was not recorded, that it is impossible that other material has not been shredded.

Whilst I have, I make it absolutely clear, no doubt whatsoever about Mr Coutts' honesty and integrity, and no doubt there was obviously thought to be a good reason for the shredding at the time, since the decision was not recorded, it seems to me that the defendants in this case, no matter what I might say, no matter frankly what Mr Coutts might say, would not be able to be certain, particularly since the material relates to John Actie, and particularly since the relationship between Mr Coutts and Mr Actie and others is an issue in this case – it does not seem to me that the defendants could have confidence in the integrity of the disclosure process and possibly in the integrity of the investigation itself.

My Lord will recognise what a very difficult position the Crown are in. I know in my mind what has to happen. I would like to reflect upon it. At the moment if my Lord was to ask me before the defendants and defence representatives whether there was any basis upon which I could defend this position, my answers would have to be no.

I am making arrangements to see the Director tomorrow morning. Plainly the decision ultimately is not for me. I can only advise what I think is the appropriate course, but I may say that Mr Clements and Mr Bennett agree with me that we cannot now proceed with this case.

MR JUSTICE SWEENEY: Well, I am extremely grateful for the integrity that what you have said demonstrates and I am particularly grateful to Sergeant May. Indeed, we must all be grateful to Sergeant May for so frankly explaining what the position is. From this perspective, with matters on a knife edge, if not already beyond the knife edge –

MR DEAN: Yes.

MR JUSTICE SWEENEY: – the consequences are very clear, but having been in a similar position myself, I can entirely understand that you want to do the right thing in the right way –

MR DEAN: Yes.

MR JUSTICE SWEENEY: – and, of course, you must.

MR DEAN: I am most grateful. I don't, in fact, propose to investigate this further with Mr Coutts, because whilst Mr Coutts may say he didn't give any such instruction ...

MR JUSTICE SWEENEY: No. Quite, quite.

MR DEAN: I am going to inform him what the position is.

MR JUSTICE SWEENEY: Yes. I think that you should speak with the defence before you do that –

MR DEAN: Yes, of course.

MR JUSTICE SWEENEY: – because I can see that they until the position has reached final clarification would be sensitive about any discussion.

MR DEAN: Oh, of course, yes. As I've said, Mr Coutts is aware this is an issue, not aware at the moment of the consequences. My Lord, in those circumstances I would simply ask that the court adjourn until Thursday morning."

17.166 A number of features of the above exchange are notable. First, although Dean QC was commendably forthcoming in his praise of DCS Coutts' "honesty and integrity", he did not make a specific point of emphasising that Coutts had in fact forcefully denied giving anyone any instruction to shred case material. In a reply to the IPCC, Dean QC explained that where the transcript reads, "I am most grateful. I don't, in fact, propose to investigate this further with Mr Coutts, because whilst Mr Coutts may say he didn't give any such instruction ..." he was going to add: "… but he is contradicted in this by what DS May and DS Allen say" – but had been interrupted by the judge. Dean QC stated that he believed that the judge was well aware of what he had meant and what he was going to say.

17.167 Second, there was no suggestion of any residual belief that the missing material might <u>not</u> have been shredded. As Dean QC explained (my emphasis) "there was obviously thought to be a good reason <u>for the shredding</u> at the time": the point in other words was that the material had been shredded; it was confidently believed to have been shredded in good faith; but in all the circumstances, good faith was no answer.

17.168 Third, Dean QC interpreted May's note as recording "that he was told in terms that there had been an instruction to shred certain material". Although that is not in fact correct – there was no instruction "in terms" to shred – in light of May's recollection the previous day, Dean QC's interpretation was understandable.

17.169 Fourth, if it was already obvious from the email to the DPP's private secretary earlier that morning that Dean QC and Clements had made up their mind that the prosecution was now untenable and had to be stopped, here, if it was needed, was confirmation. Although Dean said that he wanted to "reflect" on his position it is clear that there was little, if anything, to reflect upon. As he put it, "I know in my mind what has to happen" and "I can only advise what I think is the appropriate course, but I may say that Mr Clements and Mr Bennett agree with me that we cannot now proceed with this case." Bennett has said it became apparent on 28 November that the prosecution was "no longer sustainable".

17.170 Fifth, DCS Coutts had been excluded from all discussions and decision making and that his enforced exile was to continue.

17.171 Sixth, although Dean did not, when addressing the judge, employ the specific numbering of either the E-Catalogue (1 to 4) or the "D" numbers (D7447 or D7448), as is clear the focus was very much upon D7447 and the Actie complaints material. No specific mention was made of the William Peter Evans statements or D7448.

17.172 Seventh, the judge was also of the opinion that the trial had reached its end or was at least close to it. If there was any doubt in the exchange cited above, it was resolved in what followed shortly thereafter:

> "MR DEAN: I am grateful. I will have to consider what the appropriate, as it were, way forward is on the basis of an acknowledgment that the Crown cannot now properly put forward disclosure as having been sufficiently well done that the defence can have confidence in it. It may be that inviting a stay is one option.
>
> MR JUSTICE SWEENEY: I think that if one gets to the stage where in a trial like this that the court can no longer have confidence in the light of concessions made by the Crown as to the disclosure process and hence the fairness of the trial, then the nettle just has to be grasped –

MR DEAN: Yes.

MR JUSTICE SWEENEY: – and matters have to be brought to a very final conclusion. I am afraid that's the only fair way out."

17.173 And so at 10am the court adjourned for two days until Thursday 1 December 2011. Following the adjournment, Dean QC and Clements returned to the prosecution room at court and Dean QC began to draft his advice to the DPP for the meeting the following day.

17.174 I have set out the explanation given to the judge on 29 November 2011 in full because a concern raised by the claimants relates to the soundness of the decision-making process made by the prosecution leading up to the decision to offer no evidence and whether the decision was made on a properly informed and sufficiently careful and considered basis.

17.175 In that regard, it may be convenient here to consider some of the specific criticisms and concerns that have been made and raised at various stages about the events of the 28th and 29th. It is important to recall that some were made at a time when emotions were high and feelings raw following the collapse of this eight year investigation and without the benefit of perfect information; recriminations and misunderstandings were to be expected. It was, as May has said, a "very very emotive" time.

17.176 A particularly common concern about these events (and particularly their speed) is that what Dean QC told the judge came as a surprise to others in the broader prosecution team. Police officers are dissatisfied with the manner in which the position was presented to the judge on 29 November 2011 and this emerges clearly from the IPCC statements. The principal concerns do not exist in a state of disembodiment and it is of course relevant to understand who has raised the concerns, principally Coutts and Penhale. Coutts says he was "completely flabbergasted" that Dean QC addressed the judge as he did without having had "any discussion" with him. Penhale says that he was (and remained at the time he made his IPCC statement) "surprised and perplexed as to how these matters were investigated and reported to the court".

17.177 Penhale's misgivings were based on a departure from the *status quo ante* and from what he considered otherwise ought to have been done. First, there "appeared to be an urgency to get before the court with 'bad news'" and that the urgency was of a nature he "had not seen before". He believed that further time should have been taken and as I have already observed, however obvious the position in the eyes of Dean and Clements, that feeling was understandable.

17.178 Second, to Penhale, a comparison between how problems were confronted in the past and how this particular difficulty was treated revealed worrying deficiencies and differences in what had just happened:

"The enquiry had on many occasions in the previous months encountered what were initially considered potential case threatening situations. These were always fully researched and presented in a measured manner with the significance of the issue regularly being played down in a damage limitation exercise. This is "par for the course" in criminal trials. One side builds it up whist the other plays it down, that is in fact what a skilled QC does, they argue over matters like this causing a judge to make a decision. This wasn't to be the case this time."

This statement from Penhale is no doubt a testament to the skill with which it was felt previous such challenges had been addressed and to the collaborative spirit of the prosecution team (which made the events of 28th and 29th appear more unusual), but as I have observed, this latest issue was not susceptible to even the most careful damage limitation exercise.

17.179 Third, there should not have been this rush to judgment. Penhale is adamant that the judge would have given the prosecution more time if it had been requested and that the prosecution team could then have discussed in detail what had happened and how the prosecution should respond. As will be apparent, I agree that more time should have been sought, and would have been granted.

17.180 Fourth, Penhale is "certain that both the IPCC and [PSD] would have been able to say that the material they retained was in fact the carbon copy of material they had provided to the investigation" but "they were never asked". Coutts makes the same point when, in his witness statement to the IPCC, he identifies this as one of two "basic investigatory action[s]" that should have happened. Although I understand why Penhale and Coutts would consider this to be so – instinctively, it seems obvious that the third parties should have been able to provide such confirmation – in fact, as I have already explained, this was not so straightforward.

17.181 Fifth, there was no attempt even to search for the missing material. This, Coutts would later suggest, was the other basic investigatory action. I agree, although as will be apparent, on the information available to Penhale, he understood (incorrectly) that the prosecution team was in possession of the original documents and did not consider that the finding of the copies would be of any material significance.

17.182 Sixth, there was a possible innocent explanation for the shredding of documents, which Penhale felt was never properly explored. This explanation, of which there was no evidence, did not address any of the further disclosure problems thrown up by the episode.

17.183 And seventh, the disclosure problems were not such as to demand an end to the prosecution; or alternatively, the issue of the missing material was just part of the picture of wider failings including those revealed by the E-Catalogue exercise, but should never have been the focus. Penhale was under the impression that the judge was to be told that the issue of the missing material properly fell to be understood against a backdrop of wider disclosure failings for which the full prosecution team must accept responsibility, and that the decision that the case could not proceed was not based on the missing material alone.

17.184 Dean QC was asked about the concerns of Coutts and Penhale when he gave evidence in the civil proceedings. In relation to the suggestion that there was an "urgency" to get before the court with bad news:

> "There was a[n] urgency, of course there was, because we had been given until that morning to investigate the e-schedules. As it was, something rather more concerning had arisen, namely the shredding issue. Now, I don't know whether characterisation of it as bad news is really accurate. It seems to me that it was my responsibility to report to the judge what had happened and what I proposed to do about it. To that extent, I was reporting bad news. I think that what Mr Penhale's statement fails to reflect is a thinking through of the position that we were in because by that stage actually it wouldn't have made very much difference at all what anyone then said about the shredding issue. If you think it through, at the very best we had the Lead Disclosure Officer in the case having made a

remark about the senior investigating officer to the effect that the SIO had ordered the shredding of documentation [...] that would have to have been, as it were, explored in evidence if we were to go ahead with legal argument to sustain our position. We would also have to have called evidence about the failures in relation to the recording of the position of the material in question and the failure to record decision making about how it had been disposed of or how it had been stored. That meant that we were in a very difficult and bad situation come what may over the shredding issue and the recording of the storage and keeping of the IPCC material."

17.185 In his written response to HMCPSI, Dean QC stated that he, "did not consider that the case was stopped 'quickly'" and that "those of us who were involved in decision making had to stand back from that pressure and make calm and professional judgments".

17.186 As to the suggestion that this episode marked a departure from the approach which had been taken to previous difficult issues, Dean QC effectively said that all roads led to the offering no evidence, that there was no conceivable alternative result:

> "[I]f you think about all the possible outcomes of the position that we were in, none of them could have resulted in any other decision. [I]t's impossible to conceive of a situation in which we could have come out of this with any other result."

17.187 I have no doubt that that answer accurately and honestly reflected Dean's state of mind at the relevant time and that if he did not then, in November 2011, consider events which it now appears he should have done, it is because in his mind he was convinced that the prosecution was irretrievable. As will be demonstrated, Dean QC did not in fact appreciate just how irretrievable the prosecution had become.

17.188 In relation to the possibility of asking for "more time", Dean QC said again, that in effect, the prosecution was irretrievable and that he did not request further time because:

> "I would have had a timescale by then, I think, as to when we were going to be able to speak with the Director of Public Prosecutions. So I certainly had that in mind when I asked for time. I didn't ask [...] for more time as regards the, as it were, issues that we were investigating at that stage [...] because it wasn't required."

17.189 In relation to Coutts' remark that he (Coutts) was flabbergasted about what had happened, it was put to Dean QC in the civil proceedings, that he had done nothing wrong and that what he did was perfectly proper. Dean QC replied as follows to this obviously friendly line of questioning:

A: It really rather depends whose stand point you ask the question from. Mr Coutts may have thought I'd done something wrong. All I did was, as it were, report what had happened.

Q: But that's what you had to do as prosecuting counsel, isn't it?

A: Yes.

17.190 Dean QC, however, firmly rejected the suggestion that Coutts was "an officer who's making up every excuse under the sun to cover up for his own wrongdoing":

> "No, no. He's flabbergasted because he thinks, as far as I can see, that I've not gone far enough in terms of investigating what had happened with the material in question and I can understand from his perspective why that, at that time, may have shocked him, because he's not thought through the dilemma that we were actually in at that stage."

17.191 In relation to the absence of a search, Penhale – as a senior officer, who unlike Coutts had not been excluded from court – could of course have done more if he had considered there to be any merit in a search for the missing material. However, like others, he proceeded on the basis that the material had been destroyed and that the case was irretrievable. He was also under the misapprehension that an identical original copy of the missing copy material had been provided to the prosecution team on 28 November (I return to this below).

17.192 In relation to the possible innocent explanation for the shredding of material, that explanation was an answer to the suggestion of bad faith but as will by now be apparent, if it was not apparent to Penhale in particular when he made his statement to the IPCC, that was far from the only concern that the treatment of the missing material had thrown up.

17.193 Finally, in relation to the suggestion that the providers of the material could have been approached to confirm the actual material provided, two points may be made. First, the fact that Penhale considered that *PSD* could be approached illustrates the depth of confusion that had set in and is another illustration that Dean and Clements' concern that it was impossible to achieve sufficient assurance of what had been provided was justified. The PSD was of course not the source of any of the four items on the E-Catalogue or D7447 or D7448. The sources were the IPCC and PLSD respectively. And as Bennett has said, in reference to the IPCC material: "We had no way of establishing the continuity of this material since its receipt from the IPCC and that the contents were the same." Second, in his witness statement to the IPCC, Coutts suggested that a copy of the missing material – the "very same material" as he had in 2009 discussed with Allen – had also been provided by PSD to Clements in either 2009 or 2010. If that were correct, and therefore Clements had an exact copy of the missing material, then the question why did he not reveal that fact between 28 November and 1 December 2011 is obvious to understand.

17.194 It is, however, based on a misunderstanding, as PSD had not provided Clements with a copy of the missing material. The material that was missing was D7447, D7448 and the William Peter Evans witness statements. This part of Coutts' witness statement might be thought revealing: it demonstrates that Coutts, even when he made his witness statement to the IPCC, did not in fact know what the missing material was; Coutts was under the impression that the missing material was the "very same" material as had been provided by PSD to Clements in 2009 as part of a "formal process"; as is now known, the material that had been provided by PSD to Clements in 2009 as part of such process was not any of D7447 or D7448 or the William Peter Evans statements, but was a "Chief Officer – Briefing Paper" (the "Jones Briefing Paper") and Appendices A to O (which, nevertheless, included the witness statements of William Peter Evans – the material having been provided to Clements for the purposes of advising whether the complaints should proceed or be deferred).

17.195 As will become clear, in 2010 the Jones Briefing Paper and Appendices A to O were also provided to Haskell for advice (he in fact advised that they were irrelevant). As the terminal

events were unfolding at court, neither Haskell nor Clements remembered these documents from PSD or their contents. The documents were not the documents numbered 1 to 4 on the E-Catalogue and did not fall within the scope of the exercise set by the judge; neither were they the material registered as D7447 or D7448 (or registered on HOLMES at all: the Jones Briefing Paper should have been registered on HOLMES as it had also been supplied to the police, and Appendices A to O could not have been as they had never been supplied to the police). Even though, as I have found, the documents had an obvious relevance to what was happening and the confusion that set in, I do not consider it surprising that neither Clements nor Haskell called this material to mind. PSD was not then on the prosecution radar and neither Clements nor Haskell could have been expected to remember the fact that three of the Appendices related to William Peter Evans, one of which contained his two witness statements.

17.196 Back to the events of 29 November 2011. Following Penhale's first call to Allen, DS Allen recalls a second call a little over an hour later also from DCI Penhale (at 9.37am, by which time Dean was addressing the judge in chambers). Although Penhale recalls only one such call, I am satisfied Penhale made this second call because the 9am deadline had passed and Allen had provided no witness statement and no explanation for the delay. As to what was said, Penhale asked when Allen's witness statement would be ready (according to Allen, so "adding further pressure"). Allen says that following this call, he "quickly produced" the statement and then sent it by email.

DS ALLEN'S WITNESS STATEMENT

17.197 As a result of evidence disclosed to me, it is now possible to time the subsequent events with some accuracy. At 10.32am, Allen sent O'Connor an email to which was attached his witness statement. The document is saved as "MG11 LWIII". The subject of the email is "Statement". The body of the email reads "As requested". At 11.17am, O'Connor forwarded the email and its attachment to Clements. The body of the email reads "As requested". Arriving with O'Connor as it did half an hour after the case had been adjourned, there is, therefore, no doubt that Allen's witness statement was not provided until *after* Dean QC had seen the judge in chambers effectively to announce that the trial was over.

17.198 Allen's witness statement is very short; a little over a page (I would suggest too short bearing in mind its importance). In the main body of the witness statement, Allen wrote as follows (it is set out as written with each of its imperfections):

> "At approximately 20.10hrs on Monday 28th November 2011 I received a telephone call at home from Mr Nick Dean.
>
> Mr Dean asked me if I could recall during my time on the re-investigation whether having a conversation with Chief Superintendant Chris Coutts regarding the shredding of a document, and could I produce a statement regarding that matter.
>
> I can recall having a conversation with Mr Coutts in his office regarding a sensitive document that I considered too sensitive to put through the incident room, as it involved complaints against current members of the investigation team.
>
> As far as I can remember the document would either have come from my examination of files held at The Professional Standards Department Head Quarters Bridgend, or from

my visit to the IPCC in Cardiff. I can recall the document would have been a copy of an original, and that it would have been shown on lists provided by both IPCC and PSD.

Following our discussion in respect of how to deal with the document I cannot recall how I disposed of that document.

I am unable to put a time and date on this conversation but having viewed my pocket note book I can say I attended at PSD on 19th August 2009, where In respect of disclosure duties obtained documentation relevant to the investigation."

17.199 Regrettably – having recorded that Dean QC asked him if he could recall whether he had a conversation with DCS Coutts regarding the shredding of a document – Allen does not provide a clear response to the question and this witness statement provided more questions than it did answers. Two in particular are of note. First, what was meant by the word "disposed" in the penultimate paragraph? It introduced a most unwelcome element of ambiguity on the very issue which was at the core of the prosecution's concerns. Second, what was the "document"? If accurate, the document Allen had in mind had not been "put through the incident room": an important first clue which must mean that it could not have been part of either D7447 or D7448 which, whatever their other shortcomings may have been, had at least been processed through the incident room to be registered on HOLMES.

17.200 So if the document Allen was considering could not have been either D7447 or D7448, what was it? The only further clues in his statement were that it "involved complaints against current members of the investigation team"; that it was "sensitive"; that it was a copy; and that it was material that he would have inspected at PSD or the IPCC and would have been listed by them.

17.201 Only two documents could possibly have matched that description, and one as I have explained was not on the prosecution radar. The "document" that was in the mind of the prosecution was the William Peter Evans witness statements. As had been established the previous day, those witness statements had not been registered on HOLMES (and so appeared not to have been "put through" the incident room); they were "sensitive" in that they involved complaints against current members of the investigation team; they had been amongst material that Allen had inspected at both PSD and the IPCC; and they were provided in copy form (although in the event had come from the IPCC and not from PSD). Short and ambiguous as it was, careful reading of Allen's witness statement would have suggested that the William Peter Evans witness statements matched each of the five clues. And it was these witness statements that Allen would say he had in mind when he wrote his second IPCC witness statement.

17.202 The second "document" was the Jones Briefing Paper. It too matched each of the five clues and I return to it below. However, it had not featured on the E-Catalogue or as part of D7447 or D7448 and for that reason was not even a considered as a possible contender on 28 November 2011.

17.203 As DS Allen was the police officer to whom DS May spoke on 24 February 2010, and was, therefore, the provider of the information in May's all-important note, Allen's witness statement was always going to play a vital part in the course of attempting to understand what had happened. Yet it appears, if not to have been roundly ignored, to have been hardly scrutinised at all.

17.204 Allen believes that his witness statement played an influential part in the events that unfolded (and, therefore, feels responsible for them), but even a brief analysis demonstrates that that is not correct. The prosecution view that the trial could not continue was made before Allen's statement had been made and, as just reported, the effect of his statement appears thereafter to have gone unnoticed.

17.205 Allen has expressed his disappointment at his treatment by Dean QC and Penhale in relation to the production of his witness statement. He makes three complaints. First, that he had been subjected to "considerable pressure" to make it, the second chasing phone call only adding to the pressure he felt. Second, that he had not been given "sufficient time or information" to assist in "any useful recollection of the events" that he now believes to have happened, although it should be noted, as is clear from Allen's statement, that there was at least sufficient time for him to locate his pocket note book for the relevant part of 2009. And third, that his use of the word "disposed" had been misinterpreted: he has said that he used the word "disposed" to "describe how the document should be dealt with and stored" (so, in other words, Allen could not recall, following his discussion with Coutts, how the document had been dealt with or stored); he did not mean "dispose" as in destroy. Allen has gone so far as to suggest that the misinterpretation was deliberate: "Mr Dean has misrepresented its meaning and instead used it to try and evidence how Mr Coutts has given me an instruction to destroy documents." There is no merit in that suggestion.

17.206 Dean QC was asked about Allen's criticism of his treatment in the civil trial and whether it was "fair". Dean QC said that he was not entirely sure what Allen was referring to when he complained of misrepresentation and added:

> "Mr Allen told me, in a telephone conversation during the evening of 28 November, that he had a vague recollection of Mr Coutts saying something about the shredding of documentation … I don't remember that he said anything fundamentally different in his witness statement the next day and certainly I've not misrepresented anything he's ever said … I have represented that he told me that he had a vague recollection of shredding documents, or, forgive me, Mr Coutts saying that documents should be shredded."

EVENTS POST ADJOURNMENT ON 29 NOVEMBER 2011

17.207 May has said that, "Upon return to the Swansea Crown Court Police room Nicholas Dean QC and Simon Clements of the CPS both said to me that 'it was cleaner this way'. I'm confident that there was absolutely no malice in this comment but do wonder what the messy way would have been given the following media outcry about the decision of the SIO to destroy evidence, a summary of circumstances which have since been proven incorrect as the documents have now been found." Clements does not accept that this was said.

17.208 At 10.49am, ACC Colette Paul and Penhale spoke again. She asked to speak to Clements and Penhale's phone was passed over to him. Paul asked Clements, as recorded in her note, "if we could put the officers involved into the witness box to explain the situation and so make them available for cross examination and perhaps this could answer the questions raised." Paul recorded Clements' response to this suggestion as follows: "he [Clements] said no, just the fact that the decision to destroy copies was not recorded meant there couldn't be confidence in the disclosure process. This was on top of a range of disclosure challenges. The final decision would be made by the DPP."

17.209 Paul, it would seem, did not demur from Clements' assessment of the dismal position the prosecution had reached, and I might add, did not have any real basis to do so. She wanted nevertheless to understand what had happened and asked for the live note transcript of the hearing in chambers when it became available and to attend the meeting with the DPP the following day.

17.210 Shortly before 11am, there were two further relevant calls. First, Paul informed Chief Constable Peter Vaughan that, on the information known to her, "it was looking as if the case was fatally flawed" and second, Penhale informed Paul, as she recorded in her note, that Allen and May had been spoken to and it "looked like some copies of documents had been missing"; that "they had been recorded on the schedule but had not been disclosed"; that "it was alleged that Chris Coutts had asked them to destroy them"; and that the originals were still with the IPCC.

17.211 As to the material itself, Paul recorded on the basis of information provided by Penhale that it fell into two categories: first, "some [documents] were complaints files…about Chris [Coutts] and John [Penhale]"; and second, other documents – and "more difficult to explain" – were "complaint files from John Actie about harassment from other police officers not associated with this case".

17.212 That same morning, Penhale said May and O'Connor each approached him, separately, and raised concerns in relation to how matters "had played out in the previous 24 hours". In summary, Penhale says that they told him that from Dean QC's reaction to examining the Haskell disclosure decisions in the E-Catalogues on 28 November 2011, they had formed the opinion that Haskell's decisions alone were "highly damaging" to the continuation of the prosecution. This was the genesis of the belief that Dean QC elected to single out and, therefore, blame Coutts (and to a lesser extent Allen) in order to deflect attention away from Haskell.

17.213 It would later feed into Penhale's concerns about the content of a draft of Dean QC's proposed remarks for offering no evidence, a copy of which he was given on 30 November. This is an issue to which I return below. When he gave evidence in the civil proceedings, Penhale said:

> "… I couldn't quite understand why, in the space of 24 hours, we have gone from Mr Coutts' integrity not being in question to somehow now that not being said and the word appalling was used within the document … team members … felt … that there was a … that Mr Dean was protecting James Haskell and effectively that Mr Coutts was being pushed forward as the reason for the trial being finished."

17.214 Another concern of the police officers was that during the trial Dean QC had quite openly disclosed to both the defence and to the police that he was going to ask Sweeney J for a reference in respect of his (Dean QC's) application to become a Circuit Judge. During the last moments of the trial, there was a concern amongst the police officers that Dean QC was more worried about protecting his own reputation, and therefore the reference from the judge, than he was about protecting the trial. A little later in Penhale's evidence in the civil proceedings:

Q: So senior prosecuting counsel was essentially protecting both other counsel in the case and potentially himself, given that he had applied to the judge for a reference,

and hanging the police officers, principally DCS Coutts, out to dry on an major prosecution. That was your view?

A: Absolutely.

17.215 In the civil trial, Dean QC was asked about Penhale's account and it was suggested that Penhale appeared to be saying police officers were being used "as a scapegoat and because of the failings of counsel"; in other words, that the lawyers had focussed upon the issue of the missing material because blame might then be more readily laid at the door of the police, thereby averting attention from a series of wider prosecution disclosure failings for which the lawyers were responsible. Dean QC did not accept the characterisation:

"The context of this is the paragraph actually that you referred me to a little earlier, with the e-schedule investigation getting somewhat overtaken by the shredding issue. Now, the e-schedule investigation focused on James Haskell's work, but it doesn't imply that there were failings on Mr Haskell's behalf or indeed suggests that he got everything right. What would have happened if things had turned out somewhat differently was that on the 29th the defence would have been presented with a body of material showing instances where James Haskell had disagreed with the police and declined disclosure of documents. The defence would have said no doubt that every single one of those was an error. We would have argued about it and said but they weren't errors, they were differences of view, of judgment. Now, as it happens, that process didn't occur and therefore I can see why in a sense it may be thought that the focus was more on the police than on counsel, but that was simply because of how things, as it were, panned out."

17.216 And later, it was suggested to Dean that he was essentially telling the police officers, or some officers, that he was highly critical of Haskell. Dean QC replied:

"No, no, that's not what I was saying. What I said, what is said there, I should say, is that they had formed the opinion that this alone was highly damaging to the case. Well, the exercise that had been set, this is the examination of the e-schedules, turned up decisions that Mr Haskell had made overruling police officers. What would have then happened in the normal course of the – what's the phrase – advocacy […] there would, in the following days, if the shredding issue hadn't arisen, have been a detailed analysis in court of Mr Haskell's decisions and, based on our experience, they would all have been considered to be wrong. […] So that's highly damaging, isn't it."

17.217 Dean QC did not think he had ever expressly criticised Haskell to any police officer:

"That's not to say I wouldn't have said that he always got things right, because these are matters of judgment and of course people get things wrong. [He was not as was suggested] …fessing up about Mr Haskell to officers… [but] would openly discuss errors that any one of us had made, including myself, with officers, with counsel. This was a team."

17.218 Accordingly, Dean QC did not accept there was any truth in the suggestion that he was protecting Haskell by drawing attention to Coutts and Allen.

17.219 Penhale added that, "It is fair to say that the two officers had been less than complimentary about Mr Haskell recollection of events about his previous decisions for several weeks prior to this issue becoming apparent" and that, "There was a strong suggestion that he was trying to distance himself wherever possible from any decision he had made which had by now

obtained the title of 'controversial'". As Penhale remarked, however, when asked to provide actual examples of such conduct, May and O'Connor could provide none.

17.220 Later on 29 November 2011, Penhale called Coutts to update him as to the hearing in chambers. Penhale had not been present but had read a transcript of the exchanges. He says he had thought that Dean QC's intention was to outline to the judge first, that the issue of the missing documents in isolation would not have been a problem but second, that when taken with all the other issues it was the straw that broke the camel's back. He considers a lot of what was said to have been unnecessary considering that the "potential innocent explanation" (in other words shredding in good faith) which was available was never really explored.

17.221 Following the adjournment, Dean QC and Clements returned to the prosecution room at court and Dean QC began to draft his advice to the DPP for the meeting the following day.

17.222 At 11.22am, May sent Clements an email to which was attached his witness statement. The document was saved as "EM 291111". The subject of the email and the body of the email are both blank. Review of the properties of the file (in the way in which any Word document can be reviewed) indicates that the document was created at 8.57am on 29 November 2011 and last modified at 9.19am on 29 November 2011, and was last printed on 9.18am. This would be consistent with May starting to write his statement shortly before 9am, following Dean QC's request, printing a copy at 9.18am, before the hearing in chambers, and then saving and closing the file at 9.19am.

17.223 May's note of his conversation with Allen was the highpoint of the evidence he could provide and because May had located the note overnight and had brought it to court that morning, there was little his witness statement could add. The statement put the note into context though May added that he had a "vague recollection" of discussing the note at "some point" with Haskell. As I explain in the next chapter, Haskell denies ever having had a conversation with May, or anyone else, about a missing "D" document.

17.224 At 11.29am, ACC Paul received the transcript of what had been said that morning in chambers between Dean QC and Sweeney J.

17.225 Dean QC says, that following the adjournment he remained at court writing his advice to the DPP. Bennett was no doubt there as well but Clements did not remain.

17.226 At 4.55pm, Paul called Coutts and told him that they were to see the DPP. She added it was her understanding from Penhale that she could not discuss "why", and that the embargo was "at the request of the judge". According to the note, Coutts was "frustrated" he could not know "the reasons" and understandably sounded "very subdued".

17.227 At 5.10pm, Clements at home emailed relevant persons at the CPS attaching the advice of Dean QC and Bennett together with the transcript of that day's hearing.

WAS THERE A SEARCH AT ST. ATHAN?

17.228 Before coming to the events of the following day, principally the meeting with the DPP, this may be a good time to revisit the issue of a search. I have already set out the detail of the brief inspection conducted by Kingsbury on the afternoon of 28 November 2011. And I am satisfied, as I have said, that there was not on that day, and was not subsequently any

comprehensive search of St. Athan. How then can the conclusion of the IPCC and the observations of HMCPSI be understood?

17.229 The IPCC found that there had in fact been "no effort…to locate" D7447 and D7448 (paragraph 139) and HMCPSI observed that Dean and Bennett "believed that an extensive search had taken place before it was concluded that D7447 and D7448 could not be found" and added: "The IPCC Report sets out how the search was conducted" (paragraph 7.62). Of course the finding of the IPCC (in fact no effort to search) and the observation of HMCPSI (belief in extensive search) are not irreconcilable or logically inconsistent, but they do sit uneasily, are surprising, and require explanation; and it is particularly unfortunate that the IPCC and HMCPSI did not address the matter directly in circumstances in which the HMCPSI report specifically referred to the IPCC report on this very issue: another illustration, I am satisfied, of the disadvantages of multiple inquiries on the same subject matter, and the importance of not leaving loose ends of this avoidable kind.

17.230 The IPCC finding and the HMCPSI observation must be understood properly. The IPCC had received evidence from Penhale and Coutts, witnesses who on 28 November 2011 were not at court (Penhale at the material time; Coutts not at all), Cockett or St. Athan: evidence which, as I have already set out, amounted to an assertion that there had been no search at St. Athan. In his IPCC witness statement, Penhale has said: "There was no attempt to even search for the copy material." And in his IPCC witness statement dated 16 March 2012, Coutts says that he was "subsequently informed" by Penhale that, before addressing the judge, there had been no search for the missing documents.

17.231 The IPCC had also of course received evidence from Kingsbury and from O'Connor who, unlike Penhale and Coutts, were directly involved, and the IPCC set out in summary the "quick look" Kingsbury conducted distinguishing it from "anything that could be considered as a search" (in other words a comprehensive search) (paragraph 95). It is plain that the IPCC finding could have been better expressed. It might have been more understandable had the IPCC found that there was no "search" (and gone on to explain what it meant by that); but it was not correct to say that "no effort" was made to "locate" D7447 and D7448. What the IPCC meant was that no effort was made to locate D7447 and D7448 following Kingsbury's report on 28 November and that overall, such effort as was made cannot in fact have been very great, and did not extend beyond the most obvious and expected locations.

17.232 Read in that way, which I am satisfied is the sensible meaning and what the IPCC in fact overall intended to convey, the IPCC report is correct. There was no comprehensive search of St. Athan on 28 November 2011 or on any of the following days. And I am satisfied that the IPCC report is correct in identifying the central reason for that namely, May's recollection and the subsequent recovery of his note.

17.233 The only outstanding issue, therefore, is how it can be that Dean and Bennett came to express the view to HMCPSI that they believed, as described in the HMCPSI report, that there had been an "extensive" search. I am satisfied that the answer must lie in the making of assumptions at the time, coupled with a measure of the influence of hindsight. First, I am satisfied that it was reasonable to have considered there had been a "search" of some description at St. Athan. Police and lawyers were working together at court and then at Cockett Police Station on the 28th, and all were engaged in the serious exercise of attempting to understand what had happened to the missing material, to locate it and to make enquiries of St. Athan and third parties. O'Connor had spoken to Kingsbury about

attempting to locate the material. Second, Dean QC and Bennett would not, I am satisfied, have been directly or intimately involved in the direction and management of the steps to be taken at St. Athan to locate the material; nor should they necessarily have been. The essential message received back following the Kingsbury/O'Connor calls, and received by Dean QC and Bennett, would have been that D7447 and D7448 could not be found.

17.234 I am not satisfied that much more would necessarily have been said or said with any precision; it is not suggested that the team with all that they had to do, sat down collectively to discuss the search, still less that they held a structured discussion of its precise parameters (however sensible those steps would have been). Two central assumptions would have been natural to Dean and Bennett: first, that the issue was being treated seriously and every appropriate effort would be taken, and whether that meant searching the expected locations or more widely for the material was not a decision for them and second, that the material, if it was present at St. Athan, ought to have been easily identified and recovered because of the way in which the MIR was ordered, the material catalogued in sequence, the modest size of the MIR and the surrounding premises, the experience they had of other requests for material being met at short notice, and the likelihood that there would have been more than one officer at St. Athan looking for the material in what was a case that appeared to be well-resourced.

17.235 In his written response to the HMCPSI, Dean QC said: "Very great efforts were made to try to find the material during the afternoon of 28 November and into the evening of that day (and subsequently)." In an HMCPSI interview, he was specifically asked how extensive he understood the search to have been. He believed it had been "very. I say very – bearing in mind there is a limited space to search". He was unable, however, and I observe without criticism, to recall any meaningful detail: how many officers were at St. Athan; who was searching; if any officers went to St. Athan, who went; and to what extent he was involved in directing that a search should take place. In other words, nothing that would suggest the first answer was other than assumption and impression some years on.

17.236 Like Dean QC, Bennett in his written response to HMCPSI questions, wrote that: "Strenuous efforts were made to locate the missing material on Monday [28 November] and again on Tuesday [29 November] before we went to see the judge [at 9.30am]." And like Dean he was unable to recall precise detail. Bennett cannot now recall, and says he may not have even been aware at the time (which I consider is more likely), who precisely was at St. Athan. Bennett has said that DI Ron Devine and DS Andrew Capranini were at Cockett Police Station on 28 November 2011, and although he has suggested that they "may well" have travelled to St. Athan, both have confirmed that they did not. I have seen no other evidence or suggestion of that and am satisfied that it is unlikely they did attend. And although Bennett's recollection now is that Penhale and Devine were "responsible for directing" searches, both have confirmed that they did not do so. As I have observed, in the absence of Coutts, Penhale would have been the person to have directed such a search, had it been felt there was any merit in a search, but he did not. On the information that was presented to Penhale, his decision is not surprising.

17.237 No one has ever suggested that they ordered a comprehensive search of St. Athan whether on 28 November or on any of the days that followed. In my view, it is significant that Clements does not suggest that he was aware of any comprehensive search, that his briefing note is silent on the issue, and that Dean QC in an early account written prior to the discovery of the missing material, referred to the "system in operation" at St. Athan

being such that "the material should easily have been able to be retrieved" but not to a comprehensive search of St. Athan. I am satisfied this is because it was not considered there would be any purpose in such a search for material which, by the time of May's recollection on 28 November, was considered not only missing but destroyed. In his IPCC witness statement, O'Connor added the following:

> "My understanding was that from the evening [of the 28th]…there was a growing acceptance, particularly by Nicholas Dean QC, that the copy material within D7447 and D7448 had been shredded and therefore there would be no reason to search for material which was presumed not to exist."

17.238 That view is supported by the following. First, there is no evidence of anyone on 28 November 2011 – following Kingsbury's report back to O'Connor – making any inquiry of O'Connor, indirectly, or Kingsbury, directly, of the nature and extent of the efforts made at St. Athan to locate the material. Second, there is no evidence that Kingsbury was ever asked in person, on any of his trips to Cockett Police Station on the evening of 28 November 2011, what he had done, or told what further steps he should take at St. Athan. Third, there is no evidence that Kingsbury received any further instruction by telephone in relation to any search following his report back to O'Connor on 28 November 2011. Fourth, there is no evidence that the only other officer at St. Athan, Frazier, did either. Fifth, there is no evidence that Kingsbury received any further instruction when the following morning he was back at St. Athan from 8am to 12pm. Indeed in relation to each of those points Kingsbury has said he received no instruction and was aware of no search beyond his "quick look". And sixth, Haskell said in his HMCPSI interview that, whether or not May had searched St. Athan late on 28 November or very early on 29 November when he went to St. Athan to recover his note (and I have found that he did not), by the morning of 29 November May's note, together with the absence of any suggestion that the missing material had been stored elsewhere, would have diminished any residual enthusiasm for the search.

17.239 One final point should be addressed. Dean has said that he believed that not only was the search extensive but that having started at "late lunchtime" on 28 November 2011, it continued until 1 December 2011. When asked about this by HMCPSI he said that he "imagine[d]" that even on 30 November, "work was being done to try and find out what happened." But added: "what was being done I just don't know." The suggestion is a mistaken one and it is clear, in view of what I have set out, that the search did not continue. In addition, as is about to be revealed, the decision to offer no further evidence was taken at the meeting with the DPP on 30 November 2011, a meeting which had been arranged early on 29 November 2011. It is, therefore, difficult to understand what logic there could have been in searching for ex hypothesi destroyed material on and after that date.

17.240 I am more than satisfied that other than Kingsbury's "quick look" on 28 November 2011 (at the request of O'Connor) there was not a comprehensive search at St. Athan for the missing documents. It seems clear that no search was conducted because it was suspected from a very early stage that the documents had been destroyed and that strong suspicion was confirmed early on 29 November 2011 when May produced his note. Any belief that Dean QC and Bennett had as to the existence of an extensive or continuing search over the four days leading up to and including 1 December 2011 can have been based on nothing other than assumption. The strongest indication that there was a growing inevitability that the documents had been destroyed is that not even the police suggested, let alone undertook, a search of St. Athan.

MEETING WITH THE DPP: WEDNESDAY 30 NOVEMBER 2011

17.241 Reference has already been made to the fact that two documents were prepared for this important meeting: the Clements briefing note entitled "DCMP Update 29th November 2011 – Lynette White" and the joint advice of Dean QC and Bennett which was written on the afternoon of the 29th in the prosecution room at Swansea Crown Court. When asked in 2015, Dean QC said that he could not remember if others had any input in the advice, but added that it was "entirely likely" he would have discussed aspects of it with Bennett (as he must have done for Bennett's name is on the advice as co-author), Haskell and Clements.

17.242 Reference has already been made to the Clements briefing note. As for the Dean and Bennett joint advice, there is no reference in it to the fact that Coutts had firmly denied giving any instruction to destroy case material (there is in the Clements note) but the advice adds at paragraph 27:

> "It is though important to say one final thing about what has occurred. DCS Coutts is an absolutely honest man whose approach to this very difficult case has been admirable throughout. No one who has worked with Mr Coutts could begin to think that his relationship with any victim in this case was anything other than entirely proper [this was written in relation to the D30 material]. We feel privileged to have worked with him. That the occurrence that leads to the position we are now in stems from a decision he made will be felt very hard by him but this is a situation in which no one individual can be said to have been significantly at fault."

17.243 The next day, Wednesday 30 November 2011, the prosecution team saw the DPP, Keir Starmer QC, at CPS Headquarters London. At 10.40am, before the meeting, DCC Colette Paul, DCI Penhale and Tom Davies, the IPCC Commissioner for Wales, met and they were joined by Dean and Bennett. Paul, understandably, was concerned that Coutts should not become the "fall guy" and that collective responsibility was accepted for a range of disclosure problems. Equally understandably, Dean QC was of the view that the missing material was "extremely damaging". The meeting with the DPP lasted from 11.30am to 12.30pm and was held in two parts: the first, not unusually, was for the lawyers only: the DPP, Clements, Dean QC, Bennett and three assistants to the DPP. For the second part, the lawyers were joined by Paul, Penhale and Davies.

17.244 The best evidence of what was said is Clements's typed note of the meeting, which was prepared the following day, indeed it is the only note which was made of the meeting. It is convenient to set out the relevant part in full (my emphasis):

> "1. The meeting had been called to discuss leading counsel's advice dated 29th November 2011. (Copy Attached) and the indication that he had given to the trial judge on 29th November (transcript attached).
>
> 2. The DPP asked Nick Dean to explain in more detail the sequence of events starting with the disclosure of the "D 30" material and culminating in the events that took place on 28th November 2011. At the conclusion of this explanation the DPP asked about the secondary disclosure process and asked why junior disclosure counsel had not revisited the E catalogues at that stage. He said this was an aspect of the case that would need to be looked at in detail when a review of the case took place.

3. At the conclusion of counsel's explanation the DPP said he was very concerned about what he knew so far.

4. The DPP asked Nick Dean to explain why he thought that it was not viable to continue with the case even now.

5. Nick Dean said that the exercise that the judge had ordered on 28th November was only partially completed. All the work necessary to identify which items contained within the E catalogue had still not been disclosed had been done. But the documentation had not, as yet, been provided to the judge or the defence. Nick Dean was concerned about providing the judge with the E catalogues because although he was satisfied that the majority of the decisions made by disclosure counsel at primary disclosure were correct, or at least defensible, there were a number of comments noted on the schedules that could be said to demonstrate a less than completely open attitude to the likely issues in the case. Their release could cause further damage and would lead to further detailed argument about the prosecution team approach to disclosure: itself already a much criticised aspect of the case.

6. Nick Dean explained that he considered the case could no longer proceed because to seek to justify the destruction of the documents concerned would lead to members of the police team having to give evidence and being cross-examined about their recollections when it was already known that there was a divergence of recollection about who had ordered the destruction.

7. The DPP asked whether prosecution counsel and Simon Clements were completely satisfied that the fact of destruction had not been brought to their attention until the afternoon of 28th November. All said they were certain. Simon Clements referred to the witness statements of DS May and DS Allen (both dated 29th November 2011 – copies attached) and pointed out that there was a passage in the witness statement from DS May to the following effect:

> *"I also do not recall raising the issue with the SIO though I have a vague recollection of discussing it with James Haskell at some point".*

8. Nick Dean said that he had spoken to James Haskell who had no recollection of such a conversation. He said he was satisfied that if such information had come to Mr Haskell's attention he would have referred it to Mr Dean.

9. The DPP asked that Mr Haskell make a statement to that effect.

10. The DPP said that in all the circumstances, and in light of the more detailed explanation he had now been given, he agreed with counsel's advice that the only option now open to the prosecution was to offer no evidence."

17.245 The underlined words at paragraph 5, are revealing and I shall return to them.

17.246 Dean QC would later say: "As far as I am concerned no decision had been made until the meeting with the DPP – or at least any "decision" was not final until then and any information which emerged concerning the missing material would have been considered right up to the door of the court on 1 December."

17.247 This accords with what Clements said to HMCPSI namely, that the DPP, "said that in all the circumstances, and in light of the more detailed explanation he had now been given, he agreed with counsel's advice that the only option now open to the prosecution was to offer no evidence." Accordingly, the DPP "personally sanctioned the decision". Bennett has said the process was not an exercise in rubber stamping: "…the decision to end the prosecution was made by the DPP not Mr Dean QC … The DPP did not simply rubber stamp the opinion of Mr Dean QC. The DPP's decision was informed, considered and made having taken into account the views of counsel, his CPS lawyer, the police and the IPCC." And then this: "I had never worked with Mr Dean QC before. We were not in chambers together. If I had felt during the final week that Mr Dean QC's advice to the DPP was wrong, in particular if it was based on reasons personal to him, I would have had no hesitation in saying so then and now. I repeat his views were shared views and the decision to end the prosecution was not his decision but that of the DPP."

17.248 At 12.05pm, the IPCC Commissioner for Wales and Paul and Penhale joined for the second half of the meeting. According to Penhale: "The meeting [...] was relatively straightforward. The lawyers met beforehand and we were invited to an audience after this." The "second half" lasted just 25 minutes. Again, Clements's note is the best source of evidence (and again my emphasis):

"11. The DPP asked if the police and IPCC representatives agreed that there was no other decision to be made than to discontinue the case. They agreed that this was their view.

12. The DPP said that he also reluctantly agreed with that conclusion. He noted that DCS Coutts was in a difficult position.

13. The DPP said in the light of everyone's agreement as to the way forward it was necessary to discuss how to handle that decision and what would be said to the judge to "walk him through" the decision and how it had been arrived at.

14. Tom Davies was anxious to ensure that the court, and thereafter the public, were not in any doubt that the documents destroyed were copies, and not original documents.

15. Colette Paul said that she was concerned that not all the focus should be on DCS Coutts as it had been acknowledged in the course of the Voire Dire that mistakes had been made by all parts of the prosecution team, including police officers, the CPS lawyers and disclosure counsel. The DPP acknowledged her concerns and said that he shared her anxiety, but the fact of the matter was that the destruction of the documents was the reason why the case could no longer proceed.

16. The DPP asked if Nick Dean was certain that there was no record of a decision made by DCS Coutts to destroy the documents concerned and he replied that it was not recorded anywhere in the SIOs policy logs.

17. Nick Dean then read out passages from the partially completed draft opening he was preparing. He said that it would be made clear to the court that the destruction of the documents was a tipping point.

18. The DPP said he wanted to ensure that Nick Dean informed the judge that he, the DPP, had already ordered an inquiry into what had happened.

19. There was then discussion about the form such an inquiry would take. It was agreed that it should take the form of a joint CPS/police internal inquiry, and that at its conclusion there should be a joint report prepared between the CPS and the South Wales police. The announcement of the inquiry would enable the IPCC to state, if suggestions were made that they themselves should start an investigation, that they would wait for the report before deciding whether an investigation was necessary.

20. It was agreed that the CPS would prepare a press statement for release on 1st December, and that a draft would be shared with both the South Wales police and the IPCC in advance of its release."

17.249 By 12.30pm the meeting was over.

17.250 There are these points to add. As for paragraph 11, Dean QC's memory is slightly fuller but in essence accords with this note. He recalls that the DPP specifically asked Paul and Penhale "whether they were satisfied that the material had indeed been shredded – this in the context of the DPP exploring whether any alternative to offering no further evidence was feasible." Their response was that, "They were so satisfied." Dean QC added: "They would hardly have been so if they thought either that there was some other credible explanation or if they believed more could have been done to find the material and to explain what we had been told had happened to it." Clements says: "DCI Penhale was fully involved in the decision to offer no evidence." "[A]ll parties" including the police and IPCC "agreed that the prosecution could no longer continue". Clements in his HMCPSI written response: "The DPP asked if the police and IPCC representatives agreed that there was no other decision to be made than to discontinue the case. Everyone present agreed that was the right decision." Bennett returned to the topic in the civil trial when he was asked: "So, as far as you and the rest of the prosecution team were aware, a thorough search had been mounted at St. Athan on two occasions by police officers with a negative result?" Bennett responded: "Yes. I recall at the final meeting with the Director for Public Prosecutions he asked definitively of someone who was present are the police content that no further search is worthwhile and someone gave that confirmation." Bennett has said that Paul and Penhale, "expressed a clear view directly to questions from the DPP that the material could not be found and that further time was not going to assist." That confirmation could only have been given, of course, if it was believed that the documents had been destroyed.

17.251 As for paragraph 12, Clements has said that no one at the meeting suggested that Coutts should be spoken to: "Given the nature of the allegation that DCS Coutts had ordered the destruction of the material – or so we believed from the evidence provided to us by both DS May and DS Allen in their witness statements – it was considered by all of us that it would not be proper to speak to DCS Coutts. DCI Penhale was consulted and also attended the meeting with the DPP where the final decision was taken to offer no evidence. No one at that meeting, including the DPP, suggested that Mr Coutts should be spoken to."

17.252 As for paragraph 15, Clements' note of the meeting refers to a contribution from Davies and Paul. As that paragraph makes clear, Paul was able to give voice to the concern she had earlier expressed that Coutts should not be the focus of criticism (although she would not have known it at the time, Dean had not blamed Coutts to the exclusion of everything else: he did not avoid the E-Catalogue issue, Haskell, or the fact that that the "prosecution team approach" to disclosure had been "much criticized"). The DPP did not disagree. He shared Paul's concern. The essential point, however, was that but for the issue of shredding

raised on 28 November 2011, the prosecution would not have decided to abandon its case. The note does not refer to any contribution from Penhale. Penhale has nevertheless said: "I explained to the DPP my view on what had happened and emphasised that far from there being an integrity issue the opposite was more likely. An attempt to protect the integrity of the complaint procedures was actually what was being attempted by Mr Coutts. The DPP acknowledged this as a potential explanation." No one else refers to this contribution from Penhale. When Bennett says Penhale agreed he appears to mean Penhale did not raise any objection. He says Penhale, "may not have been asked for his view. The roles and responsibilities were very clear. The Crown Prosecution Service are independent. His views would have had an input into the decision, but ultimately Nicholas Dean and Simon Clements were satisfied the case was no longer sustainable."

17.253 As for paragraph 16, Penhale has said: "Nick Dean then read out passages from the partially completed draft opening he was preparing. He said that it would be made clear to the court that the destruction of the documents was a tipping point." Dean QC, according to Penhale, "raised the fact that nationally these types of large volume cases were regularly hitting problems and suggested changes to the law were required. I believe he was suggesting to the DPP that he should mention this in his speech to the judge but the DPP did not think this was appropriate. Although I could understand the reasons I was disappointed for the reasons already outlined. I do genuinely believe that it is almost impossible to prosecute these types of cases. Individuals tasked with doing so are being set up to fail. This in my opinion is what should have been reported to the court and the overall picture presented not just one specific issue."

17.254 As for paragraph 19, again my emphasis, it is noteworthy that there was agreement that the inevitable and necessary investigation into the circumstances in which the trial had collapsed should have been a "joint CPS/police internal inquiry". That, I agree, is what should have happened but it did not. I shall return to this later.

17.255 I have saved paragraph 5 until last because it is the most revealing part of the note. Dean QC's concern that the E-Catalogue exercise had shown that "there were a number of comments noted on the schedules that could be said to demonstrate a less than completely open attitude to the likely issues in the case. Their release could cause further damage and would lead to further detailed argument about the prosecution team approach to disclosure: itself already a much criticised aspect of the case" betrays, as certain police officers had suspected from Dean QC's demeanour, that during his reading of the E-Catalogues, Dean was indeed concerned about Haskell's approach to disclosure and that he was also worried about the impact the disclosure of the E-Catalogues might have. Terminating the trial at that stage would relieve the prosecution of its obligation to disclose the E-Catalogues and thus save the prosecution, and Haskell in particular, from any further embarrassment. This evidence certainly does expose another facet to these final moments but I do not believe that Dean QC advised that no further evidence should be offered on the ground that Coutts had ordered the shredding of documents to save or protect Haskell – as some police officers were beginning to believe. Coutts was not improperly put forward as being responsible for the failure of this prosecution. The suspicion that Coutts may have been offered as the sacrificial lamb to save the reputation of Haskell, though understandable, is not justified. Dean QC, Bennett, Clements (and others) decided as they did because of May's note (and perhaps more importantly, the gloss that May had put on it) and if the prosecution and Haskell were saved any further embarrassment by stopping the trial at that stage, that was simply a consequence of the decision, not the reason for it. I shall return to

the E-Catalogues and Haskell's comments on them at the end of this section; but Dean QC was right to be concerned.

17.256 Before leaving the meeting I should add this, it might be thought that the police officers present felt somewhat overawed at a meeting between the lawyers and the DPP at CPS HQ and that it may have been for this reason that they did not speak freely of their concerns. Nothing could be further from the truth. When I saw Paul and Penhale I asked them if they had been reticent to speak at this meeting and each rejected that as a possibility; they said that the DPP was open, welcoming and friendly and that they felt more than able to speak their minds if they had wanted to.

17.257 Bennett summarised the end of the meeting and its overall effect as follows:

> "There was unanimity amongst counsel and the stakeholders that the prosecution could not continue for the reasons I have explained. The IPPC were independent and present at court on many if not every day. Very senior police officers were present at court every day. Mr Clements was the head of one of the specialist CPS divisions. He was present on many days. He actively assisted counsel during the trial. All stakeholders were in an informed position to contribute to the final decision and speak out if they felt Mr Dean QC had acted improperly."

17.258 The DPP had known about some of the various problems in the case from the DCMP meetings but he did not and could not have known about the circumstances of the case in anything like the detail of those practitioners who were responsible for its prosecution in court. The DPP had essentially been presented with only one opinion at the meeting, but that is not unusual when a dramatic event has occurred during a trial. The DPP was very reliant on the views of those practitioners, one of whom was Simon Clements, who is one of the most experienced lawyers in the CPS and who would have been well known to the DPP. I am more than satisfied that no relevant party had been excluded from the meeting: it is known from Paul's note, for example, that it was Dean who had in fact invited Penhale and had made available to Paul, on 29 November 2011, his advice to the DPP. Everyone present had the opportunity to contribute and to speak openly and candidly, and could, therefore, have objected to the decision to offer no further evidence if that had been their opinion. The fact is that no one did so.

17.259 I am further satisfied that everyone presented to the DPP the relevant facts as they were genuinely believed then to have been; nothing was deliberately withheld with a view improperly to bring about the end of the prosecution.

17.260 Finally, before leaving this meeting, at paragraph 9 of the note, the DPP asked Haskell to make a statement but that request was not communicated to Haskell and none was made.

17.261 Once the decision had been made that no further evidence would be offered and it was clear that Coutts would not be required to give evidence, Dean agreed that Paul could inform Coutts of the decision which Paul did at 7.19pm. Paul did so, with the assistance of Dean's written speech note, but Coutts did not give, and Paul did not seek, any explanation as to what had happened. He appeared, as Paul recorded, to "be very down".

THE PROSECUTION'S EXPLANATION FOR STOPPING THE TRIAL

17.262 Following the meeting with the DPP on 30 November 2011, Dean QC continued to draft his speech for court the following day.

17.263 It is clear from some of the evidence of the civil trial that the contents of the speech was not entirely uncontroversial. In order to understand the nature and extent of the controversy and to establish whether and, if so, how the speech had evolved, I was interested to see any available drafts. Dean QC had been asked specifically in the civil trial whether he had kept the first draft of the speech and he said he had not. Simon Clements, however, did have earlier drafts electronically, as transpired in the course of interview, and the CPS subsequently disclosed the drafts.

17.264 The chronology which emerges on 30 November 2011 is as follows. First, at 1.37pm, Bennett sent an email to Clements attaching "Opening for 1 December": the subject line read simply "to print" and the body of the email was left empty. At 1.46pm, Clements forwarded that email and its attachment to the CPS Head of Communications. The body of Clements' email read "Draft – just about to discuss this with counsel". This therefore was the first version of the speech. Having read the document, the discussion was not long. Within fifteen minutes, at 1.51pm, Bennett sent a further email to Clements: the email attached "Opening for 1 December", which represented the final draft version as agreed between counsel and Clements, and the subject line and the body of the email were both left blank. At 1.55pm, Clements forwarded that email and its attachment to the CPS Head of Communications. The body of Clements' email read "Final version for discussion with IPCC and police". Tom Davies of the IPCC, and Penhale and Paul were of course all present on 30 November 2011. A little over an hour later, at 3.11pm, no doubt following discussion between Dean QC, Bennett and Clements and the police and IPCC, Bennett emailed Clements a further version of the document; again the body of the email and subject line were left blank.

17.265 Shortly before 2pm on 30 November 2011, therefore, Dean QC, Bennett and Clements were apparently satisfied that they had arrived at a final draft opening for consideration in a meeting with the IPCC and police. In a witness statement made to the IPCC, Penhale has said that meeting took place about two hours after the DPP meeting (which as I have noted concluded at about 12.30pm) and so at about 2.30pm. He has further said that: "Over a period of the next 30 minutes or so we discussed and agreed some additions and changes to the document." The timings Penhale includes in his statement are consistent with what is now known from the emails disclosed by the CPS.

17.266 Comparison of the first and second versions of the draft speech reveals that some amendments were made between 1.51pm and 3.11pm and this would indicate that the police and IPCC not only had on opportunity to contribute but had an influence in what would be said.

17.267 As to the substance of the first draft that had been presented to Penhale, he has said in the witness statement made to the IPCC that he was disappointed "with some of the phrases" which he considered "unnecessary and potentially inflamed the situation". Penhale gave two examples. First, a phrase included in the speech which, as he recalled, suggested "that the behaviour being described was appalling". And second, the absence of any mention of the

fact that Coutts' "integrity was not in question" as Dean had made plain "to the judge in chambers the previous day".

17.268 Dean QC puts it more shortly, but no less correctly, that the speech had been written out in advance and was "discussed and approved" by those concerned in the decisions made on 30 November 2011 by Penhale, Paul, Davies and Clements, all of whom knew every detail of what had transpired in the previous 48 hours or so. Dean adds: "No one suggested that anything I proposed to say, and then did say on 1 December, was inconsistent with the known facts".

17.269 In the civil trial, without the benefit of the draft versions to consider, Dean QC was asked about Penhale's recollection that the behaviour had been described in a draft as "appalling" and answered: "It may have been that I said that, if there was deliberate destruction of documents, that would be appalling, but I don't recall using that phrase." Dean QC accepted he, "might have said something for example along these lines in a draft: if of course there was the deliberate destruction of documents known to be significant in this investigation, that would be appalling. But I have no reason to believe that that is the position."

17.270 Comparison of versions one and two, leaving aside grammatical, typographic and stylistic changes, reveals that the following changes of substance (greater or lesser) were made (additions are underlined and deletions are crossed out):

- Removal of the title "~~Draft opening for 1 December~~."
- Clarification, by introduction of the adjective "original", to make it clear that the files that had been destroyed (as was then believed to be the case) were "not original documents but rather copies of original files held by the IPCC and provided to the LWIII ~~investigation~~ disclosure team in August 2009 by the IPCC."
- Explanation that "These were files properly being sought as third party material possibly containing disclosable material."
- Qualification that: "DS Allen has provided a statement in which he remains vague but in which he confirms a conversation with Mr Coutts consistent with an instruction to destroy some material."
- "[DS May] found an entry for 24th February 2010 recording his on-going audit of material held by the investigation and a conversation with DS Allen in which DS Allen had confirmed he had destroyed the copies of the four files of IPCC material seemingly because in relation to one of the files Mr Coutts had instructed him to "~~get rid~~" dispose of it and in relation to the remaining three because Mr Haskell had said they were irrelevant. In fact, six months or so earlier, Mr Haskell ~~had not of course said that these files were irrelevant, on the contrary he~~ had clearly indicated they were relevant and potentially disclosable."
- The addition of the following passage: "Of course Mr Coutts has not been able to be asked about his recollection of these events and Mr May's notes represent the clearest available account – it is highly likely as I will outline in due course that there is a wholly reasonable explanation for these events."

- "It was and is clear to us that the apparently deliberate destruction of documents would inevitably be fatal to the case – we are mindful that these documents were copies and that they had been properly registered in the investigation and properly reviewed at primary disclosure so that there is absolutely no question of the deliberate destruction of original material that could be considered in one way or another inconvenient to the investigation."

- "The reasons these revelations are fatal for this are probably obvious. The decision to dispose of documents was ~~deliberate (and there was a reason for it but not really a very good reason). The~~ itself deliberate, the decision was not though recorded in any way and came to light by pure chance."

- The addition of a line that "What DS Allen seems to have said [to DS May in February 2010] also raises concerns about his treatment of irrelevant material."

- "The decision to at least separate (but still retain) some of the IPCC material would have been justifiable – some of it related to officers in the Lynette White investigation ~~(including in fact Mr Coutts)~~ and although it had to be reviewed there would have been a case for it being held separately from other material in the case so that the officers it concerned did not have access to it. Such a policy would itself have needed to be carefully thought out and recorded. As it is, it seems likely that DS Allen took what Mr Coutts said as an instruction to destroy more wide-ranging material and in any event the decision was not, as I have repeatedly said, recorded as it very clearly should have been. The appearance of this, against the background of other disclosure difficulties and the allegations of impropriety made against Mr Coutts and the investigation, is of course appalling."

- The addition of the following passage in relation to Coutts' and Allen's integrity: "It is important to be clear that the prosecution have no reason whatsoever to consider that what has occurred in relation to the IPCC material was more than error. The prosecution have no doubt whatsoever about Mr Coutt's honesty and integrity nor indeed DS Allen's, but it has to be acknowledged that the appearance of what has occurred is very damaging."

- "For those reasons the prosecution can no longer sustain a position of maintaining that the court and the defence can have the required confidence in the disclosure process and I formally offer no further evidence and invite directed verdicts of not guilty."

- "I should add two things: The case and the developments of the last few days and weeks have been discussed in detail with the Director. He agrees it is necessary that no further evidence be offered and that not guilty verdicts be directed. The Director and the Chief Constable for South-Wales police wish me to make it clear that they have already directed that there be a full and detailed review of the circumstances in which this decision has had to be made decision and that is a review that will have the full support and co-operation of the South Wales police. Contingent upon fact finding the review may involve a subsequent reference to the IPCC."

17.271 Drawing together the strands, it would appear that as result of the discussions that had taken place between counsel, CPS, police and the IPCC on the afternoon of 30 November 2011, the principal changes to the written explanation were first, to emphasise that the material that had been destroyed was a copy of material held in original form by a third

party; second, to highlight that the material had been sought from the third party as a part of the proper discharge of the prosecution's third party disclosure obligations (in other words, actively to identify material that may assist the defence or undermine the prosecution); third, to demonstrate that the material had been formally registered on HOLMES (which of course was not so for the William Peter Evans statements); fourth, to show that the material had, moreover, been reviewed at the primary disclosure stage; fifth, to observe that those matters were in effect a complete answer to any suspicion, which might otherwise exist, that the destruction of the material was to bury material that was undermining of the prosecution case or of assistance to the defence (which holds true for D7447 and D7448 but not for the William Peter Evans statements); sixth, to remove the comment that there was "a reason" but not a very good reason for the destruction of the material (no doubt in view of Penhale's innocent shredding explanation); seventh, to substitute for the expression "get rid" (in version two) the word "dispose" as reflecting what Coutts had seemingly instructed Allen to do in relation to "one of the [IPCC copy] files"; in relation to the other three copy IPCC files, to temper the emphasis (in version two) that Haskell had "not of course said that these files were irrelevant" by excision of that part of the expression and indicating that "six months or so" had passed between Haskell's advice and the Allen/May call; to add that "Mr Coutts has not been able to be asked about his recollection of these events"; to clarify that "Mr May's notes represent the clearest available account"; to add that "it is highly likely […] that there is a wholly reasonable explanation for these events"; to add a line that "What DS Allen seems to have said [to DS May in February 2010] also raises concerns about his treatment of irrelevant material"; to remove reference to Coutts as being the subject of certain complaints material that had been destroyed; and to emphasise that Coutts' integrity (and that of Allen) was not in doubt so far as the prosecution team were concerned.

17.272 Other points to be noted are that D7448 does not feature in this at all and that Penhale's recollection is not entirely accurate. It is the appearance of what had happened, not the behaviour itself, that is described as "appalling", and the word "appalling" survived the discussions which led to the second version (in which the word remains). Finally, Penhale's recollection about the absence of any reference to Coutts' integrity in the first version is correct and his concern was addressed.

17.273 I have taken the trouble to set out the changes in such detail because they overwhelmingly demonstrate that the police played a significant part in the drafting of this statement and must have agreed its content. Dean's proposed remarks had been written out in advance; those passages that might have raised wider issues were raised within the DPP meeting; Bennett and the CPS in the form of Clements had an opportunity to consider and contribute to the remarks; and the remarks were circulated for consideration and contribution by the IPCC and police at a meeting, resulting in a final agreed version. Any suspicion that the lawyers "took over" at the end and acted without consulting the police is misplaced.

THURSDAY 1 DECEMBER 2011: THE END

17.274 At 10am the case was called on. The jury had been sent away on 28 October 2011 and knew nothing of the developments in the intervening weeks. Mr Justice Sweeney addressed the jury first. He set out the background and context to the position the prosecution had reached. What Sweeney J and Dean QC said are vital parts of the Mouncher narrative and

I will set them out in full. First the judge immediately after the jury had been brought back into court:

> "I want to explain to you what the position is. Members of the jury, thank you for attending this morning at such short notice.
>
> This trial began in early July of this year. You were last here actually on Friday, 28th October, when, with the prosecution case almost complete and with the agreement of all the parties, I released you from attending for a period of three weeks so that, after appropriate preparation, I could hear and determine various legal arguments.
>
> During the course of the trial up until then there had been a number of problems in relation to the conduct by the prosecution of its duty of disclosure. The proper conduct by the prosecution of its duty of disclosure lies at the heart of a fair trial, and a fair trial is the right of every citizen in this country.
>
> The prosecution's duty of disclosure arises in short in this way. During the course of any investigation the police are required to pursue all reasonable lines of enquiry, whether pointing towards or away from particular suspects, and also variously to obtain, record and retain material relevant to the investigation.
>
> If there is then a prosecution, the prosecution makes its choice of what of the material relevant to the investigation it is going to use as part of its case, and the remainder is or should be retained by the police and becomes what is known as unused material.
>
> The existence of all such unused material must then be recorded in quite detailed schedules by the police and then those schedules together with the unused material itself are considered by the prosecution, who are under a duty to provide to the defence typically in two stages, known as initial or primary disclosure and secondary disclosure, any unused material that might reasonably be considered capable of either undermining the case for the prosecution or of assisting the case for the defence.
>
> In this case as part of that process the police officers concerned with disclosure drew unused material which they thought required disclosure to the specific attention of the prosecution legal team by the use of what were called e-schedules. The prosecution then decided what out of all of the unused material should or should not be disclosed.
>
> In addition to the unused material that was disclosed to them, and as is the norm, the defence were also provided with copies of the requisite schedules of unused material that the police had prepared for the prosecution so that the defence could see for themselves in general terms at least what remaining unused material the police had in their possession.
>
> In accordance with the law the defence were not permitted to have access to the remaining unused material itself in order to see if by that route they themselves could find any other material that met the criteria for disclosure; rather they were dependent on the schedules to provide them with sufficient detail to enable them to make subsequent applications, whether to the prosecution or ultimately to the court, for the disclosure of some further part or parts of the remaining unused material described in the schedules.
>
> In addition, as a failsafe the law imposes a continuing duty of disclosure on the prosecution throughout the trial. The system is, however, primarily intended to ensure that well

in advance of the trial the defence are in possession of all unused material that might reasonably be considered capable of undermining the prosecution case or of assisting the defence case so that they can decide if, when and how to deploy that material in the trial to maximum advantage, typically, as we have seen during this trial, as part of a meticulously planned cross-examination of a prosecution witness.

If the defence are not provided with unused material when they should be, then there is a risk that the trial will be or will become unfair. That is why the proper conduct of the disclosure process by the police and the prosecution is integral to a fair trial. The disclosure process must be fit for purpose no matter what the scale of the task and the process must be conducted with complete integrity.

As I have already touched on, material that meets the criteria for disclosure must be disclosed in good time and the schedules must contain sufficient detail to allow the defence to know the nature of the remaining unused material that the police hold.

In this case the scale of the task was very substantial indeed, with something in the order of 800,000 items of unused material, covering a period of some now 23 years.

There were some problems with the disclosure process before the trial started, and at a relatively early stage in the trial there were indications that problems were continuing. In mid-July, just before Mr Gafoor was about to give evidence for the first time, it was discovered that relevant material in relation to him had not been disclosed. That was able to be coped with, but in consequence I required that steps be taken to double-check the position in relation to each witness far enough before they gave evidence to allow any other error that might be revealed to be put right.

Unfortunately it has since emerged that such checks as were done did not initially at least cover material arising from the original investigation and also missed other clearly disclosable material.

Further concerns arose in July and in the first half of August in connection with material in relation to Professor Knight, Miss Vilday and Miss Psaila, but, thanks to the cooperation of the defence, we managed to keep going with almost no interruptions.

By the time we returned in early September, however, the concerns began to come to a head when it emerged that a prosecution witness' original house-to-house enquiry form, which contained material of help to the defence, had been missed, and because we had reached the point when Mr Miller, followed by Mr John Actie and Mr Paris, were about to be called as prosecution witnesses.

That was against the background, as you will recall, that one of the issues of importance to the defence in this trial, and known to be so by the prosecution, was the nature of the investigation that brought these defendants to trial, its objectivity or lack of it, and its relationship with the original five defendants, two of whom, Mr Ronnie Actie and Mr Abdullahi, had, of course, sadly died by the time of the trial.

To that end the defence had sought records of all relevant contacts between this investigation and the original five defendants. There is a duty to record all such contact. The defence requests had been refused in robust terms by the prosecution, who indicated

that all contact had been recorded, that 95% was purely administrative, that all contact records had been reviewed and that none of the remaining contact was disclosable.

By 8th September my concern about disclosure was such that I gave an indication that all contact material in relation to the witnesses who were still to give evidence should be disclosed. In consequence the material was provided to the defence, and at the same time the prosecution were carrying out a much wider quality assurance check in relation to their compliance with their duty of disclosure.

In the result the defence and the prosecution had to work out together when and in relation to what there had been contact between the investigation and the original defendants. It soon became obvious to the defence that there had been a significant number of meetings over the years, and that some of the records were scant, and that, contrary to the prosecution's earlier assertions, at least some of the content of the records that had been provided did meet the test for disclosure.

What was not made clear, as it should have been at that time, but which did become clear much later, was that the investigation was well aware of the duty to keep records of all contacts with the original defendants and of the likely sensitivity of such records for disclosure purposes, that the investigation had known since the spring of 2010 that the records that it held of such contacts were actually incomplete, that the investigation also knew that both the Crown Prosecution Service and the solicitors instructed by the original five defendants had kept notes of the meetings that they had attended, and that some efforts had been made to obtain those notes, but that those efforts had not then been followed through to completion, meaning that the records provided to the defence were incomplete.

It was actually against that background that there were various delays in Mr Miller's evidence before, in the mistaken belief that there was unlikely to be any further contact material of any substance engendered by the lack of disclosure about records being missing, I required the defence to cross-examine him.

By early October, following the emergence of further relevant unused material, defence concerns were such that they submitted that the prosecution's conduct of its disclosure duties was not fit for purpose, that in consequence the trial had become unfair, that there was nothing more that I could do to make it fair and that, therefore, I should stop the trial.

In response the prosecution accepted that if the defence were right that the disclosure process was not fit for purpose, then that had to be the end of the case, but the prosecution submitted that the proper time to address that issue was at the end of the prosecution case. The defence accepted that submission, and so the argument was put back for that reason.

As it happens, during the period between then and 28th October, your last day, yet further relevant material emerged.

Since 28th October I have heard legal submissions on a number of topics, one of which has been the postponed argument about disclosure. It is not necessary to say anything more about the other arguments. The early days of the postponed argument about disclosure were characterised by assertions from the prosecution that whilst there had been a number of isolated errors, there was no risk that there was any significant undisclosed

material left or that any such risk was vanishingly small. Indeed, it was submitted that there was no basis at all for considering that there was or could be any important material that remained undisclosed.

Unhappily those assertions, though made in good faith by Mr Dean, Queen's Counsel, turned out to be wrong. What eventually emerged included, as I have already touched on, the fact that the contact material in relation to the original defendants was actually incomplete and was known to the investigation to be incomplete, that records made by the Crown Prosecution Service and the solicitors representing the original defendants still existed and were eventually made available, and that their content clearly attracted a duty of disclosure.

Equally in your absence I have heard evidence from a number of those involved in the disclosure process, some of whose understanding of the criteria for disclosure gave cause for concern.

Thus it was that I heard final submissions from both sides on Monday of this week as to whether anything could now be done to put matters right such that I could be confident that in the end these defendants would have a fair trial. The prosecution submitted that the court could now finally be confident that all relevant material had been disclosed and that the errors to date could be put right by recalling witnesses and/or by the prosecution making appropriate admissions. The defence submitted that things had already gone too far, that it was clear that the disclosure process was not fit for purpose, and that thus, in accordance with the prosecution's approach when the disclosure argument was adjourned, I should stop the case.

In the result I decided to test the prosecution's assertion, albeit oft-repeated, that there was finally nothing left to be disclosed. You will recall that as part of the disclosure process if police officers thought that there was a duty to disclose a particular item, they would put it on an e-schedule and draw it to the attention of the prosecution. It had been indicated during the course of the arguments that the prosecution had decided that a number of the items identified on e-schedules were, in fact, not disclosable. Thus in the belief that it was likely to be the best litmus test I ordered the prosecution to identify any such material that had yet to be disclosed and to provide it to the defence.

Although I have been made aware, quite rightly, of what followed, I am now going to ask Mr Dean to explain the position, please."

17.275 It seems that such a long opening address from the judge was unexpected by Dean QC, whose first draft of his remarks had itself been entitled "opening"; he had expected to be the first to give the jury the explanation that was so obviously required.

17.276 Dean then gave his reasons for the prosecution decision to abandon the trial, certain sections of which have already been set out:

"My Lord has very helpfully set out the background to the remarks that I am going to make, but, as my Lord knows, I had expected today still to be attempting robustly to defend criticisms of the disclosure process in the knowledge that, of course, my Lord still had to make final findings about it, but in the equal knowledge that the position was on a knife edge and not necessarily therefore in the expectation that my submissions would ultimately succeed.

Regrettably and for reasons that I explained to my Lord on Tuesday morning and will now explain in greater detail, it is no longer feasible for me to attempt the robust response that I had expected to be delivering now, nor would it be appropriate for me to do so.

The background to information that first came to my notice late on Monday afternoon and about which I learned more that evening and on Tuesday morning is the concern that my Lord has already mentioned to the jury over contact material, that is documents relating to contact between the police and to some extent the Crown Prosecution Service and the original defendants in this case.

That background is important to what I am about to say, because the concerns that had been raised in this case include the suggestion of inappropriately close relationship between the investigation and the prosecution and the original defendants and indeed, although not fully or clearly articulated, the suggestion of some possible impropriety.

I should make it clear that the information that came into my possession earlier this week is not new contact material, nor really anything like it, but there is an element of the information that could be interpreted, wrongly so we would say, but nevertheless certainly by appearance as being indicative of some inappropriate relationship between the police and the original defendants.

The task that we began on Monday afternoon at my Lord's invitation is a little complicated to explain, but does need to be understood. The prosecution reviewed the whole of the e-catalogue, the e-schedules during Monday. The e-catalogue consists of schedules submitted to Mr Haskell, the junior in this case dealing with disclosure, submitted to him by disclosure officers, police officers, who had listed in the schedules the material that it related to and described that material and gave an indication that they considered that material to be disclosable or possibly disclosable. With each schedule a copy of the material being considered was also forwarded to Mr Haskell.

The schedules were submitted to Mr Haskell over a lengthy period of time, and they amount to a library of material capable, as my Lord has observed, of testing the prosecution's general approach to disclosure. In relation to each document Mr Haskell was required to express his views and to make a decision. The overall review seems to confirm what might be expected, that the disclosure officers were erring on the side of caution, submitting many documents to Mr Haskell, and he in turn was considering them with care.

It is important to understand that the decisions that the e-catalogues reflect are the initial decisions. They reflect decisions made at the stage that my Lord has described of primary disclosure. They demonstrate that whilst initially Mr Haskell decided one-third of all documents should not be disclosed, he reserved judgment about many documents, and many decisions were later changed during the phases of secondary disclosure and because of developments in the issues in this case. Ultimately perhaps one-eight, about 100,000 of the 800,000 documents initially recommended for disclosure, remain to date undisclosed.

I will return to that e-catalogue material in a moment, because another exercise was also carried out on Monday that could properly be described as the other side of the coin, because as well as reviewing the e-catalogues, Mr Haskell also reviewed the totality of the material that disclosure officers had not considered was appropriate for disclosure, that's material listed on a schedule that's referred to as an MG 6C. We were able to identify

all the material that Mr Haskell had considered and the occasions where he had, in fact, changed the decision from not disclosing to ordering in effect disclosure.

Now the review that was carried out of itself seemed to, as it were, assist me in terms of being reasonably confident of being able to continue to robustly defend the basic approach to disclosure in this case, if not necessarily, of course, every single decision made. That's the overall background and analysis that was carried out on Monday, but the analysis itself exposed a serious problem, which again is a little complicated to explain.

During of afternoon of Monday, 28th November I considered a series of four consecutive entries in the e-catalogues relating to files of documents that had been put forward as disclosable to the disclosure junior by a disclosure officer. Mr Haskell had reviewed them and he marked the catalogue with his decision, which was that the documents were not disclosable, but needed to be re-reviewed on the receipt of defence statements. That is the stage that my Lord has referred to where the process of what is called secondary disclosure begins.

Three of the files related to complaints made by one of the original defendants, John Actie, to the Independent Police Complaints Commission in South Wales, and their description suggested that they might undermine Mr Actie's credibility. The other file related to a complaint to the IPCC concerning police officers involved in the Lynette White investigation, the current investigation.

The files were not original documents. They were rather copies of original files held by the IPCC and provided to the Lynette White disclosure team in August of 2009 by the IPCC. These were files that the prosecution had sought, the disclosure team had sought as third party material possibly containing disclosable content.

My Lord, of course, one of the duties of the prosecution so far as it is able to do so is to secure relevant material that may be held outside of the investigation and prosecution, held by third parties, and it was in pursuance of that responsibility that these files were obtained.

The files themselves have never been disclosed, which meant that they fell within the exercise that was being carried out as documents that the defence and my Lord would need to see in order to determine whether or not they had been properly assessed as part of the exercise of checking whether the prosecution's approach to disclosure had been proper or not.

The system in operation, the fact that all material should be retained and held and in this case should be available electronically ought to have meant that the material could easily be retrieved, even though an oddity on the e-schedule, the e-catalogue was that the reference given for these files appeared not to correspond with any reference used in the course of this investigation or prosecution.

It quickly became clear to me, however, that the material was not, in fact, held either electronically or in hard copy. Now it was at that point in the course of discussing what the position could possibly be as regards these documents that Detective Sergeant May, who the jury will be familiar with as having assisted in the operation of the EPE material, recalled being told that at some stage the Senior Investigating Officer, Mr Coutts, had given an instruction some material should be destroyed and not retained in the investigation. This, of course, immediately rang alarm bells.

By the early evening of Monday, 28th November on my instruction the original material or what was probably the original material was itself recovered from the IPCC, and the source of the information relating to the possible destruction of material was identified as Detective Sergeant Mark Allen, who is no longer a part of the investigation, but was formerly and at the relevant time the Lead Disclosure Officer, the officer taking responsibility for a team of more junior officers, and taking the police's responsibility, as it were, for conduct of the disclosure process.

Mr Allen was contacted and he confirmed that he did recollect at some point being asked to destroy some material, although his recollection was vague. Detective Sergeant Allen has provided a statement in which he remains vague, but in which he does confirm a conversation with Mr Coutts consistent with an instruction to destroy some material.

My Lord, the exercise relating to the e-catalogues was completed very late in the evening of 28th November. Early on 29th November Detective Sergeant May was able to consult his records of work he had done as Office Manager for the investigating team. He found an entry in his records for 24th February of 2010 recording his ongoing audit of material held by the investigation and a conversation with Detective Sergeant Allen in which Detective Sergeant Allen had confirmed that he had destroyed the copies of the four files of IPCC material seemingly because in relation to one of the files Mr Coutts had instructed him to dispose of it and in relation to the remaining three because Mr Haskell had said that they were irrelevant. In fact, six months or so earlier Mr Haskell had clearly indicated that they were relevant and were potentially at least disclosable.

Now, my Lord, Mr Coutts has not been able to be asked in detail about his recollection of these events and Mr May's notes represent the clearest available account. It is highly likely, as I will outline in due course, that there is an explanation for these events consistent with serious error rather than deliberate misconduct.

Returning briefly to the very late evening of 28th November, I, of course, discussed with Mr Clements, who is the Crown Prosecution Service representative, a senior member of the Crown Prosecution Service responsible for prosecuting this case, the position the apparently deliberate but unrecorded destruction of documents on the instruction of the senior investigating officer and by the Lead Disclosure Officer left this prosecution in, and we resumed our discussions early on Tuesday morning.

It was and is clear to us that the apparently deliberate destruction of documents would inevitably be fatal to this case. We are mindful that these documents were copies and that they had been properly registered in the investigation and properly reviewed at primary disclosure. So there is absolutely no question in this case of deliberate destruction of original material that might have been considered in one way or another inconvenient to the investigation.

However, the reasons these revelations are fatal are themselves probably obvious. The decision to dispose of documents was itself deliberate. The decision, though, was not recorded in any way and it came to light by pure chance. The decision involved not only the Senior Investigating Officer but also the officer who was at the time the Lead Disclosure Officer.

The subject of some of the destroyed material was one of the original defendants, one of the men with whom the police are alleged to have had an inappropriately close

relationship, and the material was, in fact, disclosable, if not in primary disclosure, then certainly in secondary disclosure. The fact that the material had been destroyed after primary disclosure meant that it could not have been re-reviewed in secondary disclosure, and this has to be set against assurances that I have repeatedly given that all material had, in fact, been re-reviewed for secondary disclosure purposes.

The fact that the material had been destroyed meant that it was impossible to say for certain whether the material retrieved from the IPCC on Monday was, in fact, exactly the same material that had been reviewed and then destroyed. That the decision to destroy the material was not recorded, particularly given to whom it related, meant that it would be impossible for me to give meaningful reassurance that no other material had been treated similarly and impossible to give meaningful reassurances that other potentially important instructions about the treatment of unused material had also not been recorded. What DS Allen seems to have said to Detective Sergeant May also raises concerns about his treatment of irrelevant material and the possible destruction of other material deemed irrelevant.

Now the decision to at least separate but still retain some of the IPCC material would itself have been justifiable. One of the files related to complaints about officers in the Lynette White investigation, and although it had to be reviewed, there would have been a case for that file being held separately and securely from other material so that the officers who were complained of did not have access to it. Such a policy would itself have needed to be carefully thought out and recorded.

As it is, it seems likely Detective Sergeant Allen took what Mr Coutts said as an instruction to destroy more wide-ranging material, and in any event the decision was not, as I have repeatedly said, recorded, as it very clearly should have been. The appearance of this against the background of the other disclosure difficulties that my Lord has outlined and the allegations of impropriety made against Mr Coutts and the investigation more generally is, of course, irredeemable.

It is important to be clear that the prosecution have no reason whatsoever to consider that what has occurred in relation to the IPCC material is more than a serious error. The prosecution have no doubt whatsoever about Mr Coutts' honesty and his integrity, nor indeed Detective Sergeant Allen's, but it has to be acknowledged that the appearance of what has occurred is itself very damaging indeed.

For those reasons the prosecution can no longer sustain a position maintaining that the court and the defendants can have the required confidence in the disclosure process, the confidence that my Lord has referred to with all its importance to our criminal justice system.

In those circumstances I formally offer no further evidence and will invite my Lord to direct the jury to return not guilty verdicts.

Before that I should say two things. The developments in this case over the last few days and weeks have been discussed in detail with the Director of Public Prosecutions. He is deeply concerned about the decision he has had to now confirm and the reasons for it. He agrees that it is necessary that no further evidence be offered and that not guilty verdicts be directed.

The Director and the Chief Constable for South Wales Police wish me to make to clear that they have already directed that there be a full and detailed review of all the circumstances in which this decision has had to be made. That is a review that will have the full support and cooperation of the South Wales Police. Contingent upon fact-finding, the review may involve a subsequent reference to the Independent Police Complaints Commission."

17.277 I do not suggest that all were significant, or that there is anything surprising about this, but there was a number of differences between the final written draft of his speech and what Dean QC said in court. No doubt some were deliberate and others may have occurred because Dean QC did not slavishly read out the draft. The principal differences were as follows.

17.278 First, the suggestion Dean QC made in court that perhaps 100,000 of 800,000 documents initially recommended for disclosure in E-Catalogues remain to date undisclosed stands in (stark) contrast to the figures as written: 100 and 800 respectively. I am satisfied this was simply an error, not least because each version of the draft contained the latter figures and the figures arose at the point in the speech where Dean QC was dealing specifically with the E-Catalogues (which it is known did not run to thousands of documents, still less hundreds of thousands). A possible reason for the error is that the judge referred to "800,000 items of unused material" in his prefatory remarks.

17.279 Second, the addition of the words "in detail" to read: "Mr Coutts has not been able to be asked in detail about his recollection of these events and Mr May's notes represent the clearest available account." That, of course, was to avoid the impression that might otherwise have resulted that Coutts had not been spoken to at all.

17.280 Third, and to temper the suggestion in the draft that any explanation could ever be "wholly reasonable" for these events, instead this: "It is highly likely, as I will outline in due course, that there is a ~~wholly reasonable~~ explanation for these events consistent with serious error rather than deliberate misconduct."

17.281 Fourth, the removal of the word "shredding" and its replacement by the word "destroyed."

17.282 Fifth, the qualification that the "subject of some of the ~~shredded destroyed~~ material was one of the original defendants" to reflect the fact that the Actie complaints material (D7447) was not the only material missing and presumed destroyed.

17.283 Sixth: "What DS Allen seems to have said to Detective Sergeant May also raises concerns about his treatment of irrelevant material and the possible destruction of other material deemed irrelevant."

17.284 Seventh, the clarification that: "One of the files" (instead of "some of the material") related to "complaints about officers" in LW3. Although not stated expressly, that might be thought to be a reference to the William Peter Evans statements.

17.285 Eighth, the qualification that there would have been a case for "that file being held separately and securely from other material in the case so that the officers ~~it concerned~~ who were complained of did not have access to it."

17.286 Ninth, the contentious word "appalling" was removed: "The appearance of this against the background of the other disclosure difficulties that my Lord has outlined and the allegations of impropriety made against Mr Coutts and the investigation ~~is of course appalling~~ more generally is, of course, irredeemable."

17.287 As to the accuracy of what Dean QC then said in court in light of the information then available to the prosecution, four general observations may be made.

17.288 First, the reference, even as amended, that Coutts, "…has not been able to be asked in detail about his recollection of these events" did not adequately reflect the facts. A deliberate decision had been taken *not* to question Coutts in detail about the events but he had been asked about the central issue namely, whether he had ordered the shredding of any documents and he had resolutely denied ever having given such an instruction. I am more than satisfied that Dean QC did not intend in any way to mislead the court, he believed that Coutts' denial was erroneous (and therefore worthless) due to May's recollection and note and the fact that the documents were in fact missing. As Dean QC said, "May's notes represent the clearest available account" and I am sure that he believed that but Coutts' denial should have featured in these remarks; it was unfair on Coutts for it not to have done so.

17.289 Second, the description of Allen's inadequate witness statement cannot be criticised because the prosecution understood the word "disposed" in the statement to mean "destroy" and in all of the circumstances that was justifiable.

17.290 Third, D7448 did not feature at all in the explanation for stopping the case. Yet it was in connection with D7448 alone that Coutts was mentioned in May's note. May's note did not suggest any involvement at all on the part of Coutts with D7447.

17.291 Fourth, significant mistakes were made in the interpretation of May's note and the E-Catalogue. May's note in particular was of such vital importance to the decision to offer no further evidence that it should have been studied with great care; it was, after all, a remarkably brief document. From Dean QC's remarks, however, it is clear that the prosecution wrongly considered May's note to explain the fate of each of the four items on the E-Catalogue. Indeed, once he had described in summary the four items on the E-Catalogue, Dean said May's note confirmed "that [Allen] had destroyed" them; but of course, May's note said nothing of item 1 of the E-Catalogue and the E-Catalogue said nothing of D7448. The explanation did not match the detail of the May note.

17.292 When abandoning a six month trial detail matters and it is perplexing that the prosecution was not accurate in its description of both the origins and the details of the documents whose absence had led to the cessation of the trial. This was not the statement of Dean QC alone, it had the imprimatur of Clements, Bennett, Paul, Davies and Penhale. The remarks in court should have corresponded to the known facts and they did not. I well appreciate that precision would have made no difference to the outcome or to the general effect of what was said in court (and the same decision would still have been made) but lack of precision gives some support to the suggestion that there had been a rush to judgment.

17.293 Following Dean QC's remarks and his offering no further evidence, verdicts of not guilty were entered on each count against the ten defendants and the same course was taken seven days later against the remaining four defendants. Nearly eight and a half years after

the LW3 investigation had begun and after many millions of pounds had been spent, the criminal process was finished, an ignominious end to such a well-intended endeavour. Furthermore, Coutts' long and distinguished career was over and a number of police officers, principal amongst which was Allen, had questions of substance to answer.

REVIEWING THE EVIDENCE

17.294 Reviewing and commenting upon the circumstances in which the trial collapsed is highly problematic because it is very difficult to remove from the mind the fact that D7447 and D7448 had not been destroyed (and neither had the William Peter Evans witness statements) and the fact that, therefore, the prosecution team had so catastrophically got it wrong. Hindsight is a frequent corruptor when reconstructing historical events and I can do no more than give the assurance that I have done my utmost to exclude the *post facto* discovery of the documents from my approach to the happenings of 28 November to 1 December 2011.

17.295 I believe that the appropriate starting point must be the mood in the prosecution camp at this late stage of the trial. The prosecution had taken a battering from both the defence and the judge on disclosure because deficiencies in the disclosure process had too often been exposed. There can be no doubt that the mood in the prosecution team was low and that this was likely to have had at least *an* influence on its response to the unfolding events.

17.296 Sweeney J's "litmus test" provided a moment of high drama and it was clear from what the judge had said both in court, "Even if it [the test] passes muster, it doesn't necessarily mean that's decisive in your favour" and in chambers, "…with matters on a knife's edge, if not already beyond the knife edge" that any further deficiency, mistake or shortcoming found in the disclosure process was likely (probably extremely likely) to be fatal to the trial.

17.297 It is of some interest that, as already reported, police officers observed a degree of concern being expressed by Dean QC when he was reviewing one of the three files of E-Catalogues and that this was before it had been discovered that documents were missing. Simply from assessing Dean QC's "body language", those police officers believed that some of the E-Catalogues must have revealed that on occasions, Haskell's approach to disclosure had been inappropriate, or at the very least that it revealed language that was highly damaging. As is now known, the assessment of those police officers had been sound and the low mood must have got lower still.

17.298 The discovery that D7447 and D7448 were missing must have been disconcerting but the recollection of May that they, in whole or in part, had been destroyed on the instructions of Coutts followed by the production of his note the following day no doubt caused the lawyers to believe that in the circumstances the trial was over.

17.299 It is very easy now to look at the May note and to think that because it is so factually wrong, it should not have had the impact that it so obviously did at the time but I have no doubt that such an approach would be driven more by hindsight than by fairness. May's note was written at a time contemporaneous to May's conversation with Allen and it was then, as Dean QC submitted, the best available evidence of what had been said and what had happened. The note is short, simple and could not be clearer as to the fact that "D" documents had been deliberately destroyed: D7447 because Haskell had decided it was irrelevant and D7448 following instructions from Coutts "to get rid" of it. The note

(together with May's recollection of what had happened) and the information that the material had not been found at St. Athan, in all the circumstances, was deemed to be so determinative on the issue of destruction that neither the lawyers nor the police even thought of comprehensively searching St. Athan for the documents; that perhaps offers the best insight into the impact which May's recollection and note had had.

17.300 Believing that the documents had been destroyed introduced a degree of inertia and an overwhelming sense of doom and inevitability into the prosecution team and inquiries that now appear to have been obvious were not made. There are no rules or policies or regulations or guidelines as to what a prosecutor should do in these circumstances: in moments of extremis lawyers are inevitably left with no more than their intuition and judgment to guide them. I have no doubt that Dean QC, Clements and Bennett genuinely believed that the course they advised and took was the only one to take notwithstanding that it caused the collapse of an exceptionally important trial and abruptly terminated their close relationship with a senior police officer whose "honesty and integrity" had never been doubted. Dean QC's belief in the correctness of the decision to stop the trial was so resolute that in the civil proceedings he said in evidence that, "… it's impossible to conceive of a situation in which we could have come out of this with any other result". Others, even if they did not fully appreciate quite how dismal the prosecution position had become, did not dissent from that view.

17.301 I further am satisfied that the course taken, based on the facts as they were genuinely believed to have been, was within the range of responses reasonably available to a prosecutor.

17.302 Coutts, on the other hand, believes that the treatment of him was shabby and wholly unnecessary and it is easy to sympathise with him, especially now. The lawyers' justification for excluding Coutts and Allen was that there was evidence that they had deliberately destroyed case material and that to ensure the integrity of the trial and due process in the investigation that would inevitably follow, an appropriate distance should be maintained from them. Any further involvement or communication with them could have resulted in the lawyers becoming witnesses either (potentially) in the proceedings before Sweeney J or in subsequent proceedings. Furthermore, the lawyers believed that any further contact was futile. That was a hard decision to have taken but it cannot be criticised in all of the circumstances.

17.303 Penhale has also been, and remains, critical of the circumstances on which the prosecution decision was taken. I do understand the concern about haste, but it is clear that he also remains under a misunderstanding of the seriousness of the position. The events of 28 November 2011 did not amount simply to another disclosure challenge amongst many. The material recovered on 28 November 2011 could not be said to be a "carbon copy" of the material said to have been destroyed. And there were a series of other damaging revelations which the events of 28 November 2011 had thrown up. I am satisfied that there was no ulterior motive for the course that was advised and taken. The decision to offer no further evidence did undoubtedly have the benefit of saving the prosecution (especially Haskell) from yet further embarrassment but that was not the reason for the decision. Having decided that what happened was within the reasonable range of options open to a prosecutor was it the best response available?

17.304 In my view not. The importance of the May note cannot be overstated but it was only a part of the picture. If May's conversation had been with Coutts, for example, then a note recording that Coutts had said that he had ordered the destruction of material could justifiably be regarded as being definitive of Coutts' involvement, but it was not. A more important part of the unfolding picture than May was Allen who was the provider of the information to May; if anyone could cast light on the darkness it was Allen and although his ambiguous statement left much to be desired he should not have been asked to make it in the circumstances he did. No decision should have been made until his statement had been received and his statement, once made, should not have been ignored. Certain features stand out: first, when May and Allen had their conversation on 24 February 2010, Allen had no documents in front of him and by then he had been away from LW3 and in a new job for about three months, not ideal conditions for accuracy, notwithstanding the precaution May had taken in sending an email to assist him in his recollection. Second, one of the details recorded in the note was obviously logically incorrect. Allen is documented as having said that Haskell had decided that D7447 was not relevant and that was known to be wrong from the E-Catalogue and because D7447 had been entered on the MG6C; this factual error should have called into doubt the accuracy of Allen's recollection when he spoke to May.

17.305 Cool and calm heads were required and on 29 November 2011 the judge should simply have been given an explanation of what had happened, without any conclusions having been reached, together with a request for more time to investigate. To that extent it is easy to understand the feeling expressed by the police – in particular those not directly involved on 28 November: Penhale, Coutts, and Paul – that everything appeared to be happening very suddenly. No decision, preliminary or otherwise, should have been made until that investigation was complete and the prosecution lawyers should have informed ACC Paul of the emerging and disturbing developments on the Monday evening. If Coutts was out of bounds then ACC Paul should have been their direct point of contact. The original of the material identified on the E-Catalogue and the original of the material registered as D7448 should have been obtained and shown to the relevant witnesses. Clements should have seen Allen, shown him D7447 and D7448 (as best as they could be recreated) and the William Peter Evans statements together with May's note and asked him for his comments. Clements should then have seen Coutts and shown him D7447, D7448 (in particular), the William Peter Evans statements, and May's note and asked him for his comments. These meetings should have been tape recorded. The Jones Briefing Paper should have been explored at the time.

17.306 In the very unusual circumstances and given the inevitable conclusion, Dean QC and Clements considered it inappropriate to conduct interviews or take statements from either Allen or Coutts. As I have said at paragraph 17.301, that assessment was within the range of responses reasonably available to a prosecutor, and I well appreciate the difficulties in interviewing or taking statements from police officers when there is a degree of suspicion that something went wrong. However, if the trial is on a precipice then measures such as those can be justified; all the more so when the integrity of the SIO is not doubted. The explanations may have made matters worse, if that was possible, but at least an attempt would have been made to discover what in fact had happened.

17.307 What is remarkable about this constantly surprising case, however, is that even if a search had been conducted and the documents had been found, the trial would I am satisfied still have collapsed and the reasons for that are many.

17.308 First, May's note (and that of Carole Williams – if it had been discovered in time) would have had to have been disclosed on 29 November 2011, together with any witness statement or interview following the discovery that documents were missing. These documents, including Allen's witness statement of 29 November 2011, created an overwhelming inference that some case material had been destroyed and the defence would have argued that if it was neither D7447 nor D7448, then it must have been other as yet unascertained material that had been destroyed and that, the defence would have submitted, is a much worse position because at least the "missing" D7447 and D7448 could reasonably well be reconstructed as the entire source from which they had been copied was identifiable and available for inspection. Unknown documents, by definition, cannot be reconstructed.

17.309 Second, the principal media and public interest in the termination of proceedings has understandably been in the fact that the documents which were said to have been destroyed were later found. And although less headline-attracting, and its significance likely underappreciated by many, evident amongst Dean QC's explanatory remarks was his acceptance that the prosecution had not discharged its obligations at the secondary disclosure stage. In respect of D7447, the Actie complaints, Dean QC accepted that this document was disclosable, if not at primary disclosure, then certainly at secondary disclosure:

> "The fact that the material had been destroyed after primary disclosure meant that it could not have been re-reviewed in secondary disclosure, and this has to be set against assurances that I have repeatedly given that all material had, in fact, been re-reviewed for secondary disclosure purposes."

17.310 That general assurance given in good faith, therefore, had been exposed as worthless and this was another disclosure failing (and a serious one) to add to the list and it is not difficult to imagine what effect its revelation would have had on the defence and the judge. But there were others.

17.311 Third, in order to fulfil the requirements of Sweeney J's "litmus test", Haskell's three files of E-Catalogues were examined by Dean QC, Bennett and Clements at court. They had understood that the three files contained all the E-Catalogues and that was Haskell's understanding as well. They were wrong.

17.312 On inspection by Patrick Hill of the material at St. Athan in 2016, it became rapidly apparent that the three Haskell files were not a full and complete record of all E-Catalogues. A number of E-Catalogues were found within boxes in the exhibits room at St. Athan. These boxes contained prosecution material recovered from Swansea Crown Court after the collapse of the trial (the relevant boxes are numbered 41 to 49) and transported to St. Athan. It is obvious that the E-Catalogue exercise set by the judge could only have been completed if all E-Catalogues had been available; the fact that they were not means that the test could never have been satisfactorily completed.

17.313 In order to understand the scale of the potential problem, I requested a complete copy of all E-Catalogues retained at St. Athan. That exercise having been completed by SWP, the following was revealed. First, 92 E-Catalogues were found in the boxes at St. Athan which were not in Haskell's three E-Catalogue files. Second, of the 92 separate E-Catalogues, there are 28 occasions on which two duplicate signed E-Catalogues for the same document were found together. The system employed was that two completed duplicate E-Catalogues were submitted to Haskell for him to approve and then sign (adding comments in manuscript if

he so chose). One copy would be placed in his files and the other would be kept in the MIR. On these 28 occasions, therefore, Haskell's copy was not filed in one of his three files and he did not have a copy of it. There is no apparent reason why that should have happened.

17.314 Third, the judge was interested in those documents which featured in an E-Catalogue but which were not disclosed. Of the 92 E-Catalogues, documents in 32 had not been disclosed. Of those 32, 7 had been disclosed under another "D" document number or other reference. SWP has confirmed that the remaining 25 documents had not been disclosed at any stage because Haskell had so advised. This is why the judge's exercise could not in fact have been successfully resolved. Fourth, for the sake of completeness, there are 13 E-Catalogues which are in Haskell's files, the duplicates of which were not found at St. Athan. For present purposes, of course, that is not of concern.

17.315 Fourth, as for the E-Catalogues themselves, Dean QC was right to be troubled by them. They did indeed "demonstrate a less than completely open attitude to the likely issues in the case" and the disclosure of them (for if the trial had continued they would then have had to have been disclosed) would have caused "further damage".

17.316 To HMCPSI on 8 December 2012, Haskell acknowledged that his written comments or remarks were not always as they should have been:

A: …in fairness, these were documents that I had done two years ago … I probably wasn't as diplomatic as I should have been in doing it ...

Q: Would you have felt comfortable though if the judge had seen some of these [E-Catalogues]?

A: Well, probably not, I'd probably cringe at the time.

17.317 Examination of the E-Catalogues reveals that the comments which would have caused the prosecution "further damage" fall into three categories: first, those that suggest that Haskell was too judgmental in his methodology; second, those that demonstrate an inappropriate approach to disclosure; and third, those that were simply inappropriate.

17.318 Examples of the first category are:

(i) D10068: a refusal to disclose information identifying the murderer as being a relation of Abdullahi on the ground that the information appears "wholly unreliable" and that, in any event, the provider of the information was drunk at the time it was supplied. It is for the defence to evaluate the quality of potentially helpful evidence and not the prosecution. Haskell's decision was based on inappropriate reasoning.

(ii) D7403: a refusal to disclose information that at the end of January 1988, a witness had seen Lynette White with bruises to her body which White had said were inflicted by Miller. The decision not to disclose was in part because Haskell did not believe that the witness was "entirely truthful". There was another reason for non-disclosure of this document, and this falls into the second and third categories, and that other reason was that there was already a "plethora of material which suggests that Miller would give her a slap if she didn't obtain enough cash to fund his drug habit. This inevitably is how we

would open our case to any jury. My own view is that it illustrates how useful she was to Miller and does not provide a motive for killing her."

17.319 Examples of the second category are:

(i) An example of this has already been given immediately above with document D7403, but there was a number of other occasions when Haskell opined that because there had already been disclosed a "plethora" of material to show that Miller had been violent to White and was a drug dealer, that there was no need to disclose yet more on this uncontested issue. Just as the prosecution should not conduct a qualitative assessment on material neither should it conduct a quantitative assessment and restrict disclosure once a certain amount has been disclosed. This is very much the wrong attitude to disclosure.

(ii) D1986: In respect of a pathologist's report, "I'm not convinced that this report undermines the prosecution case (even if the way in which Lynette died is in issue". The disclosure test is not so restrictive, disclosure counsel does not have to be "convinced" that material should be disclosed before it is disclosed. The test is whether material *might* reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused. I am sure that Haskell knew the appropriate test and believe that this was an unfortunate use of words but the defence would have had a field day if and when they had sight of this E-Catalogue. The same "I'm not convinced test" was also employed for T85, R50, D2080, D9607 and D9609.

(iii) D575: Haskell commented that it was with reluctance that an interview of Ronnie Actie should be disclosed. Again, possibly no more than an unfortunate choice of words, but there should be nothing "reluctant" about disclosure. If the test has been met then the material must be disclosed and either eagerness or reluctance to do so are irrelevant.

(iv) Y12A: notwithstanding a policy that all previous accounts of witnesses should be disclosed, Haskell decided not to disclose an interview of Gafoor because it was "entirely consistent with his [Gafoor's] statement". All previous accounts of witnesses, save for any necessary redactions, should be disclosed without exception and the prosecution should not withhold disclosure of one account simply because it is similar to another already disclosed. The defence are best positioned to assess the value of the second statement and in any event, no two accounts will ever be identical and even if they are, that is not a sufficient basis for refusing disclosure. Again, very much the wrong attitude to disclosure.

17.320 Examples of the third category are:

(i) D4413: in response to a "HOLMES Database Quality Assurance Document", "No doubt somebody is employed at great expense to South Wales Police to carry out this wholly pointless exercise".

(ii) D121: this was a statement from Anthony Miller in which he described an incident in which he chased Abdullahi who picked up a knife. Haskell commented that he did not "necessarily blame" Abdullahi for so doing. The statement was not disclosed.

(iii) T297: of a person who telephoned the police to give information about the murder, "I suspect that this person is a few sandwiches short of a picnic!" Haskell, however,

correctly decided to disclose this record of the conversation at the E-Catalogue stage despite his comment.

(iv) D7906: a prisoner confessed to having murdered Lynette White when in custody and his confession was not disclosed because Haskell assessed the prisoner as being a "nut-job".

(v) D6982: in respect of material to the detriment of Stephen Miller's character, Haskell advised against disclosure on the basis that, "Miller may not win any beauty parades; he may not be a nice person [etc.]".

(vi) S239: in respect of a witness statement of Anthony Miller, "I have reviewed this statement again at the request of DS Lewis, who has the nerve to suggest that I was wrong. I said in my initial review that this was tenuous, and I am now persuaded that I was being too generous. On reflection, there is no way on god's earth that the defence could possibly use Anthony Miller."

17.321 For the sake of completeness, of the material referred to above: D121, D575, D4413 and D10068 remained undisclosed throughout the proceedings, the remainder (save for D575 and T297 which were disclosed at the E-Catalogue stage) was later disclosed when the documents were re-reviewed at the secondary disclosure stage, another example of a restrictive approach to primary disclosure simply causing further work later in the investigation.

17.322 Fifth, the notes of DS May and Carole Williams should have been registered at St. Athan in February 2010. They should then have been disclosed. The fact that they had been neither registered nor disclosed was a significant breach of the prosecution's disclosure obligations. The information contained in these notes was highly relevant to the issues of interest to the defence; the impact that belated disclosure would have had on both the judge and the defence is not difficult to imagine. The impact from the revelation that they had not been registered and disclosed when they should have been would have been considerably greater.

17.323 Sixth, it is not just the one E-Catalogue or D7447 and D7448 that were not re-reviewed at the secondary disclosure stage, none of the E-Catalogues were re-reviewed during secondary disclosure and they plainly should have been.

17.324 Seventh, the witness statements of William Peter Evans were not registered on HOLMES and they should have been. Because they had not been registered, they could not and, therefore, were not reviewed at secondary disclosure.

17.325 Eighth, as will be discovered in the next chapter, one document from PSD was received by LW3 which was not registered on HOLMES and because it cannot be found it may have been destroyed.

17.326 If some let alone all of these disclosure failures and problems had been drawn to the attention of the judge on 29 December 2011 (not all of course would then have been apparent) then following the judge's pronouncements on that day and the day before, it is as clear as it ever can be that he would have stayed the proceedings on the basis that the court could no longer have confidence in the Crown's discharge of its disclosure obligations. Disclosure had not only failed to "pass muster"; it was in much worse shape than anyone could then have suspected.

18. What happened to D7447 and D7448 and the potential for confusion with another document

18.1 Now that the events of the end of November 2011 have been described, it can be appreciated what an important question this is and it was not answered sufficiently by either the IPCC report or the HMCPSI report. Given the way the trial would ultimately collapse, the question demands a detailed response and as will become apparent, it is also a question which has been addressed with a degree of uncertainty in all quarters and has misled all who have considered it. Because the detail is both important and necessary, it is inevitable that there will be a degree of repetition in this chapter to what has been written before.

18.2 To understand the issue properly, it is necessary to go back to the spring of 2009, when the investigation team embarked on what is commonly called "third party disclosure". In any criminal investigation, whenever it appears that a third party has, or might have, material that may be relevant to an issue in the case, the police should take reasonable steps to identify, secure, and consider such material. One such step the police will commonly take is to send a letter to the relevant third party explaining the relevant issues in the case in respect of which the third party might possess material, and asking whether it has any such material.

18.3 This case was no different. The Disclosure Protocol required the police to: "Seek to identify whether relevant or potentially relevant material is held by any third party and where it is established that such material is so held… use his best endeavours to obtain such material." Section 6 of the Protocol:

> "… the disclosure officer will seek to identify whether relevant or potentially relevant material is held by any third party and where it is established that such material is so held he will use his best endeavours to obtain such material. In the event the disclosure officer has identified what he considers to be a third party holding relevant or potentially relevant material but where he has been unable to secure voluntary surrender of the material he will so inform the prosecutor. Should the prosecutor also fail to obtain voluntary surrender of the material the prosecutor will consider whether steps to compel surrender of the material are required but he will in any event inform the representatives of any defendant considered to have an interest in the third party material of the identity of the third party and the nature of material thought to be held by the third party."

18.4 The Disclosure Protocol was silent on what would happen to third-party material once obtained, although that is not surprising.

18.5 Amongst the many third parties who held material in this case, there were three of relevance to the question of D7447 and D7448:

- The Legal Services Department of South Wales Police (PLSD);
- Professional Standards Department of South Wales Police (PSD); and
- The Independent Police Complaints Commission (IPCC).

18.6 Over the spring and summer of 2009, enquiries were made of each of those third parties and it is important to set out the enquiries and visits DS Allen made to each in a little detail. DS Allen was the Lead Disclosure Officer at all material times.

18.7 First, the IPCC. On 31 March 2009, DS Allen wrote to Chris McCoy. By 2012, when he made a witness statement to the IPCC, McCoy was a senior casework manager with the IPCC based at their Wales and South-West Regional office in Cardiff and as he explained, in 2009 his role included liaison with LW3 investigators.

18.8 On 29 April 2009, McCoy responded to DS Allen and his response is an important one because it contains the first reference I have found to a "firewall". Headed: "Re: Request for disclosure of material held by the Independent Police Complaints Commission", the letter starts:

> "We are in the process of gathering any material held within the IPCC which may be considered relevant. However there are one or two matters on which we will require your assistance, and your further clarification."

18.9 The significant part of McCoy's letter is paragraph 5 which reads:

> "As you have asked for material which "may affect the credibility and reliability of a witness", it can be supposed that if there is such material, you consider that it may impact upon the credibility and reliability of police witnesses. Should we identify any relevant material, we would need you to confirm that a firewall is created between that material and any police officers or staff within South Wales Police (including of course the reinvestigation team) to whom the material relates."

18.10 In his witness statement made to the IPCC, DS Allen acknowledged:

> "The reasons for this were obvious and clearly due to the existence of sensitive material relating to current members of the team."

18.11 DS Allen's further response was sent a little over a week later (7 May 2009) by email, and in apparent response to paragraph 5, stated:

> "The process of examining and disclosing any material follows strict guidelines in accordance with the [CPIA] and [AG Guidelines on Disclosure]. Should you identify material relating to any of the above mentioned persons, I would be available to attend IPCC offices and examine the material on site before making a decision on its relevancy, together with my deputy disclosure officer DC Eddie May. This will ensure the integrity of both relevant/irrelevant material."

18.12 In the event, May would not attend.

18.13 I have described this response as an "apparent" response to paragraph 5 because it is clear on reading DS Allen's email that it does not address the "firewall" requirement squarely or satisfactorily. Reference is made to the CPIA and to the Attorney General's Guidelines but neither deals with firewalls, and reference is also made to DS Allen (and DS May) visiting the IPCC to make a decision on relevance, but it is not at all clear how that could ever "ensure the integrity" of relevant/irrelevant material in circumstances in which a copy of relevant material would be received at St. Athan; and indeed, in truth, it is not really clear what is meant by the suggestion "This will ensure the integrity of both relevant/irrelevant material" at all.

18.14 DS Allen has said that Coutts or Haskell would have had sight of any letter sent in his (Allen's) name to persons outside LW3. In most cases "they", in other words Coutts or Haskell would have been "responsible" for (per IPCC witness statement) or would otherwise have "approved" (per civil witness statement) the wording. I am not satisfied, reading the 7 May 2009 email, that it had the input of Haskell or Coutts, but whatever the position, correspondence of this unclear kind does not give the impression that DS Allen had fully appreciated what was being asked of him.

18.15 I return to the firewall issue later in some more detail when I consider the material as it entered St. Athan in late July 2009.

18.16 In the event, DS Allen attended the IPCC's offices on 23 July 2009, and by the time he came to make his witness statement to the IPCC in 2012, he had only "vague recollections". Although it appears to have been intended as at 7 May 2009 that DS May should accompany DS Allen, and thereafter (as late as the morning of 23 July 2009) that James Haskell should accompany DS Allen, it is known from the IPCC visitor's records and Allen's pocket notebook that it was DS Lane who attended with DS Allen. It is, however, DS Allen that dealt with the relevant material for present purposes and he who had the relevant conversation in relation to the firewall with the IPCC lawyer.

18.17 In his IPCC witness statement, McCoy recalls that he had arranged into "various groups" ("possibly" 14 groups) the material that could be "liable for disclosure" to LW3; that he had produced a schedule or list for each "group"; that he had placed each group into a "large cardboard box"; and that he had placed a schedule/list on top of each box.

18.18 Over the course of the afternoon of 23 July 2009, DS Allen inspected the material and although there is no precise record of the material that DS Allen inspected (his pocket notebook is silent), or the material that he requested, there is little doubt about the material that was of particular interest: "files in respect of complaints made by Mr John Actie against Police Officers" which it is known were contained in box 14; and "another document regarding complaints against Police Officers who at the time were current members of the re-investigation team", which is plainly a reference to the witness statements of William Peter Evans, which were contained within box 13.

18.19 No more than a few days after 23 July 2009, DS Allen returned to the IPCC offices and collected an Iron Mountain box and the contents that had by then been copied. Given that it is this Iron Mountain box that ultimately would go missing, and given therefore its significance to the collapse of the trial, it is necessary to understand as precisely as possible what it did contain.

18.20 If that understanding might (not unreasonably) be assumed to be achievable without any great difficulty, it has not so far been achieved. Treatment of the D7447/D7448 issue has seen the making of any number of errors and mistaken assumptions, including (but by no means limited to) the following seven. First, that the Iron Mountain box contained only "IPCC material". Second, that D7447 and D7448 both came from the IPCC. Third, that the Iron Mountain box contained D7447 and D7448 and nothing else. Fourth, that D7447 was the totality of the material received from the IPCC. Fifth, that the witness statements of William Peter Evans were part of D7447. Sixth, that the witness statements of William Peter Evans were part of D7448. Seventh, that there was only one witness statement from William Peter Evans and not two.

18.21 I have already set out at chapter 9, by way of illustration, the imprecision that existed in relation to the IPCC report's treatment of the issue. Further examples run through the various accounts, statements and reports in other investigations and proceedings, and nothing will be achieved by identifying them all seriatim, but four brief further examples may suffice. First, the HMCPSI questionnaires asked Dean QC, Bennett, and Haskell whether they were aware of D7447 and D7448 at the secondary disclosure stage in the following terms: "Were you aware of the IPCC copy files (D7447 and D7448) at the secondary disclosure stage?" This question was asked when, as is clear, D7448 was not an IPCC document. Second, the HMCPSI report refers (at paragraph 7.50) to "the box labelled D7447" – The IPCC box was neither labelled nor registered as D7447; there is a pencil marking "D7447" on a single sheet of paper associated with the box but that related to four Actie complaints only. Third, even the civil judgment had this reference at paragraph 677:

> "As the team began to work on the exercise set by the judge it became clear that certain documents were missing. The material in question had the reference numbers D7447 and D7448. D7447 consisted of copies of documents received by LW3 officers from the IPCC in around July 2009 which contained complaints by [John Actie] and the husband of Ms Carole Evans about the conduct of LW3 officers. D7448 were copies of documents received from SWP Legal Services Department."

18.22 The complaints by the husband of Carole Evans (in other words the two witness statements of William Peter Evans) although contained in the IPCC Iron Mountain box containing D7447, were not part of D7447.

18.23 Fourth, several passages during the evidence in the civil trial illustrate not only the confusion and imprecision in operation but also their enduring nature. Three examples will suffice: in cross-examination of Allen, the questioner refers (incorrectly) to "D7448" as being IPCC material, and then later refers (again incorrectly) to D7448 as a "complaint by Mr Evans", whilst Allen (also incorrectly) thinks the questioner must be referring to "D7447", and after further confused exchanges the judge decides the only answer is to adjourn. Later, Coutts is asked about D7447 and it is suggested it involved complaints against him. He, led into error by the question, accepts that understanding. And elsewhere, Dean asks if D7447 and D7448 were recovered from the IPCC and the questioner confirms (incorrectly) that to be correct.

18.24 To identify such errors is not, I emphasise, an exercise in point-scoring or pedantry. The uncertainty that on 28 November 2011 beset the issue of the identification and composition of D7447 and D7448, and the contents of the Iron Mountain box, had its roots in important errors made when this material was first received in 2009; errors which created unnecessary anxiety and confusion over the course of 28 November to 1 December 2011, and which have continued to cause confusion ever since; and errors which illustrate the importance of careful fulfilment of the obligations placed upon investigators in recording, retaining, and revealing material.

18.25 Because of the imprecision that has existed, and in view of the significance of this issue, it is now necessary to describe the Iron Mountain box and its contents in some detail.

18.26 As to the box itself it is a standard sized brown cardboard box: of a type common to the IPCC but uncommon to SWP. The words "Iron Mountain" appear on each of the four sides of the box, and the lid. Attached to the lid of the box by sticky tape (taping the top and bottom edges) is an A4 sheet of paper headed "Rubicon Index 14" and divided into

two typed columns. The first column listed, in individual rows, the references JA/1, JA/2, JA/3, JA/4 and JA/5 ("JA" denoting John Actie). The second column (headed "Descriptor") listed a description of the material corresponding to the "JA" reference. The entry is set out as it appears in the original thus:

Rubicon Index 14

Ref	Descriptor
JA/1	IPCC John Actie complaint – supervised investigation and appeal 2007/000701
JA/2	IPCC John Actie complaint – discontinuance 2007/005114
JA/3	IPCC John Actie complaint – mgd invest. 2005/008326 (and Michael James/ Brenda Borg)
JA/4	IPCC John Actie complaint – supervised invest. 2005/010834
JA/5	IPCc investigator briefing bundle (relates to JA/3

18.27 It is known that it was the IPCC's Chris McCoy who produced this index sheet. He would later tell David Jenkins in the course of a supervised examination of the original and copy IPCC boxes, that he had produced the index sheet, in 2009, to "describe what was in the Box"; and he observes "you will see that the description against JA/1 – JA/5 roughly describe what is contained in the box". As will become apparent, in my view the word "roughly" is both correct and not without significance.

18.28 Before considering the contents of the Iron Mountain box, two further aspects of the box itself bear further consideration. First, in relation to the index sheet I have set out above, it is to be noted that the references JA/1 to JA/5 and the "descriptor" entries have all been highlighted in blue and the word "irrelevant" is written to the right-hand side margin of JA/1 to JA/3 and then crossed/scrubbed out, in black biro type pen. It is now clear that this writing is Haskell's. Nothing is written alongside JA/4 and JA/5. There is no reference on the index to the William Peter Evans witness statements.

18.29 Second, there is a single sheet of A4 paper inserted into the "pocket" formed in the space between the index and the box lid left by sticky taping the top and bottom edge only. This sheet of paper has never been folded and has writing on both sides. The writing on the front page is principally in black biro pen. Haskell has confirmed he recognises the handwriting as principally his. The signature/name "Mark Allen" at the foot of the page has been confirmed by DS Allen as his handwriting and Allen also recognises the inserted word "four" as his handwriting. Finally, the pencil-marked "D7447" at the foot of the page has been confirmed by Carole Williams as being her handwriting, no doubt written by her once she had registered the material on HOLMES in accordance with the description on the page.

18.30 On the other side of the page, there is then the following writing, again in Haskell's handwriting:

> *"24th"* [written in red biro pen];
> [Below that, in black biro pen]:
> *"John Penhale – pervert*
> *Gari Jeffries*

ACC Challi [Cahill]
Tom Davies IPCC"
To the left of Jeffries is a small *"DC"*
Superscript to the J of John Penhale is "DCI"

18.31 The Iron Mountain box itself contained six brown buff folders – four slim folders, and two thicker folders – and their contents. The six folders comprise the material referred to on the index as JA/1 to JA/4.

18.32 **JA/1** relates to the IPCC reference 2007/000701. The copy folder is one of the two thicker buff folders. On the front cover is handwritten "John ACTIE". On the spine of the buff folder is handwritten "Actie, John" the reference "2007/000701" and initials "TD" (Tom Davies). On the front of the buff folder (poking out at the top) has been affixed a small red sticky tab with the handwritten exhibit number JA/1. McCoy is sure this is his handwriting.

18.33 **JA/2** relates to IPCC reference 2007/00514. The copy folder is a single slim (0.3 cm thick) brown buff folder. On the front is handwritten "Referral ACTIE, John. Discontinuance." On the spine is handwritten "Actie, John" the reference "2007/00514" and what appear to be initials "TD" (again, Tom Davies). On the front (poking out at the top) has been affixed a small red sticky tab/file sticker with the handwritten exhibit number JA/2 (again, McCoy's handwriting).

18.34 **JA/3** relates to IPPC 2005/008326 and two linked IPCC complaint files. In fact, JA/3 comprises three folders. The first folder is a buff folder labelled, at the top of the front of the buff folder, in handwriting "Referral ACTIE, John, Received 15 August 05". On the spine is handwritten "Actie, John" the reference "2005/008326" and the initials "TD" (Tom Davies). On the front has been affixed a small sticky tab with the handwritten exhibit number JA/3 (again McCoy's handwriting). The second folder is a further slim buff folder, reference 2005/008334, on the front cover of which is handwritten. "Referral James, Michael Vincent, Received 15 Aug 05". On the spine is handwritten "James, Michael" the reference "2005/008334" and initials "TD" (Tom Davies). On the front there is no tab with a JA/ reference. The third folder is a similar slim buff folder reference 2005/007598. On the front is handwritten "Referral BORG, Brenda, Received 27 July 05". On the spine is handwritten "BORG, Brenda" the reference "2005/007598" and the initials "TD" (Tom Davies). On the front there is no tab with a JA/ reference. It is nevertheless clear from comparison with the index, and from their contents, that the James and Borg folders form part of JA/3.

18.35 **JA/4** relates to IPCC reference 2005/010834. It is a single slim brown buff folder. On the front is handwritten "Referral ACTIE, John Arthur, Received 14 October 05". On the spine is handwritten "Actie, John" the reference "2005/010834" and "TD" (Tom Davies). On the front (not poking out cf. JA/2) has been affixed a small red sticky tab with the handwritten exhibit number JA/4. Inside, the words "may be malicious" had been underlined in red pen.

18.36 If the above is straightforward, matters thereafter become less clear in two respects. First, although JA/5 is recorded as an entry on the index sheet, there was – in the Iron Mountain box recovered from Coutts' office on 17 January 2012 – no folder or file either marked JA/5 or corresponding to the description of JA/5. The most obvious alternative explanations for that are: that JA/5 was not part of the contents of the Iron Mountain box as physically received at St. Athan in July 2009, notwithstanding the reference on the index; or that JA/5 was part of the contents of the Iron Mountain box as physically received in July 2009 but had, by January 2012, gone missing.

18.37 Second, and although not recorded on the index sheet, the box recovered from Coutts' office on 17 January 2012 contained a plain and unmarked brown A4 envelope within which was contained, stapled together, a typed copy of two witness statements of William Peter Evans.

18.38 In relation to the first of these matters, regarding JA/5, because of the lack of record made by DS Allen or the IPCC, and the time that has passed, it is not now possible to be sure of the true position in relation to JA/5. On balance, however, it is more likely than not that JA/5 was not, in 2009, part of the contents of the Iron Mountain box. First, JA/5 was not contained within the copy Iron Mountain box found in Coutts' office on 17 January 2012. All the other material listed on the index was found there. Second, and significantly, neither was JA/5 found within the original IPCC box that Kingsbury initially recovered from the IPCC on 28 November 2011. As I have explained, he had to return to the IPCC subsequently to collect JA/5 which had been kept separately by the IPCC from the other material within the box. When Kingsbury finally took possession of JA/5 in November 2011, it was found to be, as the index describes, an "investigator briefing bundle" which related to JA/3. Third, JA/5 would not have been the only difference in content between the two boxes. The copy Iron Mountain box found in Coutts' office on 17 January 2012 for example did not contain the Fuji video tape in folder marked "7/7/05 Cdff Bay" which was contained in the original Iron Mountain box. And finally, McCoy has not suggested the contents of the Iron Mountain box exactly reflected the index to the box, only that it "roughly described" the contents.

18.39 In relation to the second of these matters, the William Peter Evans witness statements, however confused the prosecution team might become on 28 November 2011, it is known that it was the IPCC (and not PSD) that provided these documents. The most likely explanation for their storage with D7447 and D7448 is that when DS Allen collected the IPCC material from the IPCC's offices towards the end of July 2009, the William Peter Evans statements were simply added to the box for reasons of convenience. Understandable as that may have been as a temporary and convenient measure to transport the material back to St. Athan, it is more than unfortunate that the IPCC material once safely received at St. Athan was not then separated into sensible parts: at the very least, the Evans witness statements as one distinct part and the Actie complaints material as another; there was no connection between them and no good reason for storing them together.

18.40 As the HMCPSI report (paragraph 7.50) concluded, and I agree:

> "It is difficult to understand why the [William Peter] Evans [witness statements were] stored in the same box as the Actie complaints. It referred to entirely different subject matter and should have been given its own D number on HOLMES."

18.41 Indeed, it is especially unfortunate that the William Peter Evans statements were stored in that way when, first, to look at the index attached to the box (on the reasonable assumption that the index purported to reveal all its contents) would reveal nothing of the existence of the William Peter Evans witness statements. And second, the William Peter Evans witness statements were contained within a slim A4 envelope which was itself unmarked, and therefore had become very easy to miss or to overlook. Had careful consideration been given to the issue, it is very difficult to see how, in those circumstances, it would have been thought that the prosecution could properly conduct secondary disclosure or continuing review of such material.

18.42 The next third party to consider is PLSD: the enquiries and visit are uncontroversial and may be taken quite shortly.

18.43 At about the same time as DS Allen was dealing with complaints material held by the IPCC, the LW3 investigation was engaged in considering civil claims material held by SWP. As the IPCC report establishes, and as was apparent upon inspection of the box recovered from Coutts' office in January 2012, at least some of the civil claims material would come to be stored together with the IPCC material in the Iron Mountain box. The known chronology is as follows.

18.44 On 22 July 2009, SWP lawyer Rachel Davies sent an email to DS Allen which referred to a "recent meeting" at which Haskell and DS Allen had attended. It follows that by the time DS Allen and Lane had visited the IPCC, the material held by the PLSD in Bridgend had been viewed by DS Allen and Haskell. The PLSD email refers to DS Allen's confirmation at the PLSD visit that the LW3 investigation required five LW3 claim files, and observes that: "From these files you have requested copies of all the Pleadings and substantive correspondence i.e. letters of claim, substantive letters in response and letters addressing any disclosure etc."

18.45 The five files or groups of LW3 civil claims material from PLSD were placed in a single lever arch file and were collected by DS Allen from PLSD Headquarters, Bridgend and taken to St. Athan on or shortly after 28 July 2009. There is no uncertainty about the material supplied by PLSD and received at St. Athan: the material was provided under covering letter dated 28 July 2009 which identified the material.

18.46 Nothing in the letter suggested that PLSD required the creation of a firewall, or that PLSD sought assurances in relation to the storage of the material or access thereto. The only qualification placed on the use of the material was the redaction of confidential details prior to any future disclosure. As is known, however, Allen considered it wise to treat this material as sensitive in the same way as the IPCC material. Such conclusion by Allen was prudent and beyond criticism.

18.47 There is a final third party which is relevant – even though it was not the source of any of the material contained in the Iron Mountain box, and even though, therefore, it was not the source of any of the material that would come to be registered as D7447 and D7448. That third party is PSD. As referred to in the previous chapter, a clue to the relevance of PSD may be found in DS Allen's witness statement made on the morning of 29 November 2011 (indeed, it was his visit to PSD on 19 August 2009 to which he specifically referred in that witness statement and only that visit); but it is not a clue that was scrutinised at the time, and has not been scrutinised in previous investigations. It is important therefore to understand where, if at all, the PSD material fits in.

18.48 Examination of DS Allen's pocket notebook reveals that at 10.00am on 19 August 2009, he visited PSD, almost one month after he had visited the PLSD and the IPCC. There is no evidence that DS Allen was accompanied on this visit and both Allen and David Jenkins of the PSD believe that Allen was not accompanied. Insofar as Haskell now believes he might have attended, I am satisfied that he is mistaken and that the confusion lies in the fact that he did visit PLSD, as I have set out, in July 2009.

18.49 From documents held by PSD it is possible to identify both the material DS Allen inspected at PSD on 19 August 2009, and the material that DS Allen requested. Of the material

inspected, it is known that he requested the Jones Briefing Paper, the author of which was the then head of the PSD, Chief Superintendent Tim Jones. The Jones Briefing Paper contained summaries of numerous complaints received by PSD including those of William Peter Evans and Carole Evans. The fact that Evans complaints material was referred to within material at both the PSD and the IPCC is significant and would later cause confusion.

18.50 The Jones Briefing Paper was received at St. Athan on 20 August 2009, Allen having collected it.

18.51 Following DS Allen's visits to the PLSD, the IPCC and the PSD, what is known of what happened to the material? The known chronology may be summarised as follows. First, in late July 2009: the IPCC Iron Mountain box of material and PLSD lever arch file of civil claims material were physically received at St. Athan on separate days but in close succession. Second, on 4 August 2009: from the IPCC material, Rowlands created an E-Catalogue referring only to some of it as items 1 to 4. Third, on 12 August 2009: Haskell made disclosure decisions on items 1 to 4 of the E-Catalogue. Fourth, on 18 August 2009: Williams registered material as D7447 and D7448. Fifth, on 20 August 2009: the PSD material was received at St. Athan. Sixth, on 28 August 2009: Allen updated HOLMES entries for D7447 and D7448.

18.52 As to the fifth of those matters, and in view of the question Penhale had posed of the IPCC, which I have set out in chapter 17, namely whether there existed a PSD/Tim Jones document, I invited SWP to make enquiries first of HOLMES, and second, physically of St. Athan, to seek to establish what had become of it. The fact that no one has appeared ever to have answered Penhale's question, and its obvious importance, placed some urgency and prominence on these enquiries. In consequence of them, it is now clear that like the William Peter Evans witness statements, the Jones Briefing Paper was not registered on HOLMES as part of the LW3 investigation. Plainly it should have been and that is a further error. But unlike the William Peter Evans witness statements, the Jones Briefing Paper has not been found at St. Athan.

18.53 I have no doubt, as I explain in further detail below, that in view of the contents of the Jones Briefing Paper, it too (correctly) was considered as sensitive, and it too fell foul of LW3's inability properly to manage sensitive complaints material. I equally have no doubt that the failure to register and document the Jones Briefing Paper was as a result of a failure of understanding on the part of Allen of his disclosure obligations rather that any malicious desire to withhold it from the defence.

18.54 Consideration of the Jones Briefing Paper itself reveals reference to appendices (marked A to O), although I note, first, the appendices are not referred to in the description of the material provided by PSD to LW3 and, second, it is David Jenkins' clear recollection that the appendices were not and would not have been provided to LW3. The significance of that particular point is that the appendices contain documents with numerous references to Carole Evans and William Peter Evans, and Appendix H, for example, contains the two William Peter Evans witness statements; and it follows that had the appendices been provided to LW3, there would at St. Athan have been not only a copy of the William Peter Evans witness statements from the IPCC but a copy also from PSD. In the event, the complaints were summarised in the Jones Briefing Paper.

18.55 As the IPCC and HMCPSI recognised, the treatment of the material received by LW3 at St. Athan from the IPCC and PLSD was different from the established HOLMES and

MIRSAP process in important respects. To that may now be added the Jones Briefing Paper. First, the material was taken not to the dedicated area (the "Major Incident Room" or "MIR") at St. Athan which would have been the usual and proper destination for any material received by the investigation, to be placed in a tray awaiting formal "receipt" by a "Receiver"; instead the material was taken by DS Allen to the office he used, the Lead Disclosure Officer's office. Second, because in so doing DS Allen took it upon himself to act as "Receiver" in relation to this material, DC House who was the Receiver on LW3 was effectively removed from the first stage of the MIRSAP process. Third, and at a stage when the material had not been registered, to the material received from the IPCC in the Iron Mountain box, DS Allen added the lever arch file containing the PLSD civil claims material; it is not precisely clear when, but it is clear that if it was not added immediately upon its receipt in July 2009, it was added shortly thereafter. And fourth, some of the IPCC material came to be considered by a disclosure officer, and submitted on an E-Catalogue to Haskell, before it had ever been formally registered on HOLMES, whereas registration on HOLMES should always be the first step in the process.

18.56 In view of the significance of this to the events of 28 November 2011, the fourth irregularity warrants consideration in a little detail here. On Tuesday, 4 August 2009 (at 9.08am), DS Rowlands completed an E-Catalogue for some of the IPCC material that had been contained in the Iron Mountain box. The E-Catalogue did not list all the material received from the IPCC, as it did not include, first, the material identified on the index to the box as JA/2 and which was in the box (there is no sensible explanation for this omission and I am satisfied its inclusion was likely overlooked on the E-Catalogue, in error, an error known to have been later rectified when D7447 was registered on HOLMES); or second, the material identified on the index to the box as JA/5 (which, as I have already found, was unlikely to have been included in the box). Nor did the E-Catalogue list the civil claims material from PLSD. I note that Rowlands has no recollection of seeing the civil claims material when he submitted the E-Catalogue.

18.57 A fifth and linked irregularity, which flowed from the first, and the sequence in which the material was considered, was that it was not possible for Rowlands to enter the HOLMES reference numbers for the four items in the document number column of the E-Catalogue for the very obvious reason that no HOLMES numbers had then been assigned to this material. This would later cause unnecessary anxiety, and contributed to the confusion evident in the prosecution attempts on 28 November 2011 to reconcile the material described on the E-Catalogue as items 1 to 4, and the material later registered on HOLMES as D7447 and D7448.

18.58 Sixth, although the general rule was that an E-Catalogue would be submitted wherever a disclosure officer considered material was, or may be, disclosable (and only then), analysis of the E-Catalogue for items 1 to 4 suggests that the general rule cannot have operated in relation to these items, because for items 3 and 4, Rowlands observed that they appeared (positively) to be irrelevant and therefore should never have appeared on an E-Catalogue. Rowlands described item 1 as: "Statement of complaint Peter Evans. Makes complaint re search of premises and arrest of wife Carole Evans. Complains about D/Supt Penhale, ACC Cahill, Tom Davies IPCC and DC Jefferies and the Police Authority." Logic dictates that item 1 must have been the two witness statements of William Peter Evans. For item 2, Rowlands wrote: "Complaint of racial abuse by Police officers towards John Actie towards October 2005. Appears to undermine Acties credibility as complaint appears to be malicious and

investigating officer suggested in a report of considering prosecuting Actie for wasting Police Time". Item 2 was JA/4.

18.59 For item 3, Rowlands wrote: "Complaint following drug search of John Actie 3 October 2006 alleged false imprisonment, assault, use of force and abuse of authority etc against searching officers and appeal against finding of no case to answer (appears to be irrelevant)". Item 3 was JA/1.

18.60 For item 4, Rowlands wrote: "Complaint July 05 of assault after being sprayed with CS Spray Louisa Place after being requested to assist police by Supt Bob Tooby (appears to be irrelevant)." Item 4 was JA/3.

18.61 Seventh, Haskell had unusually been consulted even before he came on 12 August 2009 formally to assess the material submitted to him on the E-Catalogue. In interview with the HMCPSI, Haskell was able to recall, albeit vaguely, that he had a conversation with Rowlands about some of the contents of the Iron Mountain box and had offered his assistance in assessing it. Haskell's handwriting on the index to the box alongside JA/1 to JA/3 (each marked "irrelevant"), and the description of the Actie complaints material for the purposes of registration on HOLMES in Haskell's handwriting would tend to support that recollection.

18.62 By 12 August 2009, it is known that Haskell had reviewed the four items formally because that is the date of Haskell's signature on the E-Catalogue. He made detailed endorsements about his assessments of the documents in the "comments" column of the E-Catalogue. He described item 1 – the William Peter Evans witness statements – as being "not relevant to the current prosecution" because there "is nothing to suggest that the credibility of those individuals [in other words the LW3 police officers against whom complaints had been made by William Peter Evans] will be in issue in the ongoing proceedings". Those individuals included Coutts and Penhale. Haskell confirmed that there was "no need to schedule" item 1 (meaning no need to include it on the MG6C – it being irrelevant to the investigation) but that it would have to be reconsidered if the credibility of the named police officers became relevant.

18.63 As for item 2 – an Actie complaint (JA/4) – Haskell accepted that it was relevant and that it should be scheduled on the MG6C but was "unconvinced" that it did in fact undermine Actie's credibility and, therefore, concluded that there was no need to disclose it. Haskell's final comment on item 2 was that: "It can be re-assessed if it is apparent from DCS (defence case statement) that Actie's credibility is in issue".

18.64 Haskell assessed items 3 and 4 (JA/1 and JA/3) – two further Actie complaints – as again being "relevant" because Actie was a prosecution witness and that, therefore, they had to be scheduled on the MG6C but he concluded that like item 2, they were not disclosable.

18.65 Whether assessed by Haskell as irrelevant and not disclosable (item 1) or relevant and not disclosable (items 2 to 4), these documents would still have needed to be registered on HOLMES and Haskell's comments did not amount, and cannot sensibly have been interpreted to amount, to advice that the material did not require to be so registered. Indeed for each of the items, Haskell's assessments were not final, in the sense that each would require reconsideration in light of defence statements at the secondary disclosure stage. That item 1 was not registered was a significant error the responsibility for which must lie with Allen as the Lead Disclosure Officer who had taken responsibility for

"receiving" the material in an unusual way, as I have described, and thereafter storing this material. There was no good reason for the material not to have been registered.

18.66 It is not clear why Haskell should have marked the margin of the index on the box listing JA/1 to JA/3 as "irrelevant" yet at the E-Catalogue stage, JA/1 and JA/3 were assessed as "relevant" following assessment. However, as the writing was crossed out, it would be a mistake to read too much into this; perhaps he simply changed his mind.

18.67 Following his involvement in advising as to disclosure of the E-Catalogue material, I am satisfied that Haskell was not involved in giving advice either as to whether the material required registration or where the material should be stored. He has said, and I accept, that his expectation was that, following his advice, the material would have been submitted to the MIR to be processed, and that it would have been stored in the MIR.

18.68 All that can be added to the above is that when Haskell was interviewed by HMCPSI, he said that he would not have expected the PLSD material D7448 to have been kept in the same box as D7447. He evidently had some knowledge of and involvement in relation to that material because he had visited PLSD with Allen, and it is likely that he advised that it was relevant but not disclosable without the need for an E-Catalogue to be submitted in relation to it, but there can be no suggestion that he played any part in deciding that it should be stored as it was.

18.69 Six days later, and some seven weeks or so after its physical receipt at St. Athan, the Actie material from the Iron Mountain box, and the PLSD material (by now also in the same Iron Mountain box), was registered at St. Athan by the Indexer Carole Williams on 18 August 2009. The normal procedure was that the Indexer who sat in the MIR would be given the material itself, once it had been processed by the Receiver also in the MIR (who would place it in the Receiver's out tray/registration tray). The Receiver would typically attach to the material a document containing the Receiver's description of the material, and any instructions. The Indexer would copy that description, and carry out any further instructions indicated by the Receiver as being necessary. The material would then be assigned a unique HOLMES reference number and would, for the first time, have an electronic footprint in the MIR and in the investigation. As Williams put it: "The audit trail on HOLMES in respect of "other documents" will only commence when the indexer initially registers the documents on the database".

18.70 The descriptions Williams placed on HOLMES for the material were as follows. First, the Actie complaints material was described as "18/08/2009 Independent Police Complaints Commission document regarding complaints by John Actie against South Wales Police" and registered as D7447. Second, the PLSD material was registered as D7448 and described as "18/08/2009 five files in relation to civil claims against South Wales Police by John Murray, Carole Evans, Michael Daniels, Erica Coliandris and Adrian Morgan".

18.71 It is clear from the sequential HOLMES "D" numbering and the timing of the entries that Williams registered D7447 and D7448 consecutively, one immediately after the other. In her witness statement to the IPCC, Williams suggested that it was more likely than not that she had the "actual documents" when she registered D7447 and D7448. The suggestion was the result not of any positive recollection she had of dealing with the material but the fact that she had "inserted quite a lot of information and cross references at the time of initial registration". Looking back now, Williams does not now believe that the suggestion, understandable as it was, necessarily follows. And I am satisfied, given the sensitivities which

attached to the IPCC material in particular, and DS Allen's treatment of it, that it is more likely than not that Williams was not in fact provided with the "actual documents" but was provided with information sufficient for her to make a meaningful description on HOLMES rather than the Iron Mountain box. I note that neither the box nor any of its contents is in fact endorsed with the relevant HOLMES registration number. The only clue to Williams' involvement from the box itself is the pencil-marked endorsement of D7447 on the A4 sheet of paper containing Allen and May's handwriting, and suggests that she was given that document instead of the Actie complaints material itself.

18.72 Haskell had determined that the two William Peter Evans witness statements were irrelevant to the investigation (as matters stood in August 2009). And, as I have explained, whilst it followed that they did not have to be scheduled, it did not follow that they did not have to be registered on HOLMES: all material whether assessed to be relevant or irrelevant needed to be registered on HOLMES. From the now extensive enquiries that have been made by SWP, and I am assured and must accept that the interrogation of HOLMES has been comprehensive and complete, it seems plain that the two William Peter Evans witness statements were not registered on HOLMES, whether as a separate "D" document (as they should have been) or as part of either D7447 or D7448.

18.73 No one then could possibly have expected the confusion the two William Peter Evans witness statements would later cause; a confusion that arose simply because those witness statements: were not registered on HOLMES; were listed on the same E-Catalogue as items 2 to 4; and were located in the same Iron Mountain box as D7447 and D7448. It is understandable how those who would come to consider the material on 28 November 2011 (and ever since), would make either or both of the following errors of reasoning. First, that because Carole Evans was named in the civil claims material registered as D7448, and located in the Iron Mountain box, the William Peter Evans witness statements must have been part of or been intended to be part of the material registered as D7448, and must have originated from a common third party source namely the PSLD.

18.74 And second, the alternative line of reasoning was that because the William Peter Evans witness statements were in the Iron Mountain box of material that had come from the IPCC, and because Actie material from the IPCC box was registered as D7447, the William Peter Evans witness statements must have been part of or were intended to be part of the material registered as D7447.

18.75 In fact, it is plain now that the William Peter Evans witness statements did not form part of either D7447 or D7448. The two William Peter Evans witness statements had, in substance, nothing whatsoever to do with the Actie complaints. The only link was that both sets of documents had come from a common source, the IPCC. That, however, was no reason to consider that the Evans material must have been part of or was intended to be part of the material registered as D7447 (especially in circumstances in which the description of D7447 said nothing of the Evans witness statements).

18.76 Haskell's E-Catalogue endorsement for the Evans witness statement (singular though obviously a reference to both of them) was that it was irrelevant and therefore did not need to be scheduled. It would have been perverse in those circumstances for his advice to have been ignored and for the statements to have appeared as part of the Actie material about which he had reached a contrary conclusion.

18.77 Haskell was involved in the description of the material that, when registered, would form part of D7447; and as he told the HMCPSI, he would have made sure – had he intended the Evans witness statements to form part of that HOLMES reference number – that the description he contributed to would have included them.

18.78 Once Williams had registered the material, she had no further involvement in connection with the material until February 2010 when it was sought by DS May and could not be found. I am satisfied that the material remained, from July 2009 to his departure from LW3 in December 2009, with DS Allen. Had the usual procedure been followed, once Williams had registered the material, it would then have been provided to the Reader, and, there might have been further steps such as, for example, typing, reading, and further indexing.

18.79 More importantly, had the usual procedure been followed, the Office Manager would have been required to review the previous steps and if satisfied the material had been correctly dealt with, would have approved it for filing. The standard "document instruction form" contains a box for the Office Manager's initials to be entered by way of confirmation that he has approved the treatment of the material. In view of the unusual way this material was handled, I am satisfied the Office Manager was bypassed. It follows that whereas ordinarily material would pass through a carefully prescribed route and a number of hands, that was not the case here.

18.80 Had the ordinary process been followed, the registered material would have been filed in a designated alcove in the MIR office and, only at that stage, would have become available for assessment by a disclosure officer.

18.81 Although MIRSAP makes no specific provision for the manner in which material should be physically filed or stored, the system in place in LW3 at St. Athan was for registered documents to be filed in numerical sequence and kept within clear plastic sleeves in lever arch files on the alcove shelves. I have addressed this in chapter 17 in relation to the steps Kingsbury took on 28 November but summarise the general position here. The lever arch files were then marked with the numerical content of the file (for example, a file might be marked on its spine "D1-D50") and as the enquiry grew so the MIR became lined with files of registered material. If any item of registered material was too large to fit in a plastic sleeve within a file, there would be a reference on the index at the front of the file which would indicate that there was a "stand-alone box" containing the material.

18.82 The next recorded date on which any step was taken in relation to the material is 28 August 2009. On that date, DS Allen performing the role of Disclosure Officer, "updated the disclosure record" on HOLMES for D7447. In a five-minute period between 11.26am and 11.31am he entered on the HOLMES database a fuller description of the material; and he also updated disclosure sensitivity and disclosure criteria and added disclosure notes.

18.83 The original entry made by the indexer Carole Williams had limited detail, it referred simply to "complaints by John Actie". That is not a criticism of Williams because first, the role of the Indexer is simply to register material in accordance with the "Receiver's instructions" copying the title the Receiver had given and second, there would be opportunities for a fuller description to be added by the Reader and Disclosure Officer later in the process.

18.84 DS Allen entered on HOLMES a more detailed description of D7447 as follows:

> "Material from IPCC relating to four separate complaints by John Actie against the South Wales Police. First complaint (July 2005) when he was sprayed with CS Spray [this complaint corresponding to JA/3 on the index to the box, and item 4 on the E-Catalogue]; second complaint (October 2005) when he was allegedly racially abused [JA/4 and item 2]; third complaint (October 2006) when he was subject to stop and search [JA/1 and item 3]; and fourth complaint (April 2007) when he was allegedly verbally abused [JA/2 and not on the E-Catalogue]. All complaints were unproven."

18.85 This description accorded with the description handwritten (largely by Haskell) on the sheet between the box lid and index.

18.86 On the same day, DS Allen also updated the HOLMES entry for D7448 by adding further details to the description of the documents, which read as follows:

> "Five files which relate to Civil Claims brought against South Wales Police by John Murray, Carol Evans, Michael Daniels, Erica Coliandris and Adrian Morgan in 2008. The claims allege false imprisonment and personal injury. Each file contains documents including a claim form, consent order and correspondence between the parties. All civil claims have been stayed pending the outcome of the criminal proceedings."

18.87 HOLMES required an entry to be made identifying the location of the registered material and for both D7447 and D7448 this was shown to be the "Incident Room St. Athan". This was the default location on HOLMES for the location of documents and as clear an example as might be expected of the dangers of default settings. This of course was a further irregularity, as the material was not then, and I am satisfied was never, located in the Incident Room (the MIR) at St. Athan.

18.88 I have set out above in some detail how the material was dealt with – in particular by reference to the ordinary way in which material might be processed on HOLMES and in accordance with MIRSAP – to illustrate the unusual way in which this material was processed and treated. The important question that follows is why was the material dealt with in that way? Different possible explanations have been offered ranging from the pressure of work on the Indexer Carole Williams to the informality of the arrangements that were said to be a consequence of Haskell's regular presence at St. Athan. I am satisfied, however, that the reason for DS Allen taking the unusual course that he did lies in the sensitivity of (at least some of) the material.

18.89 I have already touched upon the firewall requirement imposed by the IPCC. The following points bear recalling. First, the IPCC requested – both in correspondence with SWP, and then at the visit to the IPCC's office – the creation of a "firewall" in relation to complaints material relevant to the credibility or reliability of police witnesses. Second, the firewall required by the IPCC was not, on the face of McCoy's letter, limited to police officers or staff within LW3 "to whom the material relates" but extended to "any police officers or staff within South Wales Police". Third, the practical implementation of the firewall was left to SWP to determine: there was no formal IPCC or SWP policy or arrangement between the two and the IPCC, understandably, did not stipulate how SWP was to achieve that firewall or how the material provided was to be managed or where or how it was to be stored.

18.90 Much was made in the civil trial of the "assurances" that Allen stated he had given to the IPCC in his civil witness statement. I am satisfied that, like the word "firewall", "assurance" can suggest a degree of formality that was never present. It is more likely, in all the circumstances that Allen simply gave the IPCC some "reassurance" or "comfort" that the material would be dealt with by appropriate separation at St. Athan. As Allen put it when giving evidence: "The best assurances that I could sort of recall is that I would be treating them or keeping them away from anybody that might have access to those documents" by keeping the material in his office, separate from other documents, but not "under lock and key" and "people [would probably] have been able to get access to them just by walking into the office and taking them" should they have wished to. On any view, of course, such an arrangement was inadequate.

18.91 It is against that backdrop that the steps taken and the decisions made concerning the material must be considered. What emerges, as will be apparent from that consideration, is a picture of good intentions coupled with non-observance of the set procedures in MIRSAP and, more generally, confusion, inadequate care and perhaps above all else, an absence of common sense. Common sense is the solution to many a problem but it was markedly missing throughout these protracted events.

18.92 Amongst the good intentions was the decision to store material outside the MIR, where it might have been accessible to those who, in view of the firewall requirement, should not have had access to it. In view of the sensitivity about some of the material, it is understandable that DS Allen would not have considered it a sensible course simply to leave it in a box in the MIR to be passed to the Receiver and on through a series of further hands (including necessarily the Indexer, Officer Manager, and Disclosure Officer) and for it to be otherwise generally accessible in the MIR, an unlocked room accessible to all on the LW3 investigation. Second, it is equally understandable, even though PLSD did not expressly require a firewall in relation to the material it had provided, that DS Allen nevertheless considered it should be treated in the same way as the IPCC material and should therefore be subject to a firewall. As he said in a witness statement to the IPCC, "given the sensitive nature of the complaints against current members of the investigation team contained within these documents" he "considered it necessary to maintain a "firewall" between the documents and other members of the team".

18.93 Of the IPCC material, there was in truth no particular sensitivity in relation to the Actie complaints material (the complaints were not against LW3 police officers and the complaints had, in any event, been discontinued or otherwise resolved), and yet DS Allen subjected it to the same precautions.

18.94 The position in relation to the two William Peter Evans witness statements was different. As McCoy has explained, William Peter Evans was "insistent that details of his complaint should not be disclosed to the LW3". McCoy was faced with a position in which, on the one hand, the maker of a complaint had sought to impose a restriction on its onward disclosure, and on the other hand, the complaint itself appeared to be relevant to the investigation and had been requested by LW3 in order that it could be considered for the purposes of disclosure.

18.95 Those are the good intentions. What of the inadequacies? First, there was no formal, considered or settled "policy" regarding the treatment of sensitive complaints material; Coutts' policy book contained no such policy but should have. Second, the way the treatment of the material was considered only after its receipt at St. Athan showed a

remarkable lack of forethought especially bearing in mind the very nature of some of it. Third, as already noted, common sense and good judgement were in short supply: even without a policy, a firewall should not have been difficult to implement, record and manage. So far as the firewall was to apply to "any police officers or staff within South Wales Police" who were the subject of complaint, that requirement could be met simply by storing the complaints material anywhere at St. Athan: a geographically isolated, remote, well secured, RAF base to which there was little prospect that SWP officers unconnected to LW3 would be permitted access. So far as it was to apply to "any police officers or staff within LW3" who were the subject of complaint, that requirement could be met by storing the material in any secure manner at St. Athan (for example in a safe or locked cupboard). On any view, the firewall in fact implemented – storing the material in an unsecured box in an unsecured room without record of its location – was wholly inadequate and did not in any shape or form resemble a firewall.

ALLEN'S CONVERSATION WITH COUTTS

18.96 In his witness statement to the IPCC dated 6 March 2012, Coutts stated that he had not seen the documents he discovered in his office on 17 January 2012 (D7447 and D7448 and the William Peter Evans witness statements) before that date and, leaving aside the fact the material was found in his room, there is no reason why, as SIO, he should have read, or even seen, the material before that date. Coutts says he had not seen the documents before finding them and I accept that. May has confirmed that Coutts "did not really get involved in disclosure at all" and the civil judgment, at paragraph 668, supports that. Coutts continued in his witness statement to the IPCC:

> "I do however vaguely recall a conversation with DS Mark Allen which I believe occurred sometime in 2009 in respect of material involving complaints against myself, DCI John Penhale and DC Gari Jeffries (now retired).
>
> DS Allen informed me that the aforementioned copy material had been recovered from the IPCC as part of the third party disclosure process. I recall asking him to confirm:
>
> 1. That the copy material had been secured and that the originals were with the provider in this case the IPCC. He confirmed this.
>
> 2. That the material had been registered and assessed by Lynette White 3 Disclosure Officers and Mr Haskell. He confirmed it had.
>
> 3. That third party letters been served, to ensure the Originals were retained by the IPCC. He confirmed that they had.
>
> As the material involved complaints against myself and other members of the Lynette White 3 Team I recall giving an instruction that the copy material was not to be retained in the MIR. I instructed this as to maintain the integrity of the complaints process against myself and the other Officers.
>
> As an experienced SIO I have never known complaints material in respect of the Investigation Team to be retained in the MIR of the same Investigation Team. The copy of such material following assessment and scheduling would normally be returned and retained by the third party, IPCC/PSD, with the original documents. The disclosure schedules and HOLMES database would reflect that position."

18.97 If Coutts' recollection is accurate, he must have been referring to the two William Peter Evans witness statements provided by the IPCC in which complaints were made against Coutts, Penhale, Jeffries and others. And Coutts now considers that to be so. There had, of course, been no suggestion that material from PSD was either missing or destroyed.

18.98 In his witness statement dated 21 November 2014 in the civil proceedings at paragraph 36, Allen has said:

> "I discussed the material [from the IPCC] with Chief Superintendent Coutts and in particular, the statements of William Peter Evans containing details of complaints against current members of the re-investigation team, due to the obvious sensitivity surrounding its presence within the building. Due to the passage of time I cannot provide any further detail of the conversation. I am unable to recall the outcome of the conversation."

18.99 A police officer's lot is such that receiving complaints is not unusual though it seems that other officers were not aware in any detail of Coutts' method of dealing with complaints material.

18.100 When I interviewed Coutts, he confirmed that there was no policy in LW3 in relation to sensitive material. He said, as he had said to the IPCC, that he gave an oral "instruction" to DS Allen who was the Lead Disclosure Officer at the time. He accepted that it had not been written or recorded anywhere as a policy, not even in his SIO policy file which is where policies of this importance and nature should have been recorded. He said he considered that the issue was "self-evident".

18.101 When I put this suggestion to Allen he was visibly shocked and said he had no recollection of ever having received from Coutts an oral instruction to register and then return sensitive complaints material to its third party provider, and if he had received such an instruction, he would have complied with it. He repeated to me that he could recall only one conversation and one document but, of course, in his witness statement in the civil proceedings, Allen accepted that although he could recall the conversation, he could not recall its outcome.

18.102 Leaving aside, for the moment, the wisdom of receiving copy material only then to return it to its third party provider, I have no reason to doubt that Coutts, in his mind, wanted sensitive material to be stored outside of St. Athan. There is also no doubt that Allen and Coutts spoke in either the summer or early autumn of 2009 about sensitive material and what was to be done with it. The issue is what the material was and what was said. In considering that issue, the following basic observations should be borne in mind. First, in his witness statement to the IPCC, Coutts does not suggest that he did positively instruct Allen to return the material, or any material. Whatever he said amounted, as he recalled, to an instruction that the material was "not to be retained in the MIR". Although in the civil trial, Coutts did refer to an instruction to return at one point in his evidence, I am not satisfied that he instructed Allen in terms to return the material. Second, whatever experience Coutts possessed as an experienced SIO, Allen did not possess as an inexperienced disclosure officer appointed, for the first time in his career, to the role of Lead Disclosure Officer. Third, if Coutts had given a clear instruction to Allen that the material should be returned, then there is no reason to consider Allen would not have followed it, and one might have expected that the William Peter Evans witness statements at least and probably D7448 (and D7447) would have been returned to their respective providers but they were not. Fourth, it cannot be assumed the conversation between Coutts and Allen would have been formal or detailed.

18.103 Coutts did not initiate the discussion with Allen, it was Allen who approached him for guidance. I am satisfied that Coutts made clear the material was not to be retained but whatever precisely Coutts did say, it cannot have been said clearly enough or with sufficient emphasis to convey what was in his mind namely, that the material should be returned. In the civil trial it was put to Coutts:

> Q: […] Care had to be taken, no doubt, to ensure that the relevant officers did not see the complaints. Would you agree?
>
> A: I would agree, yes.
>
> Q: You therefore gave an instruction that they should not be retained within the major incident room, correct?
>
> A: Yes, I did, yes.
>
> Q: As a result, they were originally stored in DC Allen's office. Correct?
>
> A: Sorry, I gave an instruction that they weren't to be retained after they'd gone through the HOLMES process and after consideration. There was a point in time they would have been with DS Allen and with James Haskell but certainly, not, I don't know where they were kept. I only found out later from reading these sort of statements as to the process that had been adopted.

18.104 It is significant in my view that Coutts has accepted he considered the issue to be "self-evident" and that it required no more than an oral instruction; there was no formal policy and I suspect, little formality at all. Perhaps he considered that his approach was also self-evident to Allen. That was a mistake.

18.105 Even if the instruction to Allen *had* been clear, by giving it to Allen alone there was a danger that it would not survive Allen's tenure as Lead Disclosure Officer and, in particular, would not be known by those who followed him. As will be apparent when I come to secondary disclosure below, that was a very real possibility (some might say a virtual certainty) that in fact would come to pass.

18.106 There must remain a prospect, however, that a conversation between Coutts and Allen about what should happen to sensitive documents at the very least *might* have been responsible for that part of May's note that records Allen as having said that he had been instructed by Coutts to "get rid" of complaints material, Coutts having meant "to remove from the premises" and Allen's recollection being somewhat dulled by time. Indeed, it is in my view the likely explanation. An instruction that something should not be retained admits of two possible interpretations: "retained at all" or "retained in its current location". And it is likely that when Coutts told Allen that such material should not be retained, he did so in a way that was capable of misinterpretation. It is at this remove of time simply not possible to be satisfied of the precise language, but there are any number of ways the point could have been expressed and misunderstood. Had a more experienced Lead Disclosure Officer been appointed, the prospect of misunderstanding would, I am sure, have diminished: if there had been a concern that the instruction was unclear or unusual, it would have prompted at the very least a request for clarification. But Allen was not experienced, and may very well have felt that there was no reason for concern. The original material was always with its third party provider and would not be lost.

18.107 That in my view may very well explain what happened to the Jones Briefing Paper from PSD and it is likely that it was that document, referring as it did to William Peter Evans, that has become confused as the subject matter of the Coutts/Allen "instruction to shred" conversation. And whilst I have no doubt the conversation should not have been conducted in the way I consider it is most likely to have been on such an issue, it is a long way from the worst fears that might be held. As will be apparent, I am not satisfied that Coutts issued an "instruction to shred" such material. The evidence I have received from others of his character; his treatment of other material (for example the Morris Memo); the circumstances of the conversation with Allen and the scope for misinterpretation; all tell against such an instruction. Dean QC told the HMPCSI: "I found him to be one of the most honest and straightforward men that I have ever worked with". And in the civil trial, in the context of his belief at the time that "it was more likely to be cock up than conspiracy", Dean said "I had known Chris Coutts for five years or more and I had absolute confidence in his integrity"; he had not, as was suggested, "lost faith" in Coutts. Haskell, similarly, from everything he knew of Coutts, said his "instinct" was that it was "not something [Coutts] would do". No one has suggested that they have ever received a similar instruction to that which Allen understood he had received. And May has said there was never any direction from the SIO or the Deputy SIO to "hold back" material.

18.108 As to the wisdom of the "practice" Coutts describes, he has said to the IPCC, and repeated to me, that storing sensitive material elsewhere was commonplace in the police force. That, it seems, was not the general experience of other police officers in LW3 and the wisdom of the practice is questionable. A safe or locked cupboard was not beyond the budget of this investigation (indeed there was in fact a safe at St. Athan though it was in Coutts' office) and a safe or locked cupboard is where this material should have been kept. Apart from any other reason, it is important to ensure that the "D" documents are retained in exactly the same state in which they are received. There are obviously degrees of sensitivity and in exceptional cases, of which this was not one, it may be necessary to keep certain documents in highly secure premises away from the MIR, but this does not in any sense negate the need to put them through the registration and disclosure process and clearly to record where they are; it is not difficult and must never be repeated.

ALLEN'S CONVERSATION WITH MAY

18.109 DS Allen left the LW3 investigation on 4 December 2009. Such was the effect of LW3 that he like other officers who left LW3 had to be provided with an "exit strategy" and for Allen it resulted in his movement to PSD, the SWP Professional Standards Department. Allen is unable to assist with the movement or location of the material after he left but he is as certain as he can be that when he left, the Iron Mountain box (in other words the box containing D7447 and D7448 and the two Evans witness statements) was still in "his" (the Lead Disclosure Officer's) office at St. Athan.

18.110 It was DS May who took over from Allen as Lead Disclosure Office.

18.111 It is important to note that there was no proper "handover" from Allen to May around that time and such information as Allen gave May plainly did not extend to his, Allen, informing DS May of the existence of the Iron Mountain box. Although of course May was not new to the investigation, he cannot have known of material which DS Allen had considered (as he would explain in his witness statement dated 29 November 2011) "too sensitive to put through the incident room". In my view, DS Allen was under an obvious obligation to

inform DS May, especially when the location of the material or the rationale for its storage in his office was nowhere recorded; there was no wider knowledge of the location of the material (there is no suggestion by Allen, or anyone else, that anyone other than Allen knew the location or that he had informed them of the location): Allen was, in effect, its private custodian; and the material would, as Allen ought to have appreciated as Lead Disclosure Officer, require to be reviewed at secondary disclosure and thereafter in the course of the prosecution's continuing disclosure obligations.

18.112 If there was any remaining doubt about that, the fact that May contacted Allen in February 2010 to enquire about the self-same material, in my view, disposes finally of the point: if DS Allen had informed DS May, May would have had no reason to call as he did. And it is unfortunate that Allen did not tell May because if he had done so, the issue of the missing material would never have arisen. As it is, because DS Allen did not inform DS May and indeed did not inform anyone of the location of the material when he left, or take any other step to ensure the maintenance of the firewall, the trail runs cold. All that can be said about the Iron Mountain box, as Allen has said, is that it is "most likely that it had been somewhere within the incident room complex at RAF St. Athan" until recovered from Coutts' office in January 2012. No one has suggested any sensible explanation for the movement of the material to Coutts' office, or when that movement might have happened. In the civil trial, Allen was asked and said he did not know how the material was found in Coutts' office. Coutts was also asked and said the same. It is now far too late to discover who moved it and why it was moved. It is important to note that Coutts' office was neither locked nor inaccessible, that he was not based at St. Athan during the trial, and that the box was only moved a very short distance – about 15 metres.

18.113 It had been decided that all material should be scanned and on 24 February 2010, DS May was auditing within the MIR at St. Athan in readiness for a further submission of material to the scanning company, Impact Marcom, when he came to D7447 and D7448, and he discovered that these documents had not been scanned and were not where he would have expected them to be in the MIR. DS May explained in the civil trial that he also looked in the Outside Actions Room and the Exhibits Room; to no avail. When he looked on HOLMES, he saw the last officer who had dealt with the material was DS Allen, and it was DS Allen that DS May next contacted.

THE MAY EMAIL

18.114 DS May in his IPCC witness statement, and every account since, suggests that he first sent DS Allen an email "about the missing documents". In evidence in the civil trial, he said his recollection is that he copied and pasted from HOLMES the descriptions for D7447 and D7448. If that is correct it might be thought that there can be little room for doubt about the material about which he required Allen's help, and it would no doubt have been a sensible precaution to put in writing such a communication to reduce the potential for confusion about the material DS May had identified as missing.

18.115 DS Allen has no recollection of receiving such an email and so I invited SWP to conduct a search of HOLMES for it. I was informed that SWP was "unable to locate any email between DS May and Allen relating to D7447/8 on 24th February 2010". In interview DS May indicated that he had made enquiry of the SWP ICT department to be told that they were unable to assist given the time that had elapsed. Accordingly, I invited SWP to extend the search to any other systems and for the surrounding days. I have been

informed that due to the amount of time that has passed, a "significant" amount of work and expense would be required to examine 700 tapes of data that SWP holds. The work would take between three and four months and even if such an email had been sent, it may not necessarily be located because there is no guarantee that the tapes would all be 100% readable. For obvious reasons, I did not request that such work should be undertaken.

18.116 SWP has, nevertheless, sought to make further relevant enquiries and an examination has been conducted of DS May's and DS Allen's "home drive" and "mail boxes" (live and archived). The result, in summary, was as follows. First, no stored email Outlook message files were available dating as far back as February 2010. Second, no email was available in either of DS May's live or archived mailboxes dating back as far as February 2010. And third, and linked, although email was available in DS Allen's archived mailbox dating back to February 2010, there was no available email from DS May of the kind that DS May recalls sending.

18.117 It would be a mistake to read too much into this: certainly, it is clear that the absence of an email in 2016 cannot possibly "disprove" DS May's account that he positively recalls sending an email in 2010. Indeed, it is to be noted: there remains a possibility, SWP has confirmed, that an email was sent and received but later deleted; because DS Allen cannot now recall anything of the episode he cannot be expected to assist; when I asked DS May in interview whether he had a copy of the email, he told me he did not, but added that he had tried, without success, to recover a copy by enquiry of the SWP ICT department.

18.118 In view of DS May's suggestion, I asked that a check be made for any records of such an enquiry, and I have been provided a log containing an email from DS May on 4 May 2013 in which he enquired about the possibility of recovering an email: "On either 23/02/2010 or 24/02/2010 I sent an email to DS Mark Allen 3640 concerning his recollection of two documents in relation to [LW3], specifically D7447 and D7448". The enquiry concluded on 10 March 2013 with the response: "unable to retrieve emails, our backups don't go back as far as 2010".

18.119 DS May's enquiry, when taken together with the other available evidence, is significant in my view in excluding the possibility that DS May had simply invented a false recollection of an email (and, to be clear, no one has suggested that is the case). It is notable that when DS May wrote his IPCC witness statement, it was he who volunteered reference to the email; it was, in the circumstances, an unnecessary additional detail to have included, especially if not true or not believed to be true; it was, further, to create a hostage to fortune to include a detail of that kind, if known to be false, when it would (anyone might presume) be so easily checked; and it was he who, later, made specific enquiry to try to recover the email in the hope – and I am satisfied genuine hope – that it would corroborate his account.

18.120 One further point should perhaps be made. Although May has been consistent in referring to sending an email, the reference to copying and pasting from HOLMES is an additional detail which appears for the first time in his evidence in the civil trial. I am nevertheless satisfied that he included the detail in his email. To include the description would have been the obvious and sensible thing to do, and copying and pasting the easiest way to do it. In addition, as May would have appreciated, reference to D7447 and D7448 without further detail would have meant precious little to Allen after the months that had passed.

THE ALLEN/MAY TELEPHONE CALL

18.121 Whatever the position in relation to any email, there is no doubt that on 24 February 2010 there was a telephone call between DS Allen and DS May.

18.122 There is a written note of the call made by DS May in his "MIR Notebook"/daybook. The note is as follows:

> "D7447 + D7448 contacted DS Mark Allen @ PSD – he stated that both docs were copies of info held by IPCC + our legal services. James Haskell had looked at D7447 and decided it wasn't relevant to our enquiry so Mark shredded them (they were scheduled on the MG6C phase 13). With regards D7448 the complaints include Carol Evans whose husband had made official complaints against SIO and others – SIO instructed Mark to get rid of them so he shredded them. Originals are with IPCC + legal services, Holmes updated."

18.123 The words, "Holmes updated" refer to the fact that HOLMES had, by the time the note had been made, been updated (by the indexer Carole Williams – see below) to show that D7447 "is held by the IPCC" and that D7448 "is held by the Legal Services Department at Police Headquarters Bridgend". The original documents had been retained by their respective keepers, as – according to DS May's note – DS Allen had informed him, and so the location recorded on HOLMES, namely the MIR, had been wrong.

18.124 There is a second note. From 2005, Carole Williams had been the sole HOLMES indexer on the LW3 investigation. When questioned in 2012, she had a recollection of DS May having had a telephone conversation with DS Allen about the location of D7447 and D7448 and that after the conversation, DS May: "… came off the telephone he was a bit shocked and annoyed and said something like, 'He's shredded them!'"

18.125 She later discovered an entry dated 24 February 2010 in her MIR Notebook which referred to the copies having been "destroyed". In interview, she explained that she had made the note of her own initiative and that she did not and would not have told DS May she had made the note. The note read as follows:

> "As a result of not being able to locate documents D7447 document from IPCC re complaint by N9 ACTIE and D7448 files re civil claims against South Wales Police, DS May spoke to DS Allen who has now left enquiry and was informed the original copies of D7447 was held with IPCC and D7448 was held with Legal Services the copies had been destroyed."

18.126 After DS May had finished speaking to DS Allen, and then informed Williams of their conversation, it was Williams who updated the "Other Information" section of HOLMES to show that D7447 and D7448 were held by the IPCC and PLSD respectively.

18.127 What does DS Allen say about this? DS Allen does not dispute that there was a telephone call. In a witness statement to the IPCC made two years after the conversation he said that he could not recall having the conversation described in DS May's note and thought it was "most unlikely" that he could ever have told May about the destruction of D7447 and D7448, or, he added, other documents subject to the disclosure process. In his witness statement in the civil proceedings he added, first, that May's note cannot be a "true or accurate account" of their discussion for the simple reason that D7447 and D7448 had

not in fact been destroyed. And second, he goes further and says, he "could not have informed DS May that [he] was responsible for shredding the documents that formed part of the unused material disclosure process." The first observation is not unreasonable, as logically Allen cannot have shredded material that it is known was not shredded; but the second observation in my view does not necessarily follow and leaves open the important question of how May can have formed the view that he undoubtedly did form and then communicated to Williams.

18.128 One answer is utter mistake and confusion. But there is no reason to consider that May would have approached the call with any preconception or expectation that he might hear any suggestion of shredding. Indeed, because of the contemporaneity of the notes of May and Williams, and Williams' clear recollection of May's reaction to the telephone call, there can be little doubt that DS Allen must have used language suggesting the destruction of something.

18.129 The question that arises is what was it? At this remove of time no one can be expected to recall with any precision what was said, and having given (sometimes several) previous accounts, no one can be expected clearly to separate what was known at the time from what has been discovered since. I make that observation here but it is of course of wider application in varying degrees to every undocumented recollection.

18.130 It is tempting, as I am confident was the case on 28 November 2011, to take DS May's note at face value. That temptation is no doubt greater when it is the only note taken by the parties to the conversation. However, as I shall explain, it would be a mistake to take the note at face value and the temptation must be resisted. First, although it is known that the note was written the same day and shortly after the conversation no one has suggested the note was precisely contemporaneous. Second, the note is obviously not and does not purport to be verbatim. Third, the note does not identify whether the words recorded by May are the exact words Allen had used in their conversation and May faithfully recorded, or May's words by way of precis or gloss of his recollection or understanding of the conversation; and if the former is true, whether the words were the exact words Coutts had used repeated by Allen to May, or Allen's recollection/ understanding/ gloss. That is why, as I have said, the precise language used by Coutts in his conversation with Allen cannot now be exactly established; and it would be mistake to assume it was "get rid".

18.131 Fourth, as previously reported, carefully considered there is a clear inaccuracy or illogicality within May's note: it suggests that D7447 was destroyed on the premise that Haskell had decided it was not relevant to LW3, but that of course cannot have been right. D7447 must have been assessed as relevant because it was entered on the MG6C, the sine qua non of which is relevance. When I saw DS May he accepted frankly that the illogicality had not occurred to him at the time he wrote the note in 2010. Had it occurred, it undoubtedly should have prompted some further questioning or enquiry.

18.132 Fifth, as is now known, D7447 and D7448 were not shredded.

18.133 And sixth, it has never been suggested by DS Allen that when he spoke to DS May in February 2010 he said to DS May that he might like to check the Lead Disclosure Officer's office, where DS Allen later recalled last seeing the material. In view of the fact that it was three months after DS Allen had left the LW3 investigation, that would have been the most obvious answer (and one which ought to have been readily available to him given his recollection in his IPCC witness statement) if Allen had in mind the same material as May.

I am not satisfied that Allen can have clearly understood what material he was being asked about.

18.134 As well intentioned as the creation of this note undoubtedly was, and although when he made the note May cannot have appreciated or have been expected to appreciate the importance and prominence his note would eventually assume, either the note cannot have been correct or, perhaps more likely, what DS Allen said cannot have been correct. Either way, the note has to be approached with an element of caution.

18.135 The question that arises is if it was not D7447 or D7448 that Allen had in mind, what was it? In my view, and as I have explained, there are two candidates: it can only have been either the William Peter Evans witness statements or the Jones Briefing Paper. It may well be the case that Allen could not recall with any precision; the name William Peter Evans was common to both.

18.136 The suggestion of shredding any such material ought to have been, and given May's reaction as recalled by Williams was, of immediate concern to May. It was important that the matter was dealt with properly. And dealing with the matter properly required DS May to have done – as he acknowledges – one or both of two things. First, registration. The information May had received and noted should have been treated as material relevant to the investigation and submitted by him to the Indexer (Carole Williams) for registration on HOLMES. This, May could have done, by submitting his MIR notebook, or by submitting a separate officer's report or memo containing the same information. This, May did not do, and although it is absolutely clear that there was no improper motive in his conduct (the recording of the information in a durable form, his report to Williams, and his subsequent conduct are all inconsistent with such a motive) the information remained in his notebook in his possession at the MIR and was not shared with anyone save for Carole Williams.

18.137 Second, reporting, and there is an issue the subject of conflicting recollection that requires to be addressed. When he gave his first account in a witness statement to the IPCC, May said no more than that he had "a vague recollection" of "discussing" the "issue" with Haskell "at some point". He did not suggest that he had a clear recollection of reporting the matter to Haskell, and nor did he suggest that he recalled reporting the matter to Coutts: in fact, he said to the IPCC: "I [...] do not recall raising the issue with the SIO"; or to anyone else: although he did say he considered it "highly unlikely" he would not have discussed this issue "with other personnel".

18.138 Although over time May appears genuinely to have become convinced that he would have told Haskell, or Coutts, at least if they were "on site", in other words at St. Athan, I am not satisfied that he told Haskell or Coutts (or, for that matter, anyone other than Williams).

18.139 There are four principal reasons for that, to say nothing of Haskell's and Coutts' rejection of the suggestion that they were informed.

18.140 First, May's recollection cannot sensibly have improved since he made his witness statement to the IPCC on 31 January 2012 (and in fairness to May he does not suggest it has improved). It is natural for May to read across from what he would ordinarily have done as a "conscientious individual" (his IPCC witness statement) – and no one I have spoken to doubts he was that. But that is not always, as will be apparent, a reliable guide.

18.141 Second, if he had informed Haskell "straight away" as he recalled in the civil trial, adding that he thought Haskell was working full time at St. Athan, I am satisfied that it is likely he would have noted in his MIR notebook the report to Haskell (or anyone else) and the outcome. The absence of a record might not ordinarily tell one way or the other: but this was an important issue, as May has recognised; having recorded a note of his conversation with Allen, it is in my view likely that he would have recorded a subsequent conversation; and that is particularly so when the note he did in fact make was not contemporaneous because it recorded a subsequent step namely, "HOLMES updated". It is also possible in my view that he would have said something further to Williams, and equally possible that she would have recorded the further information.

18.142 Third, and most significant of the factors, Haskell was not in fact at St. Athan on 24 February 2010, the remaining two days of that week, or indeed at all, the following week (1 to 5 March 2010). Although he attended a conference at Swansea Crown Court on 2 March 2010, no one has ever suggested that was the occasion of any relevant communication, and he did not return to St. Athan until Tuesday, 9 March 2010, almost two weeks after the May/Allen conversation (each of those dates comes from a print out of Haskell's professional diary). In view of those dates, and all the other available evidence: I am more than satisfied that, contrary to May's account that he told Haskell of the incident immediately/straight away, he did not, and cannot have done (I note May has suggested that Haskell was physically at St. Athan when he told him, which is plainly incorrect for the days immediately following the telephone call to Allen); I am satisfied that if May considered on 24 February 2010 that he needed to do more than record the facts as he understood them to be, and to cause HOLMES to be updated to reflect the location of the material, and in particular if he considered that he needed to report the incident, he would not have waited until Haskell was next at St. Athan to do so: he would have done so in the interim and at the earliest possibility with the Lead Disclosure Officer, DS Rowlands (which he has never suggested he did) or Coutts; and against that backdrop, and in addition given the volume of work he was dealing with at the time (see below), I am not satisfied that it would have occurred to May, some two weeks later, to raise the matter with Haskell.

18.143 Finally, if May had raised the issue fully and squarely with Haskell, I am satisfied that Haskell would not have been "relaxed" or not unduly concerned about the suggestion of shredding, as May suggested in the civil trial, and therefore would have done nothing at all; and it is plain that the illogicality of May's note would not have been left undetected. When I saw him, Haskell was clear that he would have interpreted those words as meaning "not requiring to be scheduled", whereas D7447 was of course entered on the MG6C (and May's note on its face stated as much).

18.144 In my view, the most likely explanation for these events, and May's failure to report the Allen revelation, is that May's initial shock at what Allen had reported did not remain with him for long. It no doubt subsided because the material shredded was "copy" material and the "original" material remained in existence with the third party; and Allen's actions, although not actions that appeared to May to be usual, appeared to have the imprimatur of Haskell and Coutts. May took the steps that he considered were important and necessary. First, May considered it important and necessary that the entry on HOLMES be amended to show the correct location of the "original" material; and he ensured that happened. And second, he considered the episode significant enough to be recorded in his notebook, and made a note. Had Haskell (or anyone else) been present in the MIR itself following the call, it is in my view likely that he would have reported it, just as he had to Williams. It,

however, did not occur to May to do more and introduce his note to the usual disclosure process in the MIR; that was a mistake, in my view. And May was not so concerned by the information received that he considered it immediately necessary to report it Coutts or Haskell, whether or not they were "on site"; a second mistake, in my view.

18.145 It is relevant to observe that two weeks before the episode with DS Allen, DS May had written a report in which he raised concerns about the volume of work he, and others, were facing. I am satisfied, from my interview of DS May, and from a review of his various written accounts, that DS May is not someone prone to hyperbole, and am further satisfied that on assuming the role of Office Manager, a role which he had never before undertaken, he did face a very considerable pressure of work. I am also satisfied that the pressure of work is an important backdrop to understanding his reaction on 24 February 2010 and, in particular, why someone so obviously conscientious can have departed from what he might in other less pressured circumstances have done and what he might since have reasoned would be his general or likely practice.

18.146 The episode is nevertheless relevant in my view for a broader reason. I am satisfied that an external document received in the MIR, containing the same information as Allen had provided to May, would have been subject to the usual disclosure process in the ordinary way and would then have been disclosed. It appears that there was inadequate appreciation for the process as it applied to internally generated material.

18.147 Although her note should also have been introduced into the usual disclosure process, Carole Williams' conduct and performance cannot be viewed in the same way as DS May's. Having of her own initiative made a note of what May had told her, she was in my view entitled to proceed on the basis that DS May, who had performed disclosure duties for two years as a former deputy and Lead Disclosure Officer, would take all further necessary steps in relation to information that after all he, May, had received from Allen. If anyone was to report the matter, it was May. However that may be, and however rare disclosure issues may be in the daily work of the Indexer, it would be advisable for all those who work in the MIR to be aware of the disclosure implications and consequence of their own role and to understand the broader context in which they work.

18.148 The omissions were significant. Had the notes been registered they would then have been subject to the disclosure process; and if they had been, the mounting registration and disclosure errors and other problems would almost certainly have been discovered and would then been remedied long before the start of the trial.

18.149 But this was not the only pre-trial opportunity to realise and address the problem with D7447 and D7448. The next missed opportunity was to come later in 2010 during secondary disclosure.

Secondary Disclosure

18.150 In February 2010, at the "first substantial directions hearing" before the trial judge, the recently assigned Mr Justice Sweeney had made various orders including, notably, for: "Defence statements, the statutory trigger for secondary disclosure, were ordered to be served in September 2010 with the case being listed for dismissal and other legal arguments (including severance) in November/December 2010."

18.151 By autumn 2010, an important stage in the prosecution had been reached. Fourteen defendants had served defence statements, and with those defence statements, defendants provided lists of documents or categories of material that they requested be disclosed because the documents would, or may, advance their case or undermine that of the prosecution. At least one defendant, Mouncher, took a different approach, preferring instead to provide a list setting out areas of potential enquiry/disclosure for the prosecution to consider. And one request I have seen in October 2010 was simply a sheet containing 200 document numbers, with no further description or explanation of the relevance of the material. I return to the issue of the manner or form in which disclosure requests are submitted in chapter 19, because in large cases, the mere exercise of managing the requests and the responses to those requests can quickly become an undue burden and work to the detriment of the prosecution.

18.152 On any view, it was to be an extremely busy period: responding to defence statements, disclosure requests and, indeed, applications made by some of the defendants for the charges against them to be dismissed on the basis that there was insufficient evidence. The level and pressure of work had been recognised. In an officer's report dated 4 August 2010, DS May informed Coutts that Dean QC had "asked that sufficient resources be put in place to allow us, as a police team to research and challenge matters of 'fact' [...] whilst he and his Juniors concentrate on the matters of 'law'." A contingency plan was put in place for officers to work at weekends and to do overtime.

18.153 It was during this period (September 2010) that the Lead Disclosure Officer, Robert Rowlands, left LW3. John Lane also left. The departure of Rowlands in particular put LW3 in a difficult position. In view of the timetable to which the prosecution was operating, it was regarded as impractical to have brought in a new Lead Disclosure Officer from outside, and an internal promotion was felt unavoidable. O'Connor became the fourth Lead Disclosure Officer since primary disclosure had begun, and LW3 had not yet embarked on secondary disclosure.

18.154 It is also clear that as the autumn progressed, the demands on the police did not let up. On 21 October 2010, in response to Cohen's email about the format of delivery of bundles for the November hearing, May responded as follows:

> "Howard, I'm concerned that this is the first time I have certainly been made aware (forgive me if DCS Coutts or DI Devine have been but they are out of the office today) of the need for yet another delivery phase before the November hearings, these deliveries are resource intensive and continually reduce our capacity to perform secondary disclosure. My understanding was that next week was the final opportunity to deliver any additional evidence and disclosure, this is very frustrating given that we could have held off this delivery phase if it was envisaged that another batch of material would be required for delivery in preparation of the November hearings (it's too late to delay now as all arrangements have been made). I will discuss further with DI Devine tomorrow, but perhaps you could give an indication of what this bundle will incorporate, surely everything that will be discussed is contained in the prosecution file, NAE's and disclosure already provided to defence teams on hard drives."

18.155 Dean QC intervened to make clear that the police would not be expected to deliver the bundles.

18.156 As part of the secondary disclosure process, all material was to be re-reviewed.

18.157 According to the IPCC report at paragraph 78, "The secondary disclosure process was managed by means of the MG6C lists being printed off the HOLMES system and endorsed by a police disclosure officer when the secondary disclosure process had been completed".

18.158 In a witness statement dated 22 September 2011, O'Connor said it was he who had printed sheets from HOLMES listing the documents which required assessment at secondary disclosure. The printed sheets were placed into files. Where a disclosure officer was working on the secondary disclosure exercise, he would go to the file, remove a sheet or a batch of sheets, and sign his name in the front of the file to show what he was working on.

18.159 Next, he would work down the list of items on the page, identifying the underlying material in hard copy or electronically; he would review that material; and he would assess whether, in particular in light of the contents of the defence statements received from the defendants, the material fell to be disclosed.

18.160 On or around 13 December 2010, DC Andrew Morris was assessing a page of the Phase 13 MG6C and wished to review D7447 and D7448. Morris had joined LW3 on 5 January 2005. Disclosure was not his principal role but he "periodically performed" disclosure duties. Having worked his way down the list from D7436 to D7446, he then came to D7447 and D7448 and, unsurprisingly, bearing in mind the location of the material, could not find the documents described by either reference number. Analysis of the relevant page of the print out reveals that Morris circled the "D" numbers D7447 and D7448 and added a note in the margin: "with IPCC" against D7447 and "with Legal Services" for D7448.

18.161 The remaining two documents on the page – D7449 and D7450 – are then crossed through as the others had been. When he had finished reviewing the documents listed on the page, the page was endorsed and dated by Morris: "A. Morris 13/12/10".

18.162 In a witness statement given to the IPCC, Morris said he had no recollection of what caused him to write the locations IPCC and Legal Services on the page. However, he assumes – reasonably, in my view – that first, he could not find the documents; second, he had consulted the location recorded on HOLMES; and third, he made the entries based on the information contained on HOLMES as to their location.

18.163 It is clear from his witness statement made to the IPCC that Morris's memory of events is limited, and it has not improved in the four years that have since passed. The lack of recollection does not matter, however, because DC Morris' involvement with the material is limited and uncontroversial, and may be summarised as follows. Unable to review D7447 and D7448, his expectation is that he would have brought the matter to the attention of O'Connor. And that is precisely what he did do because O'Connor has a specific recollection that Morris did raise the matter with him: he believes "around the date of his signature in December 2010", in other words, around 13 December 2010.

18.164 Morris' conduct in relation to this episode cannot sensibly be criticised. He reported the matter to the Lead Disclosure Officer and based on the bare information available to him namely, that the copy material was not available for review, but the original material was with the IPCC and PLSD, I do not consider that he ought reasonably to have been expected to have done more. In that regard, his position differs from that of DS May upon receipt of DS Allen's "shredding" revelation.

18.165 What O'Connor then did with the information he received from Morris is less clear.

18.166 In the absence of any policy that would automatically have required the obtaining of the original or a further copy of the missing material, and I am satisfied there was none, the appropriate course would have been to take one or more of the following steps: to have recorded in writing the information received from Morris in his MIR notebook and/or officer's report; to have retrieved the material from the IPCC and from the PLSD in order that it could be reassessed for secondary disclosure, and to ensure that it was available for ongoing review (as O'Connor has accepted would have been – plainly – the proper practice); and/or to have reported the matter to an appropriate person and such would have been Haskell, the CPS or the SIO.

18.167 It is uncontroversial and common ground that O'Connor neither recorded the information received, nor retrieved the material.

18.168 What is controversial is whether the matter was reported. O'Connor has said in an IPCC witness statement and elsewhere that he did raise the matter with Haskell. Haskell has said in an email to Andrew Riley of the IPCC on 17 May 2012, and elsewhere, that there was no such conversation.

18.169 Although the issue is not a straightforward one to resolve, it is not in my view "impossible" to determine, as the IPCC have suggested.

18.170 For the reasons set out below, on balance I am not satisfied that there was a conversation (and am quite sure that if there had been a conversation, it was not one with the requisite degree of formality and clarity that such an important conversation demanded). I note the following.

18.171 First, O'Connor has said that he reported the matter to Haskell immediately/straight away, which not least given the 13 December 2010 date of the signature of Morris suggests it would have been on that date. O'Connor has also said that he did so in person. In the civil trial, his evidence was that:

> "It was brought to my attention that they was not there. James Haskell was sat probably no further from me than we are at this moment, sir, and we had a conversation about arranging to retrieve the documents because they was marked up on our HOLMES database as being with the IPCC and the legal services of South Wales Police."

18.172 However, Haskell was not at St. Athan on 13 December 2010 although he may well have been the following day.

18.173 Second, and more significantly, Haskell suggests in his email to Andrew Riley that O'Connor had never before suggested that they had previously spoken about the material. Although the force of that observation may not be immediately apparent, its force is clear when it is recalled that O'Connor was present at court, together with Haskell, when the issue of the missing material arose on 28 November 2011; and O'Connor was directly involved in the exercise on the 28th of seeking to locate the material and to retrieve a further copy. In those circumstances, it is very surprising that O'Connor mentioned nothing of any previous conversation about D7447/D7448, whether to Haskell or to anyone else. It is equally surprising that on the following day, O'Connor did not cite this episode as an example of the concern it is known he raised with Penhale about Haskell.

18.174 Third, there is nothing independent of the conflicting accounts to support the suggestion that there was a conversation: no contemporaneous or other record or note for example made by either O'Connor or Haskell about any report of D7447/D7448 or anything done in consequence. That may, of course, be because neither took a note and neither did anything about it. But whilst O'Connor has explained the absence of a note by reference to the geography of the set up (he said he was sitting near Haskell during the secondary disclosure process) and the nature of the relationship (a fluid, informal, and frequent flow of advice) the force of those points diminishes if as I have observed, Haskell was not present at St. Athan on 13 December 2010. Even if Haskell had been present, and making allowance for the impracticalities of recording all conversations with Haskell, this was undoubtedly an important conversation about a highly unusual (in O'Connor's experience of secondary disclosure, unique) happening which, had it occurred, should have been recorded in O'Connor's MIR notebook and would have been recorded by Haskell.

18.175 And the likelihood that a record would have been made only increases if O'Connor cannot have told Haskell on 13 December 2010 in person (it has not been suggested that he was informed by email, or by phone, and if the suggestion were now made the absence of record would be more telling still). O'Connor's MIR notebook discloses an example of his recording a telephone call he had with Haskell, but there is nothing on or around 13 December 2010.

18.176 If there had been a conversation, for Haskell to have advised that the material need not be retrieved would have been inconsistent with the clear approach at secondary disclosure that all material required to be re-reviewed. Its inherent unlikelihood is a further reason to consider he cannot have so advised.

18.177 It would also have made the duty of ongoing disclosure more difficult to discharge because the documents were held elsewhere. Haskell would have been aware of the need for disclosure to be kept under review on an ongoing basis.

18.178 In fact, O'Connor does not, in his IPCC witness statement, say that he has a positive recollection that Haskell told him in terms that he need not retrieve the documents: O'Connor has said (my emphasis) that "the fact that no attempt was made to retrieve the documentation leads me to believe that I was told that there was no need to retrieve the documents although I have no record of this conversation". In any event, and as yet another illustration of the dangers of such inexperience as existed amongst the disclosure officers on LW3, it should never have been necessary for O'Connor to ask Haskell whether the material needed to be recovered at all. Common sense and ordinary practice would dictate that a Lead Disclosure Officer should take appropriate steps of this kind without consultation.

18.179 Just as I am confident that there was nothing improper in the conduct of DS May in February 2010, I am equally satisfied that there was nothing improper in O'Connor's conduct six months later. I note first, in fairness to O'Connor, Haskell excludes the possibility that O'Connor deliberately withheld anything and goes so far in his HMCPSI interview as to suggest he is "sure that if Gary [O'Connor] had have been told…that is something which, you know, he would have told me straightaway, he wouldn't have tried to keep that hidden." When I saw Haskell, he made plain that when he wrote to the IPCC, "I understand that some officers are worried about this investigation and it may be that this has influenced the content of his statement", he was not suggesting that O'Connor

was seeking to mislead or fabricate. I accept that he was not. And I make clear that I am satisfied that in the ordinary course of events, and if Haskell had been present at St. Athan when the issue was raised with O'Connor by Morris (most likely on 13 December 2010), O'Connor would likely have reported it. It is plainly relevant that at the time the issue arose, the disclosure team was, as May had been, working under a great deal of pressure from the volume of work. As O'Connor accepts, the "period […] was extremely busy with an enormous quantity of documentation requiring assessment." And Haskell said the same in his email to the IPCC and his HMCPSI interview. There are other examples of the strain of the workload to meet the deadline for the completion of the secondary disclosure exercise, which was a very significant undertaking, made more demanding by the decision to review all the material, and which, given the importance of accumulated knowledge and experience, made it very difficult (and would have been counter-productive) simply to parachute into St. Athan "additional bodies". In the circumstances, and given that Haskell was not immediately at hand, it is not difficult to imagine that O'Connor fully intended to raise the matter with Haskell when he next saw him but simply forgot to do so.

18.180 Notwithstanding the discovery that the copy documents D7447 and D7448 were missing, for the second time in a little more than six months, no attempt was made: first, fully to investigate the issue of the missing documents by, for example, calling Allen (as May had done in February – which would have led to the further consideration of the issue, and prompted an inquiry into the May/Allen conversation and note) or second, to acquire further copies either to retain or, much more importantly, to review for the purposes of secondary disclosure; and it is the failure to review these documents that is particularly troubling and problematic and that would have remained so even had the material been found on 28 November 2011 or in the days that followed.

18.181 A second opportunity had been missed to correct the records and to deal with this "sensitive" material appropriately. These collective failures would resurface on 28 November 2011 and ultimately led to the demise of the prosecution of 12 police officers and two civilians.

18.182 Had any of these opportunities been taken, or these failures been avoided, they would have surfaced before the trial started. What would also have been revealed fully, and been resolved properly, was the question that occasionally surfaces but amidst all the confusion and imprecision has never been fully answered: if not D7447 or D7448 or the William Peter Evans witness statements, was anything in fact shredded, and if so what was it? I have touched upon the issue already but it is important that I answer it more fully now. Allen has said in the civil trial: "I haven't got rid of any documents" and I accept that he has not shredded material with malice and I further accept that Allen would never have destroyed an original document or material he believed he should not destroy; but on the balance of probabilities, I am satisfied that material was shredded and that the material was the Jones Briefing Paper.

18.183 First, whatever confusion there was in his conversations with May in February 2010 and with Dean in 2011 about the precise material – confusion borne in part of their having in mind D7447/D7448 (May) and the Actie complaints material in particular (Dean), and Allen having in mind some other material – the "shredding message" received by May in particular was unambiguous, was conveyed by Allen (the shredder), and therefore was not, I am satisfied, the product of mistake or confusion: May's reaction, as confirmed by Williams and Williams' note, reinforces that. Something must have been shredded, what was it?

18.184 Second, in the summer/autumn of 2009, Allen and Coutts had a conversation about sensitive complaints material in the course of which Coutts gave Allen an instruction to the effect that the material should not be retained at St. Athan; I do not consider it likely the conversation would have been conducted with any particular formality, or that it would have been long. Coutts with his experience considered the appropriate course to be "self-evident" but I am satisfied Allen without such experience did not.

18.185 Third, although the precise language which caused the confusion cannot now be identified with any confidence, I am satisfied that Allen mistook Coutts and considered he was carrying out Coutts' instruction when he destroyed material, but in so doing genuinely believed that there was nothing unusual or concerning about that course and so neither questioned nor challenged it. The following factors are relevant to this finding: (i) Coutts' plain sensitivity to sensitive material, his understanding was that such documents should not be at St. Athan (as he accepted in the civil trial, "the position I adopted was that the material [he discussed with Allen] shouldn't be anywhere near the MIR"); (ii) the Jones Briefing Paper was amongst the most sensitive of all of the documents which came into the possession of LW3; (iii) the fact that the Jones Briefing Paper was a copy; (iv) the fact that it would always be retained by PSD in hardcopy and/or digital form; (v) the fact that it was a summary of other material rather than "source material"; and (vi) Allen's inexperience and lack of appreciation of the importance of registering even irrelevant material.

18.186 Fourth, in view of the fact that the William Peter Evans witness statements were not destroyed but the Jones Briefing Paper cannot now be found, I am satisfied that the mischaracterised "instruction to shred" conversation related to the Jones Briefing Paper, in which *reference was of course made* to the William Peter Evans complaints, rather than the witness statements from William Peter Evans: the former material coming from the PSD and the latter from the IPCC within one month of each other. I have said that the Jones Briefing Paper, having been physically received at St. Athan on 20 August 2009, has not been found amongst material stored at St. Athan and as would be expected, SWP have at my request sought to locate it, but without success. That it has been neither registered nor recovered cannot be said to be conclusive proof of its fate, but in all the circumstances its destruction makes sense of these events and in my view is the most likely explanation for what happened.

18.187 I should add that there was, for a time, considered to be a possibility that the Jones Briefing Paper collected by Allen (and other PSD material) had in fact been located at St. Athan, and I should therefore address that now. Following the collapse of the trial, as I will explain in chapter 21, prosecution material was recovered from court. A black carry file was recovered from the main prosecution team room at court. The black carry file was marked on its spine "Potential MG6E material for inspection by James Haskell". Inside were the Jones Briefing Paper; Appendices A to O; and a single page of an unrelated fax, without attachments, from Jones to Coutts dated 16 September 2011. The black carry file was placed into a new box by the police recovery team (Box 70) and that box was transported to St. Athan. The black carry file was later placed in a new box (Box 46) as part of the civil disclosure exercise and stored in the Exhibits Room at St. Athan.

18.188 Where does this leave matters? It is known that the CPS provided a copy of the Jones Briefing Paper and Appendices A to O to James Haskell in early 2010 in order that he may advise on whether the material was relevant and disclosable. He decided that it was not relevant at that stage (and therefore not disclosable), and a significant reason said to support

that view was that "none of the Defendants have, so far, raised any issue about the credibility or integrity of the Phase III Investigation Team as a whole, or on an individual basis." Of course that was to change. As to what then happened to the Jones Briefing Paper and Appendices A to O, Haskell has said he believed he would, following his advice, have done one of three things: retained the copy PSD material; returned it to the CPS; or provided it to the Lead Disclosure Officer. Robert Rowlands was the Lead Disclosure Officer at that time but does not recognise the PSD material or, therefore, being provided it, whether by Haskell or by anyone else. I consider the most likely explanation to be that the copy of the Jones Briefing Paper and Appendices A to O recovered from the prosecution team room at court was what Haskell had been provided by the CPS, and – this being the more significant point – I am more than satisfied this copy of the Jones Briefing Paper cannot have been the copy provided by PSD to LW3. After all, the PSD never supplied LW3 with Appendices A to O. And although the black carry file marked on its spine "Potential MG6E material for inspection by James Haskell" in which the material was found was a "police" file, three points must be borne in mind. First, by the time of the trial, the E-Catalogue system was no longer in operation and so had become redundant for its original purpose. Second, the black copy file was one which had previously been used for material that was for Haskell's attention and consideration. And finally, the black copy file was recovered from the prosecution team room at court, from which in common with others Haskell worked for much of the trial.

18.189 In addition, I have said that I am more than satisfied that in all the circumstances there was no malicious design to withhold this material from the defence, and it is appropriate that I record now at least the principal reasons for that conclusion. First, had Allen been acting from malicious motives, I am satisfied that he would never have identified the William Peter Evans witness statements from amongst a box of material at the IPCC in the first place and physically brought them to St. Athan. Those two statements were positively selected by him, when if the worst suspicions were true, they might more conveniently have been "overlooked". I consider it to be beyond doubt that he was doing his genuine best to identify relevant material. Second, and if there is doubt about that and it is suggested that he considered such nefarious intent after the receipt of the witness statements at St. Athan, I am satisfied that they would never have been given to Rowlands so risking any possibility (and in the circumstances perhaps near inevitability) that the they would be submitted on an E-Catalogue to Haskell. Third, insofar as there may be considered to be significance in the fact that the William Peter Evans statements were not registered, that applies equally to the Jones Briefing Paper; this undoubtedly supports a concern about Allen's appreciation of the requirement that irrelevant material should be registered but it does no more than that (usually, of course, registration was a step in the process taken *before* any determination of relevance). Fourth, if Allen had been given a clear instruction by Coutts to shred the copy of the William Peter Evans statements, I believe he would have done so (without malice), or if he was concerned, would have raised the matter; in fact, those statements were not destroyed. Allen's lack of experience and poor general aptitude for the role of Lead Disclosure Officer in this of all cases must never be underestimated; the management of sensitive documents was new to him and the documents relevant to this inquiry were copies, the originals were secure and would always be available.

18.190 The only other possibility is that the Jones Briefing Paper was not destroyed but is still at St. Athan (or in fact, in the secure storeroom at Ty Thomas House where the LW3 documents are now located) and simply has not been found. While that, of course, cannot be excluded as impossible, I regard it as unlikely. Subsequent to 1 December 2011, the material held at St. Athan has been the subject of closer scrutiny than it ever was in the

period 28 November to 1 December 2011. There are two matters which are of particular significance. First, the detailed civil disclosure exercise which was directed at identifying material that had not been registered as part of LW3. And second, and more significant, SWP has known for some months now that the whereabouts, electronically and physically, of the Jones Briefing Paper, is a live issue and a matter of concern in the present investigation. On 25 October 2016, SWP confirmed it had "caused enquiries" to be made to ascertain if the Jones Briefing Paper (and associated material) could be located. On 3 November 2016, SWP confirmed the "work is ongoing". On the 4 November 2016, although SWP said it had so far "failed to locate" the material, it would "keep trying to physically locate" it. And on 12 January 2017, in response to my request for specific confirmation, and knowing the stage by then reached in my investigation, SWP finally confirmed that "[h]aving been physically received, the Briefing Paper has not been found amongst material stored at St. Athan" (as by then transferred to Ty Thomas House). It is difficult to imagine from the enquiries and searches made by SWP, both as part of the civil disclosure process and, more particularly, as part of the even more focussed exercise between 25 October 2016 and 12 January 2017, that the Jones Briefing Paper (a 22 page document) would not have been found if it had been there. Furthermore, following the telephone conversation between May and Allen, it is likely that something was destroyed by Allen and the best, if not only, candidate for destruction is the Jones Briefing Paper.

18.191 Before leaving this important topic, I should add that no blame should attach to Allen following this finding; I do not consider that his actions amount to misconduct or anything approaching that. That he acted in good faith is palpable and he should never have been given the role of Lead Disclosure Officer: a role for which he was inexperienced and ill-equipped and perhaps more importantly, bearing in mind SWP's obligation to both him and the investigation, a role for which he was given wholly inadequate training. The principle which out of necessity (it is said) LW3 was too often required to follow, namely that of police officers "learning on the job", was inappropriate to a role as important as Lead Disclosure Officer and this applies especially to Allen who was given no clear, let alone written, guidance as to how to manage irrelevant and sensitive copy documents.

18.192 This was the assessment of Haskell to HMCPSI:

> "I've said this to Chris Coutts and John Penhale and to lots of people, I think one of the biggest mistakes they made was appointing [Allen] as Lead Disclosure Officer. I made that perfectly clear. I don't know if this has come out in any of your, of what you've done before, but he really wasn't very good at the job, and I think in fairness to him, and he was a nice bloke, but the lead disclosure role, particularly in a case like this, is hard, and it takes a certain type of individual, and the one we had before, Jayne Hill, was superb at it, but he really wasn't; and I think in fairness to him, he realised that he was rather out of his depth, which is why he made the request to go."

18.193 Haskell later added that Allen lacked judgment, but explained that Allen had been out of his depth and had lacked the necessary experience.

18.194 Howard Cohen to HMCPSI:

> "You see, one of the concerns that we had was that the police officers, as I said to you earlier [inaudible] hadn't a clue what they were doing … They really did not know. A lot of these officers had come on to this team from pre-CPIA days, didn't know anything about it."

18.195 Cohen agreed that there was very little CPIA training in SWP and that it became clear that training needed to be given. Cohen praised Jayne Hill's abilities as Lead Disclosure Officer, but said that after she had left, nobody wanted her job because it was regarded as a "poisoned chalice" or as one police officer described it, the "short straw". He said that the high turnover of Lead Disclosure Officers was a "huge problem" and it resulted in a lack of consistency.

19. Disclosure

19.1 The quotation from DCS Coutts at the beginning of this report namely, "*The only way this case will fail is through disclosure*" proved, of course, to be prophetic. Coutts was an experienced campaigner by the time this investigation began and he was well aware of the undoubted scale of the disclosure exercise and the vulnerability of the entire prosecution if disclosure was not handled with sufficient diligence and proficiency. Others must have been similarly aware.

19.2 The disconcerting reality is that the Mouncher prosecution does not stand alone and that a number of other high profile criminal trials have also failed because of disclosure deficiencies. The public must be utterly bemused as to why on occasions the prosecutorial process cannot seem to cope with a principle that is long established and central to the tenets of fairness and justice.

19.3 To say that disclosure is straightforward is both to tell the truth and to mislead. Some disclosure decisions, mainly those concerning information protected by Public Interest Immunity (PII) or those where the dissemination of material is prohibited by law under the Regulation of Investigatory Powers Act 2000 (RIPA), can be highly complex; there were no such complexities to trouble the lawyers in Mouncher.

19.4 Absent PII and RIPA, however, disclosure should be relatively straightforward; normally difficulties should only arise from either the scale of the exercise or from the intricacy of the background. In Mouncher, the scale of the disclosure exercise was considerable and the background was certainly involved but neither factor was insurmountable and proper and effective disclosure was more than capable of being achieved.

19.5 The disclosure test is provided by section 3 of CPIA, the version relevant to the Mouncher investigation was the following (my emphasis):

Primary disclosure by prosecutor

(1) The prosecutor must

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion <u>might undermine the case for the prosecution against the accused</u>, or

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)

19.6 The version in force today (again my emphasis):

Initial duty of prosecutor to disclose

(1) The prosecutor must

(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and <u>which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused</u>

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)

19.7 In practical terms, the two tests are the same and the test for disclosure is so simply stated that Parliament must have expected guidance to follow, though perhaps not even Parliament could have anticipated the sheer quantity of guidance that would in fact follow.

19.8 One of the unnecessary adjuncts to disclosure is that there are far too many guidelines and policy documents and the plethora of such material creates the (I would suggest) false impression that the exercise is more difficult than it should be. For example, as this report is published, the following guidelines/policies/papers/advice are in existence and relevant to disclosure:

- Attorney General's Guidelines on Disclosure: 2013
- Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material 2011
- Codes of Practice Under the CPIA 1996: 2015
- CPS Disclosure Manual
- Judicial Protocol on the Disclosure of Unused Material in Criminal Cases: 2013
- Lord Justice Gross: Review of Disclosure in Criminal Proceedings ("the Gross Review"): September 2011
- Lord Justice Gross and Lord Justice Treacy: Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure ("the Gross/Treacy Review"): November 2012
- Joint Operational Instructions for the disclosure of Unused Material (JOPI), of which there have been different versions over the years
- Holmes 2 Disclosure Manual

19.9 In addition, there is Part 15 of both the Criminal Procedure Rules and the Criminal Practice Directions.

19.10 These are certainly the principal documents but this list is not exhaustive. The CPS Disclosure Manual is the most bloated of all these documents and runs to more than 100 pages and comprises 37 chapters and 11 annexes; it is too long. It is no surprise that Lord Justice Gross in his first report described the CPS Disclosure Manual in the following terms:

> "… we cannot help thinking that it would greatly benefit from substantial shortening".

19.11 Lord Justice Gross at page 11 (paragraph 8 xxix) of his 2011 report:

> "There is too much "guidance" amplifying the operation of the CPIA. We encountered a near unanimous call for consolidation and abbreviation. We agree entirely in principle, though the reality of what can be achieved is more complex."

19.12 It is a great source of frustration that the recommendation of such an eminent judge has, so far, been roundly ignored.

19.13 It is important to understand that the disclosure pendulum has swung in both directions. Fifty years ago, disclosure was a common law principle and hardly featured in the law books and had little impact in criminal trials. Then, because of a number of Court of Appeal decisions in which convictions were quashed due to disclosure failures, the first Attorney General's Guidelines on Disclosure were published in 1981. From the late 1980s onwards, there were other Court of Appeal pronouncements on disclosure deficiencies, in particular *R v Judith Ward* in 1992, and there was a revolutionary backlash, a new era was introduced which led to the prosecution making almost everything available to the defence; an era of such openness that it is often described as that of the "keys to the warehouse". Although this period was commendable for its candidness it was also notable for its cost. In significant trials involving multiple defendants, often separately represented, multiple teams of defence lawyers would spend many hundreds of hours going through the prosecution "warehouse" at significant cost to the legal aid fund. It could not continue and it was decided that the prosecution must take responsibility for disclosure and instead of disclosing almost everything, must disclose only that which "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". This test was introduced in a slightly different form in 1996 through the CPIA and it placed a substantial burden on the prosecution. How should this test be interpreted and this obligation discharged?

19.14 During the HMCPSI interviews, Dean QC, Bennett and Haskell often referred to Howard Cohen imposing a "strict adherence" to the disclosure test and it is not unusual for prosecuting counsel to use similar language in court to the approval of judges. Cohen's choice of words caused concern to HMCPSI as it does to me. I shall first summarise the evidence of Dean, Bennett and Haskell and then set out why I believe that the use of the word "strict" is inappropriate as a description of or a qualification to the disclosure test.

19.15 Dean said that the phrase used by Cohen, "from time to time was that the statutory criteria for disclosure would be 'strictly adhered to' or 'strictly applied'". He said that at first he thought that this simply meant that the CPS would be thorough in the exercise of its statutory requirements but, with the benefit of hindsight, believed "that the use of such phrases risked … a creeping culture of resistance to disclosure rather than a more open-minded and imaginative approach" and to a "greater resistance to disclosure than is appropriate".

19.16 Of, for example, the Actie complaints, Dean described them as being "probably disclosable from the outset" and that the decision not to disclose this material was the result of "over-analysis" when the approach should have been, "he's made complaints that may be exaggerated, may be false – just disclose it" and "it frankly makes life easier for us to just make robust and quick decisions about this".

19.17 Bennett:

> "Mr Cohen did say that his view was that the prosecution was applying the CPIA test too generously. However, I knew that Mr Cohen never reversed an assessment made by Mr Haskell that a document was disclosable. But I understood from speaking to Mr Haskell at the time that there was a degree [of] resistance on Mr Cohen's part who thought a more restrictive interpretation of the CPIA test should be applied.

I know from speaking to Mr Dean QC towards the end of the trial and from reading his Note to the DPP (20 January 2011) he felt with the benefit of hindsight that Mr Cohen's resistance had been unhelpful. Mr Dean QC believed it had contributed to some of the problems that arose in relation to the disclosure errors by creating an atmosphere that meant the CPIA was on occasions applied too restrictively. The number of less important errors revealed during the trial became a problem because of the volume."

19.18 And later:

> "From speaking to and observing Mr Haskell he never gave me the impression Mr Cohen's resistance influenced him. Indeed, Mr Cohen's attitude came to light because Mr Haskell took a different view."

19.19 As Haskell was disclosure counsel he had the most contact with Cohen. It is very much to Haskell's credit that when interviewed by HMCPSI he did not seek to blame Cohen for any shortcomings in any of the disclosure decisions. Haskell emphasised that,

> "Howard would challenge me quite robustly on some items, and I can remember lots of occasions where I would have to justify why I was disclosing something. In fact, to be honest, I can't recall ultimately him overruling me on something I thought should be disclosed".

19.20 Haskell was asked if looking back, Cohen's attitude to disclosure might have influenced his [Haskell's] approach:

> "So I have asked myself that. I think it's very difficult to answer that, when you bear in mind what's happened … I can't rule out the possibility that maybe subconsciously, because maybe I felt that I was constantly having to justify every [disclosure] decision, maybe, maybe, and it is a maybe, maybe if Howard had been slightly more, or slightly less strict about […] disclosing items, then who knows."

19.21 On a later occasion there was the following exchange with HMCPSI (my emphasis):

> Q: The point I was interested in was his [Cohen's] primary concern about decisions that you made were those you'd said "disclose" [and less] the case where you'd said CND?
>
> A: We did spend more time in our discussions me justifying…
>
> Q: Justifying disclosure rather than justifying non-disclosure?
>
> A: Yeah.
>
> Q: Somehow I suspected that. This is where his so-called strict approach becomes an issue, and we talked to Nick [Dean] about this. Is it possible that, consciously or subconsciously, knowing what he would want affected the decision you made to justify so that it was borderline?
>
> A: Yeah.
>
> Q: You think it did?

A: Well, I think I said last time, I don't recognise that consciously, but it may well be, I think inevitably, that subconsciously it may be something, because I was thinking, crikey, I am going to have to justify this, so I need to be sure it is disclosable, whereas I suppose had he taken a much more flexible approach, maybe I would have, there would have been some documents where I would have marked sub-consciously.

Q: But you now, because it's subconscious, you couldn't identify?

A: I couldn't. And I can't honestly say that I consciously felt that. And there were occasions when he really would argue with me and then I would, fought my corner when there were things that I thought he was wrong about; and in fairness to him, it was a battle, as I said, I usually won.

Q: Usually?

A: I can't recall an incident where he overruled me.

Q: Was it a painful business?

A: It was a painful business.

19.22 That last exchange is particularly revealing. Disclosure counsel has to make an assessment of unused material and if it is thought that it "might reasonably be considered capable" of undermining the prosecution or assisting the defence, then it "must" be disclosed. Disclosure counsel does not have to be "sure" that material is disclosable, the test requires a lower standard, and descriptions of arguments over disclosure and concern that decisions to disclose would constantly have to be justified, are anathema to disclosure where one simple principle should dominate namely, "if in doubt, disclose". It is very troubling that more time was spent justifying decisions to disclose rather than decisions not to disclose; it is the wrong emphasis. The time of Cohen and Haskell would have been much better spent reviewing decisions not to disclose rather than decisions to the contrary; this approach was indicative of a reluctance of spirit rather than one of openness and generosity. The statutory test does not prohibit disclosure of material that is borderline – indeed any material that is borderline or about which there is any doubt must be disclosed. Haskell was correct in what he said to HMCPSI, a more flexible approach to disclosure would have been appropriate.

19.23 Section 3 is deliberately wide, how have the words "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused" been interpreted amongst the guidance?

19.24 In the Attorney General's Guidelines, these words are cited without any elaboration, perhaps not unnaturally, it is expected that they will be given their normal everyday meaning. I note that the foreword to the old, 2005, version of the Attorney General's Guidelines does make reference to complying "with the CPIA disclosure regime robustly". This muscular theme was also evident in the Attorney General's speech to Prosecutors delivered at Whitehall in 2005:

> "Counsel must be given firm instructions as to disclosure and prosecutors should not abrogate their responsibility and let counsel make the disclosure decisions. By applying consistent and proper principles, prosecutors can take a more robust stance, challenging

inconsistent defence statements or indeed non-existent defence statements where disclosure requests amount to nothing more than fishing expeditions, or do not comply with the procedure set out under the CPIA."

And:

"We must *all* make a concerted effort to comply with the CPIA disclosure regime robustly and consistently in order to regain the trust and confidence of all those involved in the criminal justice system."

19.25 The reference to and emphasis upon "robustness", happily, is omitted from the foreword to the 2013 version. The latest foreword is rather differently expressed and there is mention of the need for:

"Proper disclosure of unused material, made through a rigorous and carefully considered application of the law, remains a crucial part of a fair trial, and essential to avoiding miscarriages of justice."

19.26 The CPS Disclosure Manual assists as to the spirit in which the disclosure test should be interpreted and applied at paragraph 12.18 (my emphasis):

"Prosecutors should <u>resolve any doubt they may have in favour of disclosure</u>, unless the material is sensitive and to be placed before the court in a PII application. Prosecutors are reminded that the consideration whether material satisfies the disclosure test does not include an assessment as to whether such material is or could be admissable (sic) in a trial."

19.27 That spirit of openness was even more widely expressed in JOPI at paragraphs 3.30 and 3.50 (my emphasis):

3.30 Where there is any doubt as to whether material should be disclosed at primary stage, this should be resolved in favour of disclosure.

3.50 The purpose of the second stage is to disclose anything which <u>might possibly help the accused</u>, within the terms of the defence that is raised. This should be <u>generously interpreted</u>, so as to avoid potential injustice or unnecessary applications under section 8. In considering afresh the disclosure schedules at this stage, the prosecutor must be proactive in identifying material, which in light of the defence statement, might reasonably be expected to assist the defence. The prosecutor should also consider whether material that has not been included on the MG6E ought nevertheless to be disclosed.

19.28 It was that spirit of generosity which was so noticeably absent during the LW3 disclosure process and which rightly caused HMCPSI to be critical of the prosecution's approach to disclosure.

19.29 As for publications from the judiciary, the two Lord Justice Gross reviews do not seek to interpret the test any further than has already been done though in his first report, Lord Justice Gross did observe that, "There are still too many examples of prosecution disclosure failures". At paragraph 4 of the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, it is stated that:

"The overarching principle is that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations."

19.30 Some seek to use that paragraph as a justification for a strict interpretation of the disclosure test. I do not believe that can be correct. First, because the statutory test is itself wide and the statute does not prohibit disclosure outside of the test and secondly, a combination of the guidance already cited and the "too many … prosecution disclosure failures" is such that no one could reasonably contend that a strict interpretation was wise, practical or just.

19.31 I interviewed Simon Clements and Sue Hemming who is described by the CPS as its "National Disclosure Champion". Both agreed that the word "strict" should never be used to describe the manner in which the disclosure test is applied. I asked Hemming what a prosecution advocate should do who considers that it is appropriate and just to disclose certain material but believes that it does not fall within the test. Hemming, whilst observing fairly that such decisions necessarily depend on knowledge of the precise circumstances, suggested she could see how to disclose all material for a key period of the LW1 investigation could be said to be compliant with the CPIA, on the basis (in summary) that as a general principle, it is necessary to look at any case as a whole and important not to look at material item by item in isolation – such would be a narrow or blinkered approach rather than a thinking one; where the conduct of an investigation is alleged to have been corrupt, it might be perfectly reasonable to take the view that everything should be disclosed in order to allow the defence to make sense of the entire investigation and the allegation; there may, in addition, be circumstances in which the prosecution might properly disclose material to be of help to the defence, for example, to stop the defence from "going down blind alleys". To that Hemming added that the Better Case Management initiative was important in enabling the prosecution to apply its mind early to the disclosure exercise, its scope, and its limitations, in an informed manner and in light of the identification of the issues in the case. She saw no basis for the mantra of "strict" interpretation: it was question simply of applying the law; the answer I had wanted to receive and had expected but welcome nonetheless. It can only be hoped that the words "strict interpretation of the disclosure test" will not be heard again; they have no place in our criminal justice system.

19.32 Disclosure is not performed in timeless academia; it is performed often in police stations and MIRs, under significant pressures of time and weight of work. If the principles of openness and generosity are employed, disclosure errors should be rare.

19.33 Before I turn to what happened in the LW3 investigation, it is worth noting that since the start of that investigation, the statutory concepts of primary and secondary disclosure have been repealed and replaced in 2005 with one ongoing disclosure approach which has been subdivided into "initial disclosure" after which there is a "continuing duty of [the] prosecutor to disclose" (sometimes described as the continuing duty of review) and the service of the defence statement is now no more than an event (albeit an extremely important one) to be considered during the continuing duty to disclose. The disclosure test itself has effectively remained the same throughout. Because the LW3 investigation commenced in 2003, and therefore before the repeal was enacted, the previous disclosure regime applied throughout.

LW3 DISCLOSURE: THE LAWYERS

19.34 Haskell delivered a training session for the police disclosure officers and he and Dean drafted a "Disclosure Protocol" and other disclosure documents setting out the areas of interest to the defence as the prosecution understood these to be. And Haskell, of course, was at St. Athan for significant periods and therefore was available to give advice and assistance whenever necessary.

19.35 From a document dated 13 November 2008 (three and a half months before the decision to charge the police officers) it is clear that Haskell had identified that "Anything that suggests original defendants/suspects were responsible for murder" would be relevant and disclosable. But on any view, that approach was too narrow: in view of the evidence which the Core Four had given at the original murder trials, any information that suggested presence in or outside of the flat should have been highlighted as disclosable. As another example of a limited view of relevance and potential issues, it was only at secondary disclosure that the disclosure officers' attention was emphatically drawn to material "that suggests that they might have had some involvement, motive or that they had some knowledge or connection with Gafoor."

19.36 That Protocol had also emphasised that even material deemed to be irrelevant, "… must be retained and made readily identifiable" and that "A record must be kept of decisions concerning material deemed to be irrelevant". Furthermore, "At the stage of secondary disclosure the material previously deemed to be irrelevant must be re-reviewed and scheduled if new information renders specific material relevant." If those simple instructions had been followed, the outcome may well have been different. There was nothing in the Protocol (or elsewhere), however, about the handling, management or storage of sensitive material.

19.37 Although the purpose and objective of disclosure is straightforward, it is also important that any disclosure exercise commands the respect and confidence of the defence. There is still widespread concern at the Bar as to the manner in which disclosure is conducted and that is to the detriment of the entire criminal justice system. As Lord Justice Gross commented in his first report of September 2011 at paragraph 61:

> "Both solicitors and barristers with experience of defence work spoke of a lack of confidence in the prosecution's performance of its disclosure obligations. It was also said, on the basis of experience, that, by no means infrequently, challenges to prosecution disclosure turned out to be well-founded and productive."

19.38 That concern remains five years after the collapse of the Mouncher trial and it will require a significant change in attitude, emphasis and approach from prosecuting authorities to build the confidence that is so necessary for the criminal justice system to work efficiently. Our system may be adversarial but disclosure must not be.

19.39 HMCPSI concluded that the impression had been created that there was a "grudging reluctance" to disclosure and the tenor of its report is that the application of the disclosure test was, at times, too narrow and reluctant. Such epithets should never apply to disclosure in a criminal prosecution.

19.40 But in case it is thought otherwise, it is very important to note that disclosure is a three way process. First, the judge must ensure that there is robust case management of disclosure

and second, there is a significant requirement on the defence to participate and engage and that is principally achieved through the production of a defence statement and raising any concerns with the court especially through a section 8 CPIA application for disclosure, section 8(2) of which provides that:

> "If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him."

19.41 A similar provision was in force at the start of the LW3 investigation and applied to it throughout.

19.42 There has already been comment about the remarkable lack of use by the defence of section 8 in Mouncher and the judge was concerned that he had not been advised of the developing disclosure problems; a judge can only manage a trial (robustly or otherwise) if kept fully informed. Whether the limited use of section 8 was a defence tactic or not is perhaps not the point, the fact is that the defence will invariably benefit from a late and slow process of disclosure requests and the system must be capable of preventing this whatever the causes may be.

19.43 One of the disadvantages to the prosecution was that its team of counsel was unable to concentrate on and respond to the evidence. The number of disclosure requests *during* the trial became so great that the prosecution could not keep its team of counsel in court where it belonged. During the civil proceedings, Haskell in evidence said that because of the number of disclosure requests, he "effectively spent the entire trial out of court" and Bennett, likewise, spent a significant proportion of his time out of court dealing with disclosure requests. Dean estimates that during the trial he was on his own in court for about one quarter of the time: that on any view is unacceptable in a complex 10 handed police corruption trial.

19.44 Haskell has estimated that following the start of the trial on 4 July 2011, the Mouncher team made approximately 240 individual disclosure requests which resulted in 14 further documents being disclosed. In Haskell's opinion, of those 240 requests, approximately half could have been made in advance of the trial.

19.45 HMCPSI was of the view that the two year murder investigation was so central to the Mouncher trial that full disclosure of all material generated by it should have been made. This was also the view of Coutts and other police officers. Paragraph 8.120 of the HMCPSI report:

> "A lot of time could have been saved by the prosecution disclosing to the LW3 defendants all material generated by the police defendants during their investigation of LW1, except any that was genuinely sensitive."

19.46 No one doubts that disclosure of all investigatory material would have saved the prosecution a lot of time, but it was surely incumbent on HMCPSI to explain in its report how and why such disclosure would have been consistent with the CPIA, especially as Bennett was interviewed about this issue and disagreed with HMCPSI's assessment:

> "… I still think, even with the benefit of hindsight, that would be stepping past the threshold of keys to the warehouse. Because it was so much material. And I don't remember an

> occasion when any of the defence lawyers actually suggested that should have been the approach … I'm confident if we had said, all Lynette White Phase 1 material passes the disclosure test and you can have it, we would have been criticised and would face criticism from the defence."

19.47 As to the volume of LW1 material, Bennett pointed out that there were, for example, over 100,000 pages of manuscript documents, nominal cards and actions and that if everything connected to the LW1 investigation had been disclosed, the defence would have required many years to prepare for the trial.

19.48 There has long been an aversion to the disclosure of a large number of documents on a class basis and I can see no support for the HMCPSI approach in the literature, guidance or authorities.

LW3 DISCLOSURE: THE POLICE

19.49 At the start of the investigation, it was decided that the LW3 HOLMES database would contain only material that the LW3 investigation had generated and that this database would be used in conjunction with the LW1 and LW2 databases. This was a mistake; it is assumed that the rationale for this decision was convenience and cost. Haskell explained the problems in his witness statement dated 21 August 2015 for the civil proceedings:

> "The most significant contributing factor to the range of errors that did occur was the inadequate way in which the material was registered at the outset. A significant amount of LW1 material had been recovered. During the LW2 (prosecution of Gafoor) a HOLMES database referred to by the police as "Mistral" was used. Some but not all material which had been recovered from LW1 was registered during LW2. When LW3 commenced in 2004 a new database on HOLMES was set up. This database contained all new material generated during LW3, but the police continued to use the LW2 database concurrently.
>
> All LW2 material and all LW1 material should have been transferred and registered on to the LW3 database so that all material was held within one searchable database.
>
> During primary disclosure it became apparent that some LW2 material, but not all, had been registered on the LW3 database. Some LW1 material had been registered on the LW3 database. Some material had been registered on both databases (under different reference numbers) and some LW1 material had not been registered on either.
>
> The volume of duplicate material which this generated across multiple databases undoubtedly caused confusion and a vast amount of unnecessary work. It made the disclosure officer's task of searching for documents and responding to disclosure requests much harder than it should have been. During phase 13 the task of identifying and scheduling LW1 material which had not previously been registered on HOLMES during LW2 or LW3 on HOLMES was hugely resource intensive."

19.50 At times it seems that if something could go wrong it would. The decision to utilise separate databases during the LW3 investigation was wrong and not cost effective.

19.51 In reviewing the evidence, one of the principal concerns I have about the disclosure exercise conducted by SWP is the recruitment, employment and retention of disclosure officers. To say that the role was not sought after would be an understatement. There was little interest

amongst SWP police officers to be disclosure officers on LW3 for three reasons: first (and outside any reason attached to the specific role of disclosure officer), the investigation was unpopular because it involved SWP investigating its own police officers. It was not unusual for some of the police officers under investigation to have friends and family also employed by SWP and accordingly, although an appropriate distance could be established between LW3 investigators and those under investigation, such distance was not always possible between the investigators and those who supported the officers under investigation.

19.52 Second, the work of a disclosure officer was considered uninspiring and unattractive (particularly so in a very protracted investigation) and it has been described on more than one occasion as a "thankless task". As an example of the unattractiveness of the investigation from a disclosure perspective, as it reached the arrest stage in 2005, a number of detectives decided to leave LW3, Penhale commented that "very few had any desire to remain for the daunting disclosure mountain ahead". Later, an advertisement for replacements made "force wide" received only 11 expressions of interest for 10 vacancies and of the 11, one almost immediately had to be removed making 10 applications for 10 positions.

19.53 Third, the role of disclosure officer was considered to be an impediment to promotion and talented and ambitious police officers were discouraged either from applying for the role or from remaining in it for long. When I asked DS Allen what lessons he had learnt from his time in LW3 he replied that his main discovery was that he should never have applied to have been part of LW3.

19.54 The post of Lead Disclosure Officer is particularly important because the Lead Disclosure Officer has supervisory and advisory functions to perform which can and (indeed) should influence the more junior Deputy Disclosure Officers. Amongst the requirements of a Lead Disclosure Officer is that the Lead Disclosure Officer must quality assure the work of Deputy Disclosure Officers by periodically auditing an individual disclosure officer's decisions through HOLMES. The Lead Disclosure Officer must have disclosure experience because the Lead Disclosure Officer should lead by example and be available to give help whenever called upon but the turnover of Lead Disclosure Officers was lamentably high. The following were Lead Disclosure Officers in the LW3 investigation:

- DS Jayne Hill: February 2007-February 2008
- DS Mark Allen: February 2008-December 2009
- DS Edward May: December 2009
- DC Robert Rowlands: January 2010-September 2010
- DC Gary O'Connor: September 2010-December 2011

19.55 DS Allen, for example, was appointed Lead Disclosure Officer without ever having been a Deputy Disclosure Officer. As a detective, Allen had certainly been responsible, on occasions, for disclosure in some of his cases but such experience is very different to that required for the role of Lead Disclosure Officer in a complex case. He had little or no experience or appreciation of MIRSAP; and had received no MIRSAP training. Each of the police officers that succeeded Allen was also performing the role of Lead Disclosure Officer for the first time. That in my view, in a case such as Mouncher, is an astonishing state of

affairs. The weight of responsibility placed on any disclosure officer is a considerable one, and on a Lead Disclosure Officer especially so. And although I am less impressed on the evidence available to me than was Mr Justice Wyn Williams about the capability and the understanding of the disclosure officers of their obligations, I do not doubt that the officers were diligent or that they were doing their honest best: however, a few days of training, and time to "read in" was no answer to their inexperience. And disclosure is not the only example of a role in which inexperienced police officers were employed. On his return to LW3, having left to pursue promotion prospects, DS May performed the important role of Office Manager for the first time in LW3. He did not receive formal training for that new role. Allen and May, like others, had to "learn on the job" and that should not have happened. Penhale in his witness statement to the IPCC:

> "At times with the exception of myself and the DCS all of our supervisory officers were performing at their rank for the first time on the enquiry, they having come to us [as] PCs and in a relatively short time scale were potentially a DS and then having to perform roles that they may have been trained for but which they had no other experience of."

19.56 In that limited sense, rapid promotion was possible, but it was not the career promotion that most police officers consider and plan.

19.57 In his witness statement in the civil proceedings, Haskell spoke of the disclosure errors unravelled by the defence:

> "A number of factors contributed to the making of those errors. The lack of continuity in Lead Disclosure Officer was unhelpful. Some change in the disclosure team over a lengthy period was probably inevitable and indeed was arguably healthy, but when DS Mark Allen left the inquiry in October 2009 I did stress the importance of future continuity in that specific role. Regrettably, three further Lead Disclosure Officers were appointed between then and the trial. This placed an unenviable burden on me and certainly made DC O'Connor's task very difficult."

19.58 Penhale, who was very aware of these staffing difficulties at the time, estimates that it took up to six months before a new recruit was of any real use to the investigation, such was the time required to read into the extensive detail. Coutts was also of course aware of these difficulties, and has suggested he "worked with what [he] was given" and with the comfort that the Core Four prosecution had proceeded without difficulty, that disclosure counsel had been instructed, and that the disclosure officers, and in particular Allen, would not be working in "isolation" (and those whose work raised particular performance concerns were removed from disclosure duties). Although he would have preferred to hand-select officers in whom he had absolute confidence, as he had been permitted and was able to do at the outset of the investigation, that was not possible later. The "depth of loathing" for the investigation, as Coutts described it, "across the force" was such that applicants of the calibre that might have been expected to have been available (and I would add, essential) to undertake the disclosure exercise were not available to him.

19.59 As already referred to, during a critical period in September 2010, the start of secondary disclosure, the Lead Disclosure Officer, Robert Rowlands, left LW3. John Lane, a Deputy Disclosure Officer also left. These departures, particularly that of Rowlands, were extremely detrimental to LW3 and should not have been permitted. In view of the timetable to which the prosecution was operating, it was regarded as impractical to have brought in a new Lead Disclosure Officer from outside, and an internal promotion had to be made.

19.60 The problem of recruitment and retention of disclosure officers is well recognised in the police force and although I do not believe the problem is intractable, I accept that there is no obvious panacea, but the police force must find a better way to manage its staff and to prevent key officers leaving investigations at critical times. What lessons have been learnt and what improvements have been made are addressed in chapter 20.

SPECIFIC LW3 DISCLOSURE PROBLEMS

19.61 LW3 was beset by a number of disclosure problems. It would be wrong to suggest that all were particularly significant, but the corrosive drip feed of problems of *any* significance during the course of the trial process, sets an important backdrop to the issue of the missing material and how it must have been viewed on 28 November 2011.

19.62 The best contemporaneous source of evidence as to what Mr Justice Sweeney considered to be the relevant context and background to that issue is found in the matters he outlined for the jury on 1 December 2011. First, the problems of disclosure were not confined to the trial; some were pre-trial. And although they are not identified, they are likely to have included the "Auto-index issue", the Powell notebook, and the "Assessment of Case". The latter two were of obvious concern to the judge. In interview, Powell had suggested that he was a "meticulous" record keeper, and in support of that proposition sought disclosure of a detailed notebook for the year 1994 (there were no records for the relevant period in 1988). Dean QC ultimately provided the document following earlier refusals. He described the actual assistance that Powell might have derived from his 1994 notebook as "debatable" but accepted that it "illustrates how disclosure based upon an overly analytical approach can store up problems and seem also to reveal a too negative mind-set and a "default" position of not disclosing unused material". Indeed, from the judge's questioning of Simon Clements there appeared to be little doubt in the judge's mind about which side of the line this document fell. There may be a range of respectable opinion about disclosure, but in a system in which the prosecution holds all the cards, and in which the presumption should be to disclose in marginal cases, questions or reasoning along the following lines should be redundant: (1) how much assistance is this document actually going to be to the defendant; (2) does the existence of a "detailed" notebook mean the defendant is in fact a "meticulous" record keeper; (3) if he was, would he ever have noted any incriminating involvement in any event; (4) this document does not correspond perfectly to the indictment period and for that reason is not relevant or cannot sensibly assist the defendant when he refers to his practice six years earlier; or (5) the prosecution do not in fact dispute that he is a "meticulous" record keeper and so a document which might support a defendant's assertion is of no sensible assistance. It is not difficult to see why, when senior lawyers and judges can take differing views about the disclosure of a document, disclosure officers should regard the process as "subjective".

19.63 On 1 December 2011, the judge commented that from a relatively early stage of the trial it was evident that disclosure problems were "continuing" and the relevant problems which were of sufficient concern to the judge that they should find reflection in his remarks included a tape recording of an interview with Gafoor. Gafoor was obviously a vital witness and was to be the first witness called in the trial. The tape had been marked as "used material" rather than "unused material" but had never been served as an exhibit and because it was marked as "used" it had not been considered for disclosure purposes or disclosed; by definition, anything that is "used" has been made available to the defence. If that was a simple error to have been made, it was a serious one – Dean accepted that it

was a "major" problem – and would easily have been remedied by a careful review, before trial, to ensure that all material categorized as used was in fact used and had in fact been served. The impression created by such a problem emerging so early on in the trial in relation to so fundamental a witness is not difficult to imagine. The following exchange on 12 July 2011 gives an early example of the emerging expression of concerns by the defence:

> MR COKER: I am perfectly content to leave court and read this material.
>
> MR JUSTICE SWEENEY: You must not be under undue pressure in relation to such an important witness.
>
> MR COKER: I hope your Lordship will accept we had tried very hard to avoid this.
>
> MR JUSTICE SWEENEY: I can imagine.

And a little later:

> MR JUSTICE SWEENEY: Right. Are we capable of getting to Mr Gafoor today?
>
> MR DEAN: I think not today probably.
>
> MR COKER: My Lord, we now have the interview transcript. I have read it in five minutes. There are matters that I want to consider and there are some outstanding issues too. I am perfectly content that Mr Gafoor be called in chief. If your Lordship insists, I shall make a start, but I would prefer not to.
>
> MR JUSTICE SWEENEY: I am certainly not going to insist with such an important witness. We will see how we go on starting him. I am reluctant to start him without everybody knowing exactly where they think they are going.
>
> MR COKER: May I mention one other matter? I hope it will not detain your Lordship for the reasons that you mentioned before, but it may be that we will require an explanation as to how this slipped through the net.
>
> MR JUSTICE SWEENEY: I can understand that.

19.64 On 14 July 2011, Coker QC returned to the issue and the concerns which flowed, prompting the judicial observation that "what could have been disastrous was happily averted":

> MR JUSTICE SWEENEY: Yes. Well, disclosure can sometimes be an exception to the rule of not wishing to know the state of play between counsel, and bearing in mind the significance of Mr Gafoor as a witness, what could have been disastrous was happily averted. No doubt, Mr Dean, part of what you will now do in relation to each of the most vital witnesses whose identity is obvious is to double-check or institute double-checking insofar as each of them is concerned far enough before they gave evidence to allow any other error which might have occurred to be put right in good time.

19.65 Dean QC assured the court "the systems are robust, intact and the errors are human errors that occur inevitably" and that such checks "would anyway have independently instituted". Those checks would in due course reveal other errors.

19.66 In July and the first half of August "further concerns" arose. Professor Bernard Knight gave evidence on 15 July 2011 (Day 8 of the trial). He was examined in chief by Bennett and it is clear that the prosecution hoped that his evidence, and the descriptions of the injuries sustained by White, could be addressed "very generally"; this was not a murder trial and the prosecution self-evidently did not wish it to become a murder trial. That hope proved, however, not to be possible: the defence wished to explore the injuries in detail, and were keen for the jury to understand the "full savagery" of the attack. A question by the judge prompted consideration of an issue which it appears no one else had considered, namely whether there was a "body map" depicting the location of the injuries. The prosecution's immediate answer (which proved to be incorrect) was that there was no "body map" but there were "photographs" and was met as follows:

> MR JUSTICE SWEENEY: Yes. Of course, the whole point of body maps is to avoid the jury having to look at a lot of extremely unpleasant photographs. In that case then, if there are not any body maps, I am certainly not going to suggest that the jury start looking at such photographs unless it is absolutely necessary, but that means that we are going to have to take it one by one, and the professor is going to have to point out on him where each of the injuries that he's describing were as well as a description in words which allows us to understand what he found. All right?

19.67 The exercise had advanced no further than injury number one before this interruption:

> MR COKER: My Lord, I am very sorry to interrupt, but we are listening to this and doing our best to put ourselves in the jury's position.
>
> MR JUSTICE SWEENEY: Quite. So am I, Mr Coker.
>
> MR COKER: We are personally content to admit a schedule of injuries, which can be subsequently cross-referenced to body charts, to dispense with this exercise. It has to be done sooner or later.
>
> MR JUSTICE SWEENEY: Yes. It is always a pity when it can't be done with the witness, but there we go.
>
> MR COKER: My Lord, it was a suggestion to shorten matters.
>
> MR JUSTICE SWEENEY: I quite understand. Does that suggestion attract itself to everyone else? It does at least have the advantage of meaning one can follow the evidence.
>
> MR BULL: All I am keen, my Lord, is that the jury know the full extent of the savagery of the attack.
>
> MR JUSTICE SWEENEY: That's why I have asked the questions.
>
> MR BULL: That's why I rose earlier, my Lord.
>
> PROFESSOR KNIGHT: My Lord, if necessary, I could quickly do a sketch map of the injuries.
>
> MR JUSTICE SWEENEY: You will gather I am a bit surprised you have not been asked to do that already, because it's an obvious presentational tool.

19.68 Once the jury had withdrawn the judge indicated that the prosecution view that the matter could be addressed only "very generally" was "extraordinary" bearing in mind the issues raised by the defence and added this: "What I don't want to do is to have some sort of half-cocked exercise now with some attempt to put it right ex post facto, which effectively makes it (a) more difficult for the jury to follow and (b) makes it more difficult for the defence to make such points as they wish to make." He indicated to Professor Knight: "It is not your fault at all, but this won't do, and it needs to be done properly". And to Dean, who informed the court that in fact amongst the unused material some body maps had been found, the judge observed: "some of us would have hoped and expected that they played a part before now." And later: "today's events simply won't do, and I am particularly concerned about Professor Knight from your side". It was not a major failing by any means, and has been cast (understandably) by Dean and Bennett as a presentational issue rather than a pure disclosure issue, as the passages above make clear, but it cannot have promoted confidence that the prosecution had all in order. Body maps are commonly prepared and used by the prosecution in cases of murder and here the injuries inflicted on Lynette White were of significance for a number of reasons, the principal one being that Gafoor to his solicitor had accepted stabbing his victim only 12 times, the defence would obviously be raising the issue that if that were so, who had caused the remaining 38 wounds?

19.69 What then of the evidence of Vilday and Psaila to which Sweeney J referred next on 1 December 2011? On 21 July 2011 (Day 12), Psaila gave evidence. Following a hiatus in cross-examination, there was an argument about disclosure of witness statements Psaila had made in other investigations. Dean QC said that he was "reluctant simply to disclose where we would be doing nothing more than clearing up what those who defend consider to be mysteries where there are none." The judge was not persuaded the defence were entitled to see their contents, but did rule that the defence were entitled to know who had taken the statements, the date, the length of, and the number of signatures on each statement. The next day (Day 13) before the court rose Coker QC took up the judge's parting invitation to "raise anything else" by giving notice of the issue of Vilday's medical records. Again, it was not a significant matter in isolation but the impression was obvious:

> MR COKER [...] there is a problem, and it is this. By chance it was discovered when a diary that had hitherto been marked very much "Clearly Not Disclosable", when we got to look at it, it turned out that there was an entry there to suggest that Miss Vilday had been taken to see a psychiatrist for counselling in relation to her experience, in other words, witnessing the murder.
>
> We drew that to the Crown's attention and I understand that the medical records, if they do contain anything, won't be available to us until she comes to court, because obviously she has a right to be heard.
>
> What we have tried to do, as I hope your Lordship will have noticed, is anticipate these problems well in advance and get the document so we can prepare ourselves. It is likely that the medical records may not contain anything, but they may contain something.
>
> The problem is it may, when we see the records, mean we have to look elsewhere, hospital, I don't know. The risk is we will just stall when, if we could somehow confront this problem earlier, we wouldn't.

19.70 To the prosecution suggestion that the holder of Vilday's confidential medical records should attend court on the same day as Vilday was due to give evidence, which "may then cause

some delay", the judge asked why this could not be dealt with sooner than that. In the event a summons was sought and granted, and disclosure was made as soon as Vilday's consent was forthcoming. But consideration of the medical records raised the possibility that there were further and relevant notes. Disclosure, of course, can beget disclosure, and invariably in this case it seems that the provision of some material would prompt a request for more. Coker said there was no need for a "post-mortem" and added: "I have to say we haven't been embarrassed by not having this material so far, but it has come in the nick of time."

19.71 By 4 August 2011, and in the course of legal argument arising from the evidence of Grommek, matters had progressed to the point that Coker felt able to inform the court that he would in due course be submitting that the investigation was flawed: LW3, so it would be submitted, had placed inappropriate reliance on the contents of the mitigation advanced on behalf of Grommek "without investigating" its truth. Coker apologised for the lateness in raising this "wider issue" but observed that much of the support for the submission had come only during the course of the trial (as he put it: "whenever one shakes the tree whatever had hitherto resisted the forces of gravity falls to the sand"); he had, he reminded the court, only thus far asked for ten minutes' adjournment.

19.72 The trial broke off between 12 August and 1 September 2011 but very soon after the return on 5 September 2011, a further "wider issue" was raised by Coker, arising from the disclosure of an entry in a contact log. He raised a concern about the prosecution approach to disclosure and added this: "All I need to be reassured about before I cross-examine these witnesses by Mr Dean -- because it may be Mr Dean is relying on others -- is that we have had complete disclosure of relevant contact." Within two days the issue of contact would be raised again in the guise of the Amiel "house to house form". It was, explained the judge on 1 December 2011, the point at which "concerns began to come to a head" not least because three fundamental prosecution witnesses – Miller, Actie and Paris – were about to be called. Amiel was called on 7 September 2011. Her house to house form was one of a very considerable number of block-listed manuscript forms completed by the police during their house to house enquiries in the streets surrounding James Street in the weeks immediately following the murder. Noreen Amiel was seen in early March 1988. She had neither heard nor seen anything of significance in relation to the murder but the officer who saw her observed that she: "spoke to half caste male (20's denims) on Monday 7th March at pub. This man stated that the police were looking for him in connection with murder, and he was leaving the country. Lives in new flats West Bute St. Name not known". She would come to name that "male" in her witness statement made two months later as Abdullahi.

19.73 On the morning before she was due to give evidence, the house to house form was disclosed following a specific request made on behalf of Mouncher. This failure in the disclosure process was said to be a failure sufficiently to appreciate the finer details of the case: the omission to name Abdullahi permitted an inference that Amiel was initially reluctant to identify Abdullahi, possibly as a result of threats or intimidation. As the judge indicated, the form should have been disclosed: it was an early account of a prosecution witness arising from first contact with the police. And whilst it might be said that the inferences the defence suggested were by no means obvious, it did, at the very least, suggest a line of questioning in cross-examination. The value of the material was a matter for those receiving the disclosure, and disclosure of all such contact would have avoided the consequences of an insufficiently imaginative foretelling of the approach the defence would

take to the case. Diagnosing a difficulty which is by no means unique to Mouncher, Coker put it as follows on 8 September:

> MR COKER: At the heart of the problem is how difficult it is sometimes for a prosecutor -- we have all been in this position and I obviously include myself in this -- it is very difficult to look at a document through the eyes of the defence, however hard one tries. Because one is looking at the whole case from a different angle, all the pieces of the jigsaw don't necessarily spring to mind.

19.74 Coker added that he could "well see" why the Amiel form had not been disclosed, but the "little episode" was illustrative of a wider tension between two approaches to disclosure: on the one hand, the keys to the warehouse (which he said "no one" wanted) and on the other, "the rigorous" application of the law. He advocated a "shift in the balance" and, in an observation which triggered Sweeney J's remark about his policy when prosecuting almost to disclose every contact with a witness:

> MR COKER: If the prosecution were to relax their approach to all records of contact between the original investigation witnesses and the current investigation witnesses, subject to PII, it would be unnecessary for us every day almost to say, "Have you checked all contact with witnesses and disclosed it to us?", which, in fact, over the weeks has triggered quite a lot of disclosure.

19.75 Dean QC whilst "more than happy to take a more relaxed view" was also conscious of the danger of inundation. It is not an easy balance to strike. With the judge's comments ringing, by 12 September 2011, the prosecution had disclosed logs and officers' reports of contact.

19.76 On the same day, the prosecution disclosed that part of the D30 contact material relating to Miller: as I have explained in earlier chapters, D30 concerned material which related to police contact with the original defendants. As is clear from what I have explained, it was to become an issue of real concern to the judge: indeed, perhaps the most damaging of all the disclosure problems. And it is not difficult to understand why that should be. Receipt of a file of D30 material for Miller on 12 September elicited this response from Coker:

> MR COKER: I'd like Mr Dean's help as to whether or not anyone has reviewed it and, if so, who. There are nine teams. There are five of these files. They spread over ten years. We are disappointed, to say the least, that this has happened. In the light of recent events I have to say we are not surprised. May we ask your Lordship to pencil in -- ink in a time to raise disclosure? We will do our best to maintain momentum of the trial. We have only asked I think for one ten-minute adjournment so far. We undertake to do our very best to ensure that the trial proceeds without interruption, but we have even more on our plate now.

19.77 And later, drawing together some of the strands of the "wider problem", Coker made explicit reference to a concern about the "integrity of the system" and, in light of disclosure received that day, what was said to be Coutts' "remarkably close" relationship with the original defendants. The suggestion Coker had made that the investigation that had brought the defendants to trial had been less than objective, and that the relationship with the original defendants had been inappropriately close, formed an important background to the emergence, and significance, of the disclosure issues: the poor quality of note taking and record keeping of meetings; the addition to a single "D" number (D30), associated material and material post-dating its registration and scheduling by that same "D" number; a failure,

too late, to appreciate that notes and records were incomplete and to ensure that such deficiencies were fully and promptly corrected; and a failure to inform the court that there was an ongoing issue of missing or incomplete notes. All, in addition to revealing a failure to record and retain material, assumed a more troubling hue.

19.78 The genesis of these problems arose early on: leaving aside the necessity or wisdom of such contact as there was, Dean QC has suggested, and I agree, that "a system that ensured clarity of record keeping" should have been agreed upon at the very outset of the case. Thereafter, the CPS should have demanded more rigorous record keeping by the police. For the CPS's part, Cohen ought to have ensured proper CPS record keeping and ought to have recognised that there was a problem: whether or not he reviewed D30 closely or at all, as an experienced lawyer, the potential disclosure relevance, and sensitivity, of contact with the original defendants should have been apparent to him: indeed, there had been disagreement between him and another CPS lawyer Gaon Hart as to the wisdom of such contact; and he had been present at a number of the meetings. Formality and clarity were key, but as has been explained by HMCPSI, they were lacking.

19.79 In 2010, Coutts ordered a chronology to be produced of all contact: undoubtedly that was sensible. It might be said with hindsight that such a chronology could usefully have been prepared and maintained from the outset, but equally it could never have been appreciated at the outset that the issue could ever have caused such difficulty. Coutts instructed DC Matthew Jones, who had responsibility for family and witness liaison, and "victim care", to draw up the chronology, and in turn another officer, Simon Williams (now deceased) was enlisted to assist in that exercise. To bring order to the D30 material it was split into individual files for each of the original defendants who had been seen. Cross-referencing by Simon Williams of the files and the meetings revealed gaps and I am satisfied that at the time, in the spring of 2010, that would have been of no great concern: the gaps could and would be filled long before trial. In the event, that was not done and, of course, it should have been. Efforts were made to fill the gaps but those efforts were not sufficient. Requests for solicitors' records were not followed up sufficiently quickly, or notes requested, and there was a failure to appreciate the potential for the issue if not resolved well in advance of trial, to become a much more significant one.

19.80 There were, of course, general issues which underlay a number of the disclosure problems that emerged in the course of the trial. Block listing, for example. Block listing is the practice of registering, under a single reference number, and necessarily by a broad description, a class of material of the same kind. In complex cases, with many hundreds of thousands of documents, the use of the practice is often not only appropriate but necessary. The separate registration of every document is laborious, wasteful of resource, and can itself become an unnecessary burden to all involved. The problems in Mouncher were: its use in respect of classes of unlike material; its use in respect of classes of material not contemplated by earlier guidance (such as anodyne, administrative material); and the failure to draw from the block list relevant individual documents (for example the Amiel house to house form).

19.81 Most significant of all perhaps, was an inability of the prosecution to have considered the case from all of the "different angles" that Coker with his mastery of the detail could see: it is plain that some of the angles were viewed by Dean and others as not just peculiar but positively kaleidoscopic, and it is difficult to see how the disclosure officers should meet

criticism for failure to see in the material that which those considerably more experienced, and setting the parameters of the disclosure exercise, could not see.

19.82 Internally generated documents: this was not a matter which emerged through the trial process but was, rightly, considered to be of significance by Dean QC on 28 November 2011 against the backdrop of the other problems. There can be an inclination to regard the disclosure exercise as attaching only to the material generated "externally" by an investigation, and received physically in the MIR; the material being split into the fruits of an investigation which may advance the prosecution case, on the one hand, to be served as used material, and the residue, on the other hand, to be unused material. Thus viewed, insufficient emphasis may be paid to the way in which those acting within the investigation may view "internally" generated material that is disclosure relevant and which itself must be recorded, retained, reviewed and revealed. The treatment of the May and (although it was not recollected or apparent between 28 November 2011 and 1 December 2011) the Williams notes is the clearest example of this failure.

19.83 The claimants refer in their supplemental grounds to the fact that HMCPSI did not make "specific recommendations…in relation to police handling of disclosure, whether (for example) in terms of training or improved procedures or resourcing. Accordingly, the claimants' representations also highlighted as outstanding the potential police disclosure failings in respect of the disclosure process and highlighted [in the HMCPSI report] but not thus far examined in detail". As is clear from that submission, the concern (rightly) expressed by the claimants is that errors are not repeated and that recommendations are made on a sound footing; it goes without saying that lessons must be learnt. I have sought to identify the relevant and important underlying causes of the failings and am satisfied that in Mouncher they included: the appointment of inexperienced disclosure officers, under the supervision of officers who had never before performed the supervisory role on any investigation, far less an investigation like Mouncher; the inadequacy of standard training to prepare such officers for a case like Mouncher; the lack of continuity of disclosure officers, who in view of their inexperience, could never have known fully what was in store, and when it became apparent, predictably sought opportunities elsewhere; the pressure of work; the collective lack of understanding amongst the disclosure officers of the precise criteria to apply in a disclosure exercise, and the feeling that the criteria were prone to change, a result of the decision to wait until the issues were identified explicitly at the stage of secondary disclosure; mistakes of judgement and interpretation and a failure fully to appreciate the significance of material, in isolation, or to be sufficiently sensitised to the use to which material might be put in cross-examination by imaginative cross-examiners unmoored by instructions; and the absence of any regime of supervision or quality assurance of a kind that could ever cure those essential problems.

19.84 Against that unhappy backdrop, it will I hope be obvious why seeking to examine in detail every alleged disclosure failing, or to attribute responsibility to any particular disclosure officer for any individual decision, whether a decision to block list, or the description of a document in a schedule, or otherwise, is in the circumstances unnecessary to learn the obvious and necessary lessons.

19.85 Prosecutors would be well advised to pay heed to the pronouncement of Sweeney J that when at the Bar, his policy when prosecuting was, "almost to disclose every contact with a witness". The implementation of that view will cure many disclosure shortcomings as it is frequently the case that the most pertinent of all disclosed material is that which is either

spoken to or spoken by witnesses, especially principal witnesses. The recognition that this is a particularly important and sensitive category of disclosure will place it at the forefront of the minds of those conducting disclosure work and will prevent the type of embarrassment that befell the prosecution in Mouncher.

ANOTHER WAY?

19.86 Dean, Coutts and Penhale have at various times suggested that the disclosure requirements are too onerous in complex cases and that the burden should be reduced to make such cases capable of being prosecuted. For example, paragraph 26 of Dean's advice to the DPP dated 29 November 2011:

> "Although there will need to be a more detailed post-mortem I have little doubt that this case is another illustration of just how the burdens of disclosure can break a large-scale investigation/prosecution. There must be a strong argument for identifying classes of cases in which the prosecution are entitled to apply a more liberal disclosure test and one that reduces the scope for errors of judgement."

19.87 I strongly disagree with that view. With the appropriate resources, the disclosure exercise in Mouncher was capable of being performed. Although not directly comparable (disclosure in LW3 was certainly more onerous than it was in the civil proceedings), disclosure in the civil proceedings was nonetheless a formidable task which was conducted by the one team over three years and there was only one disclosure failure (one of Haskell's advices came in two parts of which, mistakenly, only one part was disclosed) which once recognised was very quickly resolved. The failures in Mouncher should not be met by a change in the law but by a change in the approach and commitment of prosecuting authorities to the discharge of their disclosure obligations in complex cases. But as already stated, disclosure is most certainly not a process involving the prosecution alone; the defence must also be involved to a much greater degree and at an earlier stage than happened in Mouncher. Disclosure requests must be made and concerns resolved before the start of the trial. Section 8 applications are to be encouraged – and now are required – where there is conflict because judges can only become involved through proceedings in court. It is often counterproductive to investigate motive, but where disclosure requests are made during the trial that could and should have been made before, a judge should not be excluded from that development but must be involved and should ensure that the prosecution are not disadvantaged by having one or more of its team of counsel kept out of court. None of these proclamations are controversial or new, they are often repeated yet, regrettably, not always observed. In the triumvirate of prosecution, defence and judge, however, there can be no doubt that the principal responsibility lies with the prosecution; only if it is discharging its obligations comprehensively and properly can the defence and especially the judge be fully engaged.

20. How the agencies responded to the collapse of the Trial

20.1 It is essential that improvements are made to ensure that so far as is ever possible, the errors that beset the Mouncher prosecution are never repeated. Five years having since passed, I have asked the CPS, SWP and the National Police Chiefs Council (NPCC) – the national body for all chief officers, which is intended to "provide national co-ordination of policing and policing leadership" – to identify how each has responded to the collapse of the trial and, in particular, to identify the changes that have been specifically made as a result.

20.2 If that might be thought to be a simple exercise, it has not been. In particular it is apparent from the responses received from the various agencies that it is not always possible clearly to separate: those developments that are strictly "Mouncher developments", in other words, developments specifically in consequence of the collapse of the trial and the lessons to be learned therefrom; and those that are "other developments", those in consequence of other reviews, reports, or otherwise the result of the on-going reforms and initiatives that have been made and introduced in any event in the last five years.

20.3 That may not matter greatly, because the principal concern must be, first, to understand whether the way in which disclosure is dealt with has improved post-Mouncher (be it part of a general process of improvement or a direct response to Mouncher); and, second, to ensure that there is in place a proper process to ensure that the lessons and recommendations of bodies like the IPCC, or HMCPSI, are promptly and carefully considered and where appropriate implemented.

20.4 But it does make my task in this chapter somewhat less neat, because although this is not the place for an exhaustive survey of every development in half a decade, it is necessary to set out, if only in summary form, some of the principal relevant disclosure developments.

2011-2013: DISCLOSURE DEVELOPMENTS

20.5 As an indication of the level of activity that there has been around disclosure, and to say nothing of the post-2013 initiatives, and in particular the wider-ranging review ("Review of Efficiency in Criminal Proceedings") conducted by Sir Brian Leveson, the President of the Queen's Bench Division of the High Court, and published in 2015, there have been, during the currency of the trial in Mouncher and following it:

- 2011: Lord Justice Gross "Review of Disclosure in Criminal Proceedings";
- 2011: "Review of Disclosure in Criminal Proceedings" ("the Rose Review"):
- 2011: "Attorney General's Guidelines on Disclosure: Supplementary Guidelines on Digitally Stored Material";
- 2012: DPP appoints CPS National Disclosure Champion;
- 2012: Lord Justices Gross and Treacy "Further review of disclosure in criminal proceedings: sanctions for disclosure failure";
- 2013: HMCPSI "Review into the disclosure handling in the case of R v Mouncher and others";

- 2013: IPCC "South Wales Police destruction of specific documents leading to the collapse of the R v Mouncher & others trial at Swansea Crown Court on 1 December 2011";
- 2013: "Attorney General's Guidelines on Disclosure for investigators, prosecutors, and defence practitioners";
- 2013: "Judicial Protocol on the Disclosure of Unused Material in Criminal Cases".

20.6 In fact, in the very same month that the prosecution offered no evidence in Mouncher (December 2011), the Rt Hon Sir Christopher Rose reported following an inquiry he had conducted – at the request of the then DPP Keir Starmer QC – into the Ratcliffe-on-Soar Power Station protest/trespass case. The inquiry was launched following the Court of Appeal's decision on 20 July 2011 quashing convictions in that case "because of non-disclosure to the defence of sensitive material in the prosecution's possession relating to the role and activities of Mark Kennedy, an undercover police officer" (paragraph 3).

20.7 I do not set out the Rose Inquiry's Terms of Reference in any detail but note the ToR included the following: "Whether the CPS and prosecuting counsel complied with their disclosure duties properly in relation to the known existence of an undercover police officer in this case" (paragraph 5). The report concluded: "the CPS failed properly to comply with their disclosure duties partly because they failed to ask questions of the police, partly because the police failed to tell the prosecutor the extent of the UCO's [Undercover Police Officer's] participating authorisations and partly because the Case Management Review Panel's oversight of the prosecutor was not as effective as it could or should have been." That of course is a complaint that the HMCPSI would also come to make of the case management panels in R v Mouncher.

20.8 A second relevant report, which I have already touched upon, was published earlier that autumn. It followed a more general review by Lord Justice Gross of the practical operation of the CPIA disclosure regime and in particular as it applied to document-heavy cases ("Review of Disclosure in Criminal Proceedings", September 2011). Lord Justice Gross identified a number of areas that required improvement and made a number of significant recommendations, many of which I would observe are demonstrated by the experience of Mouncher to be essential (although it may be observed that a concern about "excessive" detail in schedules should not be taken – and is not intended to be taken – as licence for less than full, accurate, and proper detail, which was the concern in Mouncher). These included:

- "Proper" police disclosure training, "extending to an appropriate "mindset"" as "part and parcel of the professional development of a police investigator";
- Greater common sense in the "scheduling" of unused material, the "full use" of block-listing in appropriate cases, and the avoidance of "excessive" detail in schedules;
- More active and earlier prosecution engagement, including the articulation of "the prosecution's approach to disclosure" in the "Prosecution Case Statement", and a "Disclosure Management Document" – documents which the CPS had helpfully canvassed with Lord Justice Gross in the course of the report consultation – to "identify and narrow the issues in dispute"; to encourage the defence in turn to identify the issues in the case and to engage with the prosecution approach to its disclosure

exercise; and to enable "early judicial guidance or indications" as to the propriety of that approach;

- Early case management, including the prosecution taking greater responsibility for drawing the court's attention to issues of disclosure that may require the court's attention or assistance to resolve;
- "[S]cant tolerance of continual, speculative sniping and of late or uninformative defence statements";
- Consolidation and abbreviation of the slew of "guidance" that exists on the issue of disclosure. It is convenient at this point to note that the CPS have informed me that "a complete review of the Disclosure Manual is underway." It is being "fully updated generally and with developments in [Transforming Summary Justice] and [Better Case Management]." The CPS acknowledges: "Until now amendments have been done gradually and this is the first complete review that has taken place for some time" and "will need to take into account all developments since it was last updated". Work on reviewing the Disclosure Manual has reached the final editing stage following input from the police and an updated version will be available by the summer of 2017 following full consultation.

20.9 The next relevant development came in January 2012 when, against the backdrop of the Rose Review, the Gross Review, and Mouncher, the DPP ordered what has been described by the CPS as "a complete overhaul" of its "approach to disclosure in serious and complex cases such as [Mouncher]". Over the course of the eighteen months that followed (all of 2012, and the first half of 2013) the CPS sought to combine into a single model the "good practice" it had identified and extracted from different "Areas and Central Casework Divisions".

20.10 Although it is always necessary to exercise caution before accepting at face value what may, upon analysis, be little more than re-branding, I am satisfied that this was a sensible, well-intentioned, and significant reform. Six months into the "overhaul" (July 2012), the CPS was able to say, in response to the Gross Review, that:

- The CPS had introduced a new national disclosure role ("National Disclosure Champion"). Susan Hemming was appointed to the role by the DPP to the role in May 2012 to ensure that "best practice" was, first, communicated to all relevant parties and secondly, that it was complied with. Equivalent roles were established in the individual CPS areas ("Area Disclosure Champions").
- The CPS was to make mandatory, in certain categories of case, two documents the CPS had canvassed with Lord Justice Gross and which the Gross Review had considered favourably: one internal ("the Prosecution Strategy Document"); the other for the court and defence ("the Disclosure Management Document"). Because they are put forward in answer to some of the HMCPSI recommendations, it is important to consider these documents in a little detail and I do so below.
- A third document, the "Disclosure Record Sheet", which was not addressed in the Gross Review, was also to become mandatory and would ensure a full record of all disclosure requests and responses.

- The CPS introduced a new system of review ("Disclosure Gateway Reviews") for that class of case in which there was "deemed" to be a "disclosure risk". The system of review was to be made mandatory if certain "risk factors" were met, or if the case was a VHCC case (unless specifically exempted); and discretionary in non-VHCC cases and in cases which did not meet disclose risk factors. Again, it will be necessary to come to the detail of the review system below.

- The CPS introduced revised disclosure training, including revised compulsory training, for CPS lawyers.

- The CPS introduced revised processes governing its Case Management Panels.

20.11 The Gross Review was followed by a further short report later in 2012, produced at the invitation of the Lord Chief Justice. This report, the Gross/Treacy review ("Further review of disclosure in criminal proceedings: sanctions for disclosure failure", November 2012) was principally concerned with the question of sanctions for non-compliance with disclosure obligations. Nonetheless, the report did:

- Observe that: "it has been notable in our consultations that we have heard significant complaints and concerns about prosecution disclosure failures; disclosure exercises being inadequately resourced, and without an individual taking responsibility for the case to ensure that the disclosure duties are fulfilled. Overwhelmingly the concerns voiced to us in conducting this review have been concerning prosecution failures, not failures of the defence."

- Underline the "consistent and sustained" support it had encountered for the earlier recommendations of the Gross Review, including in particular for: consolidation of guidance; training to ensure a proper understanding of disclosure principles in particular for investigators and prosecution lawyers; and judicial case management. In addition the Gross/Treacy Report called for the swift implementation of those recommendations.

- Make a series of further relevant recommendations, including: that any deficiencies identified in the Defence Statement by the prosecution should be brought to the attention of the court and defence; that defence disclosure requests should be "justified" and made in a new pro forma addendum to the Defence Statement signed by counsel and solicitor; that judges should insist on additional requests being made by section 8 application (of which, historically there have been few, including in Mouncher); that sufficient time should be allotted for judges to prepare and deal with prosecution and defence applications relating to disclosure, particularly in more complex cases; that "the ownership of responsibility for disclosure, by a specific named officer and lawyer, is vital in ensuring that there is individual responsibility for the disclosure process"; and "front-loading the disclosure work, especially in larger cases, and the early engagement of counsel".

20.12 On 1 March 2013, a little under six months after the Gross/Treacy Review, and 15 months after the CPS "overhaul" of disclosure had started, the CPS "overhaul" was said to be complete.

20.13 Later that year, on 3 June 2013, a number of recommendations made in the Gross Review and the Gross/Treacy Review were introduced in the Senior Presiding Judge's Disclosure Case Management Initiative (DCMI); a pilot scheme implemented at a number of Crown

Courts over a period of 18 months for cases of particular complexity (including cases which alleged serious police misconduct and corruption). The scheme had a number of aspects: the service of a prosecution case summary; the service of a prosecution notification form setting out a proposed timetable, including a proposed disclosure timetable, and identifying potential evidential, presentational and legal issues; a preliminary hearing for the judge actively to manage the case and set a timetable; the use of a Disclosure Management Document; a requirement that all disclosure requests be made formally in writing (to ensure there was a record); early identification of the trial judge, a fixed date for trial and effective case management by the judge through the life of the case encouraging discussion and defence engagement.

HMCPSI RECOMMENDATIONS

20.14 I have set out the above chronology in summary because it was against a backdrop of what the CPS had described as "fundamental reforms" of disclosure that, by the time the HMCPSI reported on 16 July 2013, the CPS felt able to say that its response to some of the "broader issues" identified by the HMCPSI was already well advanced.

20.15 In the first of two press releases on 16 July 2013, the CPS set out five relevant "broader" reforms which it said had now become "embedded" into practice across the CPS. In headline summary, those reforms were: the Gateway Review System; the Prosecution Strategy Document; the revised Director's Case Management Panel meetings; the National Disclosure Champion; and the revised selection and instruction of Counsel.

20.16 As to the eight specific recommendations the HMCPSI report had made, the CPS accepted them "in their entirety". It is convenient to set out each of the recommendations in full and because some apply to the CPS and Police equally, their responses may be taken together.

20.17 The first of the HMCPSI's recommendations was that:

> "1. At the outset of a potentially large, complex or sensitive case, a CPS lawyer with responsibility for the allocation of resources, should meet the police to ensure that the CPS has a full understanding of its implications and to enable the investigators to explain their needs, including the likely burden of disclosure."

20.18 The CPS accepted this recommendation, and it accepted in particular that in Mouncher, "managers in the casework division should have played a more active role at the beginning of the case"; that "[t]his would have given them a clearer idea of the resources likely to be needed"; and that this "should have led to a more considered approach to the selection of CPS staff and the counsel team to work on it".

20.19 So far as the early appreciation of resources is concerned, it is clear from the summary I have set out, and the relevant questions posed in the Prosecution Strategy Document (see below), that the CPS's reformed practice, if followed properly and fully (and as ever those caveats are obviously vital), should make unavoidable such early and active engagement and should promote a proper assessment of the resource required.

20.20 As for the manner of the instruction of counsel, the CPS in its press release dated 16 July 2013 acknowledged that Counsel instructed in Mouncher "… did not have sufficient collective experience for the very unusual burdens placed on them by a case which was extremely difficult to prosecute. Mr Dean QC was a relatively new Queen's Counsel, but

the [HMCPSI] Review doubted whether anyone could have led such an inexperienced team in such a voluminous and challenging case with the degree of supervision and management required. More attention should have been paid to the requests for the instruction of an additional experienced junior (paragraph 10.10)". The HMCPSI Review found that "… despite the considerable ability of junior disclosure counsel, the size and sensitivity of the case required someone with considerably more experience (paragraph 5.39). HMCPSI observed that the instruction of very junior counsel to act as disclosure counsel is not advisable, particularly where substantial experience of Crown Court trials is necessary (paragraph 5.40)".

20.21 Two important improvements have been made by the CPS. The first relates to the formal introduction of minimum requirements for counsel instructed; the second, to the manner of instructing counsel. In March 2012, the CPS Advocate Panel was introduced to "grade" junior advocates at levels 1, 2, 3 and 4, the selection criteria for progression from one level to the next including knowledge, skills and experience of disclosure. As a result, if Mouncher were to be prosecuted now, it is inconceivable that Haskell, given his years of call (or for that matter Bennett), would ever have met the minimum requirements to be considered "suitably experienced, competent and capable" to perform the role. Haskell was, at the time of his instruction, "level 1" on the CPS grading system, i.e. the lowest level, at which a junior barrister would ordinarily be permitted to conduct straightforward or uncontentious preparatory hearings, and at most conduct straightforward Crown Court trials. By 2008, Haskell had progressed to "level 2". Hemming has confirmed that if Mouncher were prosecuted today, the disclosure counsel appointed would be expected to be, at the very least, level 2, but possibly more likely level 3 and depending on the complexity of the case, as high as level 4. And whoever was instructed would not have been instructed without "clear and comprehensive written instructions" setting out, to take the example of disclosure counsel, the parameters of his role, his tasks, the level of autonomy, the type of decisions he could take, the type of decisions that have to be referred to the reviewing prosecutor, and his role in any subsequent trial. A set of standard instructions has been drafted which form a helpful starting point and aide memoire to the reviewing lawyer who must ensure that all relevant issues are covered and upon whom responsibility ultimately rests for ensuring that the prosecution discharges its duty of disclosure.

20.22 The second HMCPSI recommendation was that:

> "2. The CPS works with other prosecuting authorities that handle large and complex cases and the Association of Chief Police Officers [now the NPCC] to consider the development of a searchable IT system for the handling of disclosure in large or complex cases."

20.23 In its response, the CPS has placed emphasis on the word "consider", and it is true to observe the recommendation was not that the CPS, Police, or anyone else must introduce a particular "IT system" or software. In similar vein, in response to the fifth HMCPSI recommendation that "The CPS investigates with the Association of Chief Police Officers [now the NPCC] the availability of software that sorts emails into chronological order", I am informed that the CPS has "investigated" this possibility without change and that the HMCPSI has confirmed that is the extent of the CPS obligation under this recommendation.

20.24 In 2012, so prior to the HMCPSI recommendations, ACPO, City of London Police, SOCA, HMRC, the CPS and the SFO had already met to consider the SFO "systems for digital

disclosure". In August 2013, that is following the HMCPSI recommendations, the CPS set up a "Digital Disclosure Group" and convened meetings to bring together representatives of individual police forces. I was obviously interested to understand whether anything had come of these meetings and have asked the CPS and Police. The CPS position, in summary, is that: for its part, the chronological ordering of email is not something which it has found to be "a significant issue" in view of broader digital advances made (and it is true also to observe that "digital" cases will commonly afford possibilities for searching electronically by keyword); "system change", by which is meant the development of new IT systems and the introduction of new software, is ultimately a matter for the Police, because it is the responsibility of the Police to provide the CPS with unused material and disclosure schedules; and "part of the problem" in achieving more is that individual Forces, and investigators, may commonly each "use different software" so making it difficult to introduce a single "national scheme." The NPCC has also emphasised this latter point and no one national system is in place.

20.25 The third HMCPSI recommendation was that:

> "3. The CPS and the police should agree in each case on the treatment of secondary source and duplicate material. The agreed approach to secondary source and duplicate material should be written down and provided to the defence and the court."

20.26 I am told by the CPS this is a matter which would fall to be addressed in the Prosecution Strategy Document and thereafter in the Disclosure Management Document (as I have already observed, the first document is internal only but the second is provided to the court and the defence). There is, however, no specific reference to secondary source or duplicate material in either document. It would in my view be desirable to include specific reference to both; and this could readily be achieved by a single question (which might conveniently be included following the existing question about sensitive material) along the following lines: "How will other categories of material (such as secondary source; duplicate/copy material) be treated for disclosure purposes? Refer to in DMD and if applicable Disclosure Strategy Document". The NPCC has added that it intends this will be specifically covered in the revised version of the Disclosure Manual (see below) and will form part of revised training prepared with the College of Policing.

20.27 The fourth HMCPSI recommendation was that:

> "4. When applying a thinking approach to disclosure decisions, prosecutors should not be judgmental about the merits of a defence that is apparent from the case papers and should keep in mind the guidance in the Attorney General's Guidelines and the Disclosure Manual about resolving doubt in favour of disclosure. They should be slow to overrule a police view that material is relevant."

20.28 On a restricted view, this recommendation of the HMCPSI was no more and no less than the restatement of well-established principle. And it is true that HMPCSI does not here recommend the publication of (yet further) guidance reminding prosecutors of their responsibilities and the contents of already existing guidance. So important is the principle, however, that it is worthy of emphasis in existing material and training. The CPS have told me: that "the Prosecution Strategy Document not only reminds prosecutors of the correct approach to disclosure but also requires the approach to disclosure taken in the particular case to be clearly set out" and that: this "requirement allows the Case Management Panel

to understand the approach taken and enables the Disclosure Gateway Review prosecutors to test the approach with the reviewing lawyer."

20.29 Analysis of the Prosecution Strategy Document reveals a number of important questions asked of the prosecution (and, as I have indicated a number are relevant to the first HMCPSI recommendation). The questions include: "Are there any sensitive issues?" "What are the (likely) issues in the case?" "What defences can reasonably be anticipated at this stage in the case?" "Are there any categories of material that are at this stage considered irrelevant?" "What material has been identified and is in the possession of the investigation, what is its category, location what if any special provision is to be made for disclosure purposes e.g. dip sampling or computer based material." "What material actual or potential has been identified but is not in the possession of the investigation, what is its category/nature, its location and what are the third party contact details, the steps taken or to be taken as per Code of Practice para. 3.6, and the agreed timescale for securing and obtaining the material, bearing in mind that certain material may only be available for a limited period of time?"

20.30 The questions continue: "What are the key risks and challenges to a successful prosecution, the resources required for the case, and at what stage (e.g. a second CPS lawyer; expert evidence; EPE)?" "What is the plan for the appointment of counsel including number, seniority, timing, security clearance, and are they to be briefed to deal with any particular task? Does the case need disclosure counsel? What key issues need to be included in the brief? What are the key strategic issues that should be discussed with counsel in advance?" "What review has been conducted (e.g. full, evidential, disclosure), with what outcome and are there any lessons learned that could be fed into future development of the case and/or shared with colleagues?" A final section addressed at "post case completion review" asks whether a "formal 'wash-up' or lessons learnt conference with the investigator" is "appropriate".

20.31 These are, as I have said, important questions; and it is clear to me that the Prosecution Strategy Document is potentially a document of real value, that value depending on its being carefully considered, completed, updated and reviewed. It is axiomatic, however, that the success of all documents, strategies and protocols is dependent upon the quality of those who are required to act in accordance with them; their input will always remain the most significant and the most vulnerable of all variables. The document is of no purpose if it is treated as simply another form amongst many to be hurriedly completed and set aside; and its value in practice will depend on the level of training, quality of lawyer and the scrutiny brought to bear by the CMP and DGR processes. The questions and issues set out above are, of course, worthwhile but it might be said that they are obvious and would have been obvious, whether in a form or not, to the CPS lawyers in Mouncher. I have no doubt, however, that it is better to have a Prosecution Strategy Document than not to. I am assured that: "Work to improve these key documents has continued as the CPS acknowledge this is an on-going process of continual improvement and a valuable way to refresh the important message to prosecutors that they should apply the law on disclosure correctly by using helpful tools such as the PSD."

20.32 It is also right to observe its occasional limitations: examples of unfortunate language: "Element(s) of the offence(s) it is hoped that the enquiry will prove" might be thought to betray an approach inconsistent with the proper even-handed function of an investigator; examples of questions which are too narrow and could therefore helpfully be broadened:

instead of the question, for example, "What defences can reasonably be anticipated? Were any disclosed in interview?" it would be better to focus the reader's mind on the full gamut of potential sources that might be considered for a possible defence: "Were any disclosed at the scene, in interview (whether under caution or in the course of any other, for example, disciplinary interview), any prepared statement, in correspondence, in any Defence Statement or otherwise"; and importantly, in view of the CPS response, the document itself does not, in either of the two versions I have seen, in fact remind prosecutors of, or direct them to, the "correct approach" to disclosure. In view of the HMCPSI recommendation and the CPS response, it plainly should do.

20.33 I have taken the fifth HMCPSI recommendation out of turn above and addressed it with the second recommendation. The sixth HMCPSI recommendation was that:

> "6. The Disclosure Manual should explicitly state that, where direct communication with victims (DCV) meetings occur before a case is finalised, CPS notes of them should be agreed as far as possible and enter the disclosure process through the police disclosure officer."

20.34 The recommendation is clear and it is straightforward to implement; it follows one of the main disclosure errors in Mouncher. I was therefore surprised to be informed that it had not been implemented and have asked for an explanation. The CPS response, whilst accepting that the recommendation has not been implemented, does observe that the Disclosure Manual "refers the reader to the DCV guidance" and adds that guidance did "actually deal with the issue". The Direct Communications with Victims (DCV) guidance provides that: "A full note, recording what was said at the meeting, should be made and retained on the file". It further adds that if any such meeting takes place before the conclusion of the proceedings: the defence must be informed that "a meeting took place"; any material that falls to be disclosed should be "revealed"; and those attending such a meeting should be informed at the outset that the prosecution "may be required to inform the defence of what was said during the meeting". Of course, and as the CPS accepts, that does not meet the recommendation that the Disclosure Manual should address "explicitly" the issue, and the CPS and NPCC have confirmed this will be addressed in the revised Disclosure Manual in connection with the Victim Communication and Liaison (VCL) scheme which supersedes the DCV scheme.

20.35 The CPS delay in implementing the sixth HMCPSI recommendation raises a more general concern. In view of the more than three year delay, for which there has been no good explanation, I asked the CPS what if any changes the CPS has made, or will make, to ensure that in future the recommendations of bodies such as the HMCPSI will be fully and swiftly addressed. Although the CPS does not accept that there is a real problem here, because: first, it says it took seriously the HMCPSI report, as is evident from the response of the DPP on the day of its publication, and second, its shortcomings in responding to this one recommendation cannot be said to disclose a systemic issue, the CPS has nonetheless indicated: "There is now a new formal monitoring and quality assurance system in place to ensure action is taken to implement recommendations in a timely fashion and feedback is then given by CPS to HMCPSI on a regular basis."

20.36 The new system involves, in summary, six developments which, as devised, should prevent a recurrence of this failing:

- First, a full reconciliation exercise has been conducted to check all HMCPSI reports in order to identify any recommendations that have not been fully progressed;
- Second, following an HMCPSI inspection, an Action Plan will be developed by the CPS Area or thematic lead outlining how, who, and by when, the recommendation will be addressed;
- Third, the Action Plan will be shared with HMCPSI proactively to ensure full transparency;
- Fourth, progress against the Action Plan will then be monitored/tracked centrally by HQ on a quarterly basis, by requesting updates from Areas or thematic lead;
- Fifth, performance against a broad range of activities is specifically included as part of the national performance database and performance is reviewed with all Areas each quarter as part of the Area Performance Review process involving CCP/Head of Central Casework Division and Directors of Legal Services and Business Services who report to the CPS Chief Executive; and
- Sixth, an update on progress will be provided to HMCPSI on a bi-annual basis.

20.37 It might also be added that HMCPSI should, following the publication of its report, have been more observant and more demanding in relation to its recommendations; there is little point in making them if they are not introduced and in a timely fashion.

20.38 The seventh HMCPSI recommendation was that:

> "7. At the primary disclosure stage, the prosecution should provide to the defence and the court a summary of the disclosure processes adopted, including a clear description of and the rationale for the parameters employed in the identification of undermining or assisting material."

20.39 This recommendation has been addressed by the CPS use of the Disclosure Management Document. Although it is correct that there was a document of similar kind (headed "Disclosure Protocol") in Mouncher, which was provided both to the defence and court and which set out in helpful overview the regime and approach proposed to be applied, and as Dean QC has observed, the document itself was never the subject of defence or judicial criticism (although attaching weight to the former fact should be done only with considerable care), it is equally true that the Disclosure Management Document would now be expected to be: a full document and in particular one which set out in some considerable further detail inter alia: the way in which (in other words within what parameters and by what means) the prosecution disclosure exercise was being conducted; the method and sources of non-sensitive information which the prosecution were intending to consider or were not intending to consider; the defence case as understood by the prosecution for the purposes of the exercise; and steps taken to obtain third party material; and a living document: a document that would be updated during the life of the case, by way of updated notes provided to the defence and court. Neither of those adjectives could properly be said to apply to the Disclosure Protocol in Mouncher.

20.40 Two of the most important qualities of a full and "living" Disclosure Management Document are: first, its transparency – the defence and court are fully informed of what the prosecution is doing, and what the prosecution is not proposing to do, on an ongoing basis; and second, the early opportunity it gives (and, really, under the current regime, the obligation it places upon) those defending to highlight issues or areas which may not be apparent to those prosecuting which it considers to be of significance. The pro forma document includes the following: "Any representations the defence wish to make on this management document should be forwarded to the prosecutor at the earliest convenience." An invitation to the defence to contribute to, for example, keyword search terms to apply to an examination of digital material, or third parties to approach for potentially relevant material, or to identify issues or contribute to a summary of a defence as appeared from interview, is one that no defence lawyer could responsibly choose to decline.

20.41 Nonetheless, just as I have noted a limitation in the Prosecution Strategy Document, it is important to make this observation of the pro forma Disclosure Management Document. The document requires the prosecution to articulate its understanding of the defence case ("if applicable" or "evident", for example, from a defence raised in interview) and any other issues. The document provides "If no such defence is evident then the whole paragraph can be removed and replaced by: "The Crown is complying with its duty of continuing review and on receipt of a defence case statement all relevant material will be reviewed by the prosecution team in accordance with the Act." I simply observe that this should not be taken as licence to defer a "thinking" approach to the likely issues in the case until the service of a Defence Statement.

20.42 The eighth HMCPSI recommendation was that:

> "8. The Disclosure Manual should require quality assurance exercises to be conducted in large cases (indicating the main areas on which they should normally focus) and require the maintenance of a log of quality assurance exercises conducted."

20.43 In the absence of an updated Disclosure Manual, the requirement that quality assurance exercises be conducted in large cases is now part of the Gateway Review system to which I have already made brief reference. One of the significant failings of Mouncher was the lack of effective oversight by and of CPS lawyers and it is therefore convenient to address the Disclosure Gateway Review system which was designed to address that failing. The system has the following essential features:

- The appointment of a CPS lawyer independent of the case nominated by a Chief Crown Prosecutor and approved by the Chief Operating Officer to review the case;
- A process of inspection by the Gateway Review lawyer of key documentation including inter alia the Prosecution Strategy Document (including the Risk Register), the disclosure schedules, any disclosure instructions to counsel, notes of disclosure conferences, any defence statement, any section 8 application and notes of the Case Management Panel meetings;
- A process of interviewing the reviewing lawyer and the Unit/CCU Head to "explore all relevant disclosure issues to assure themselves that the reviewing lawyer has identified the disclosure challenges properly and has managed disclosure and case progression effectively"; and

- A process of reporting by the Gateway Review lawyer, who would write up a review report within 14 days to be shared with the Chief Crown Prosecutor for the Area in question or the Heads of the Casework Division in question and with the Chief Operating Officer. "These reports will be used to inform the line management quality assurance process, the Case Management Panels and studied to bring out best practice and lessons to be shared".

20.44 The "main areas" of concern to which the eighth recommendation refers (and upon which quality assurance would therefore usefully focus) will of necessity vary from case to case, and any particular concerns would now fall to be identified in the Prosecution Strategy Document. In addition, as for the "log", the occasions on which the case has been reviewed, the identity of the reviewing lawyer, the key findings from the review, and the recommendations that arose from the review, would all be set out in the same document: to that extent, although not reflected in the Disclosure Manual, the substance of the recommendation has been met by the CPS by alternative means.

20.45 As to the practical utility of those quality assurance exercises, to test the system in operation by a very simple example likely to arise in almost every if not every case, I asked the CPS whether a Gateway Review lawyer reviewing the work of a case reviewing lawyer is required to identify – in the Prosecution Strategy Document or elsewhere – those items on the MG6C that he has reviewed. I was surprised to be told not, and that in view of the many demands on the lawyers, and the fact that they will be trained and experienced in reviewing such work, the CPS regards such a requirement as "disproportionate" and an unnecessary further burden. Conscious as I am of not adding unreasonably to those burdens, I am not satisfied that the requirement I have suggested would be disproportionate; and indeed it seems to me clear that any lawyer reviewing the MG6C should always list the items reviewed (for example: "Review of items 1, 10, 20, 30 on MG6C dated ….."). First, it would in fact take only moments to note the item numbers reviewed and thus, the further effort required is not in any sense disproportionate. Second, the duty would impose a valuable discipline and incentive upon the Gateway Review lawyers, the quality of the review is bound to improve if the reviewer knows that his or her work is capable of being checked. The CPS lawyers in Mouncher were very experienced yet fell short of the mark; training and experience are not guarantees of proficiency. Third, should it ever be necessary for any supervisory or reviewing individual or body to consider the quality of a Gateway Review lawyer's work, or the efficacy of a review exercise, the identification of the items reviewed would enable the review to be effective and worthwhile. The principal function of the CPS in most major disclosure exercises will be that of review, it is an abrogation of responsibility if the review cannot be audited and personal accountability identified. When carrying out random sampling or the "quality assurance exercise", the items on the MG6C examined by either the reviewing lawyer or the Gateway Review lawyer must be recorded so that an audit trail can be available for future use and inspection. It would also be sensible to record the number of decisions upheld and the number rejected.

20.46 In complex cases the CPS effectively delegates responsibility for disclosure to disclosure counsel and there is nothing unusual or demeaning in that. Lines of responsibility should be clear, the CPS should be very closely involved in the choice and instruction of disclosure counsel, the education of police disclosure officers (if necessary) and the drafting of the Disclosure Management Document but thereafter, its limited energies and finances would be much better spent in taking on the role of supervising the disclosure exercise through reviewing (mainly through random sampling or otherwise) the decisions which disclosure

counsel has made. Unlike in Mouncher, the concentration, for obvious reasons, should be on those decisions not to disclose rather than on those to disclose. In this way, the lines of responsibility will be clear and the CPS's involvement real and accountable.

20.47 From the police perspective, the position is less impressive still: there is no national standard in place regarding quality reviews of a disclosure officer's work, and no log or template to manage the conduct and recording of such reviews. I am told that it is intended this will be considered at the national Disclosure Working Group and in consultation with the CPS.

20.48 I would encourage that such consideration be given as a matter of priority and recommend that a police log is introduced. I further recommend that a CPS log is introduced in which the CPS reviewing lawyer sets out those items which have been reviewed, and, on the occasions where that work is reviewed by the Gateway Review lawyer, a further log should also record the details of that exercise. Audit trails and personal accountability are essential in order to raise disclosure standards. Again, I am assured that: "Work has continued to improve the Disclosure Gateway Review system, namely by refreshing the guidance reflecting the benefit of having operated the system for some time now, by appointing additional reviewers and providing additional training to CPS Complex Casework Unit Heads."

IPCC RECOMMENDATIONS

20.49 The recommendations of the IPCC report can be dealt with more shortly. It did not make any. It concluded that any consideration of learning was probably best achieved following publication of the HMCPSI report (and no doubt following consideration of its recommendations), and that such learning might be most usefully achieved by means of a "full structured debrief" which SWP would "host"; and involving attendance by all interested parties (paragraph 152).

20.50 The HMCPSI report was of course published in the summer of 2013, and although the holding of a full debrief was considered by SWP at that stage, in the event it was deferred: (albeit two and half years after the collapse of the trial) with civil proceedings, judicial review proceedings, and complaints still ongoing, it was felt to be "premature" and that the appropriate time to hold the debrief would be once those proceedings had finally been resolved.

20.51 The existence of other unresolved proceedings is not, however, an excuse for inactivity and so I have sought to understand what has been done – locally/regionally (by SWP) and nationally (by the NPCC, as successor to ACPO) – to ensure that, since the collapse of the Mouncher trial, lessons have been learnt and in particular that: first, only disclosure officers of suitable quality and experience are appointed to perform the difficult and painstaking role; and second, once suitable disclosure officers are in position on an investigation they remain.

20.52 The SWP response has, in summary, been as follows: the creation in 2012 of the joint, CPS and Police, Wales Regional Disclosure Working Group, the purpose of which is to ensure that the different police forces in Wales and the CPS are better able to learn from one another; the enhanced training and, thereafter, exclusive use of officers and staff from within the Major Crime investigation department of SWP to perform the role of disclosure officer on serious and complex investigations; the introduction of a new supervisory disclosure role for a "Key Role Investigator (Disclosure)" whose responsibilities are inter alia to provide assistance and advice on the kinds of disclosure issues that may arise in serious and complex

investigations; the use of the "Key Role Investigator (Disclosure)" to mentor "new" disclosure officers and to ensure support, where it proves unavoidable, that existing disclosure officers attached to an investigation cannot for good reason continue in post (as the NPCC has suggested, "inevitably some retire, some leave and some suffer ill health"); and the review of all training and guidance in light of the reports and reviews that have taken place, and the introduction of new guidance, training seminars, and other training.

20.53 Each of those aspects of the SWP response is to be welcomed. However, they remain only local responses. As the concern must be to eradicate, or if that is impossible at the very least to minimise, the possibility of a repetition of a case like Mouncher wherever it may arise, it is at the national level that change is required. Yet it remains the case that: there is no nationally approved training programme for disclosure officers; no national framework for the training of disclosure officers; and no national coordination of training of disclosure officers; and there is no national system of accreditation for disclosure officers.

20.54 The absence of agreement at a national level in those areas is as puzzling as it is troubling: for in disclosure, perhaps more than almost any other area of policing, the principles that are to be applied, and the approach and procedures to be followed, ought to be constant. A national approach would enable the crystallisation of experience, knowledge and skill, a concentration of energies and, importantly, consistency. In circumstances in which no one has suggested otherwise, to have dozens of forces each developing their own "in house" training materials and policies, is surely wastefully expensive, unnecessary, and sows the seeds of conditions in which local practice, and differences in quality, may take root. I have no intention of entering the longstanding debate as to whether England and Wales would be better served by keeping the existing 43 constabularies or by reducing their number, but the Police Service must appreciate that unless there is good reason to the contrary, the public expect national rather than regional standards to prevail. As already stated, there is no better candidate for a single national standard than disclosure and I recommend that the NPCC changes the present arrangement.

20.55 There appears now to be some acceptance of the benefit, if not necessity, of addressing certain aspects of disclosure – "one of the hardest roles to perform" the NPCC accepts – at a national level. Encouraged by SWP, and albeit in embryonic stages, I am told that consideration is being given by the NPCC to the development of a formal process of accreditation of disclosure officers. There are, of course, many other areas of policing specialism – for example, public order, and firearms – in which the requirement to undergo a process of accreditation is a familiar and well-established part of qualification, and a precondition to performance of the specialised duty. And once accredited, the officers will receive mentoring and must continue to receive training to ensure that they remain up to date with relevant developments.

20.56 In the absence of a national response, some individual police forces have developed their own initiatives the better to ensure that disclosure officers are both sufficiently qualified and experienced for the role, and are likely to remain once assigned. I say likely to remain because of what happened in LW3. However attractive it might seem to suggest that disclosure officers must remain throughout the investigation and up until the conclusion of trial, those I have consulted have been clear that such a requirement would be the path to resentment, detachment, and a lowering of standards and morale. The theoretical benefit of continuity would therefore not in reality be realised. In addition, it is said that such a requirement, amounting to compulsion, is unworkable. I entirely understand and appreciate

the difficulties but I believe that the position is clear: in any significant investigation, key individuals should never be permitted to leave to do other police work at critical stages; that should be made clear at the interview and selection stage. It is surely not excessive or unreasonable to require a commitment of at least three years, if not more, to an investigation such as LW3. The turnover of Lead Disclosure Officers on LW3 was an embarrassment and although the effect is difficult to quantify, it cannot be a coincidence that the errors and misunderstandings which led to the collapse of the trial involved, at the time, an inexperienced Lead Disclosure Officer (Allen) and an inexperienced Office Manager (May). It can only be hoped that good sense and pragmatism prevails and that every effort is made to ensure that the recruitment and retention problems in Mouncher are reduced, and significantly so, in the future.

20.57 One initiative is of particular interest. In 2004, West Midlands Police created a specialist body of permanent disclosure officers and staff to perform disclosure duties. I am conscious that the concept of a permanent cadre of disclosure officers doing nothing else might raise its own issues: I agree that disclosure does not exist in isolation or in a vacuum, and as a general principle therefore that it must be right that the quality of a disclosure officer is enhanced by gaining, and retaining, practical and investigative experience.

20.58 But the West Midlands model is nevertheless significant in that: it places appropriate emphasis on disclosure as a specialist discipline; it recognises that whilst disclosure will not be the discipline of choice for all, there will be some who possess the necessary attributes, dedication, and disposition and are willing to develop expertise in performing this difficult task, and be recognised for it; it demonstrates, by its longevity, that concerns commonly expressed against the introduction of such a model (for example fears of career stasis) should not be overemphasized; it further demonstrates that the role can be made more attractive to police officers (not least, as has been so in the West Midlands model, by recognizing the contribution of the disclosure officers with increased financial reward); and it acknowledges the importance of disclosure officers gaining experience (and dare it be said, learning from mistakes) to become better disclosure officers. This is a change for the better and other constabularies should observe and learn from the West Midlands experiment.

20.59 Whilst few forces have adopted the West Midlands model, similar initiatives have been introduced regionally and locally, including the introduction of specialist units at a regional level available where required to perform a similar function to individual forces within the region; and the introduction, as demonstrated by SWP, of dedicated disclosure officers within major and serious crime departments. I recommend a process of accreditation nationally is implemented and that a register is maintained of those officers who are accredited.

20.60 Three further areas of concern identified in Mouncher may conveniently and more briefly be addressed here. The first relates to the absence of a policy for handling sensitive complaints material. One of the most significant failings, if not the most significant failing, of Mouncher concerned the treatment and storage of sensitive complaints material about members of the LW3 investigation team. I have therefore sought to establish from the NPCC whether there was at the time of LW3, and whether there is now, any policy, guidance or protocol nationally that would govern the issue. The NPCC has confirmed it is aware of "none" at the time, and that "nothing" has been written nationally since. If the lack of relevant guidance at the time is troubling, the fact that nothing has since been done

nationally since is deeply so. It is no answer that "individual PSD departments may have drawn up their own specific guidance" and that, for example, SWP has introduced a policy (welcome though that is). And it is no answer to refer to other guidance that may have some tangentially relevant bearing, such as the "Government Marking System" of documents. The lack of guidance must be remedied, it requires direct and focussed attention, and it requires attention at the national level.

20.61 Before leaving this area of concern, I should add one further observation in view of the reference that the NPCC has made to the introduction of a new senior independent role ("PIP 4 role") to provide oversight for SIOs in complex investigations. While that too is to be welcomed, it must never be forgotten that there was no lack of formal oversight in Mouncher and it cannot be assumed that the introduction of a new role alone will necessarily ensure improvement. It will be critically important to make clear not just to SIOs, but to all levels of disclosure officer, in what circumstances the PIP 4 should be consulted. Complaints against police officers are not rare and the issue must be addressed nationally, clearly and directly.

20.62 The second relates to the very prosaic but for that no less significant issue of requests for disclosure and how best those requests can be managed in long and complex cases. The issue will rarely arise in a very straightforward case, but in a complex and multi-handed case like Mouncher, the proliferation of requests made in correspondence and in Defence Statements can soon cause questions such as who asked for what and when, and whether sufficient justification for the request was provided. These questions can occupy unnecessary time and energy and can soon become almost impenetrable and dilute the limited resources of the prosecution. This issue is one to which the CPS is alive. The answer implemented in the DCMI was to require that all requests be made in writing. That is a sensible precaution and may resolve the obvious vice that a request made orally can be later misconstrued or forgotten; but that precaution of course existed in Mouncher. A second answer is to have a physical "disclosure book" for that purpose; however as in Mouncher, where one existed, it is often easier to have an electronic record than a handwritten one: the more so now. A further and third answer offered by the CPS is to have an electronic folder that contains all disclosure requests in one place. Again, that is sensible.

20.63 In my view, however, more could usefully be done to ensure not only that there is a record of requests and that the record can be identified without difficulty, but to ensure that first, the requests are reasoned and second, the requests and the responses are navigable in a single document. I have asked Hemming to revisit the issue because it is an important one and with digital advances a better answer to the three answers listed above should be easily achieved. If there is concern that resistance will be met to the creation of "another form" or template, it should be easy enough to overcome with judicial support (indeed, I understand, such is likely to be necessary because the Digital Case System now in use in courts is not a creature of the CPS but the court system itself). And if there is concern that it may become unworkable in difficult cases where there may be many requests, the concern would betray a misconception: it is precisely in those sorts of cases that I am confident it would be simpler than the existing tangled exchange of request and response.

20.64 The kind of document I have in mind would be available digitally for all parties including the court and would include most of the following columns: (1) date of request; (2) name of defendant requesting; (3) MG6C item number requested (or if the request does not relate to an item on the MG6C, any other reference to enable the prosecutor to identify

the material and if there is none, sufficient detail otherwise to identify the basis upon which it is believed the prosecutor is in possession of the material); (4) reasons for defence request (in other words why is the material relevant and to what issue does it go? If post-Defence Statement, all requests will require to be in section 8 form and must in addition refer to the specific paragraph in the Defence Statement); (5) date of prosecution response; (6) prosecution response and reasons (for example: no reasons given or no reference to the Defence Statement); (7) section 8 application date; (8) section 8 ruling; (9) further action required by prosecution; (10) further action required by defence; and (11) date by which further action to be completed. It would be for the defendant requesting disclosure to complete the relevant fields in the table, and for the prosecution to respond. And it would enable the court to be aware, in a simple form, of the nature and extent of potential disclosure issues as they arise.

20.65 The third issue that it is important to address here is the question, which is linked to the question of note-taking and record-keeping, of the proper limits as to what may be said at a meeting with any witness. In my view, and although I understand that it may be said that police and CPS should know those limits, I am not satisfied that can always be assumed to be so, the experience of Mouncher demonstrates the dangers of assumed competence, and it would be sensible for consideration to be given explicitly to addressing the issue as a preamble in a template document that may be used at such meetings together with clear directions as to how the meeting should be recorded.

21. The 227 Boxes

21.1 The relevant paragraph of the Terms of Reference includes the assertions that 227 boxes of documents were "overlooked" and that "the contents not considered for the purposes of disclosure in the prosecution." These assertions are important but also, unfortunately, misleading, and are the consequence of taking at face value the information that was provided in good faith to the court in unusual circumstances during the course of the judicial review proceedings. The background, listed below, encouraged (understandably) a degree of intrigue and suspicion in, and ultimately, in the ToR, a prominence that the issue, in truth, does not warrant.

21.2 First, an unexpected and unusual telephone conversation which an unnamed "retired police officer" made to the HMCPSI's Chief Inspector Michael Fuller between 11 and 14 February 2014.

21.3 Second, the absence of any personal prior knowledge of the issue on the part of Fuller who could in consequence only repeat what he had been told.

21.4 Third, the suggestion (against the backdrop of, and in addition to, the copy IPCC box of material that had been lost and then on 17 January 2012 discovered in Coutts' office) that a further 227 boxes of material that "had been found" (without reference to where they had been found, and with the implication that they had been "lost" or worse).

21.5 Fourth, the implication from the timing the telephone call that this was material only very recently discovered (i.e. found post-trial and during the currency of the judicial review proceedings).

21.6 Fifth, the suggestion from the anonymous caller that the material was "relevant to the Lynette White III inquiry".

21.7 Sixth, the suggestion from the anonymous caller that "these documents were unregistered", in other words, had not been registered or reviewed during the disclosure process in the LW3 investigation.

21.8 Seventh, the implication, not least from Michael Fuller's (understandable) treatment of the identity of the caller as confidential, that there was some significant element at least of secrecy and possibly of impropriety surrounding the issue.

21.9 Set against the backdrop of the collapse of the trial, and the loss of material, its apparent destruction, and then its re-discovery, the suspicion in the minds of the claimants about the 227 boxes is not difficult to imagine. First, the suspicious mind would reason: not only had 227 boxes of relevant material failed to enter the LW3 disclosure process but, since 227 boxes cannot reasonably be overlooked, the contents must have been positively withheld from consideration as part of the disclosure exercise. Second, the material, inferentially, must have included further material that would have assisted the defendants at their trial. And third, even the very existence of this material had been deliberately concealed until more than three years after the collapse of the trial when a retired police officer had decided, anonymously, to alert an independent source.

21.10 And although the reality was far less mysterious and far less suspicious, and although the reliability of the information of the unrevealed source was doubtful – as recounted by

Fuller, no more than hearsay, and anonymous hearsay – nothing was communicated to the judicial review claimants in the period between Fuller's statement (27 February 2014) and the agreement of the ToR in the present investigation (20 February 2015) to de-mystify the issue, to correct the misapprehension, or to place the issue in its proper context. That is unfortunate because the true significance of the issue was known at the time. It was certainly known that 227 boxes had not been overlooked and it was known that the contents of 227 boxes had not failed to be registered on HOLMES. The troubling impression was permitted to persist that somewhere a mountain of material had been withheld and that could only give further support to the belief that the LW3 investigators were themselves corrupt and had acted in bad faith.

21.11 To understand the true significance and import of the issue, it is necessary to return to events shortly after the offering of no evidence in the main trial on Thursday 1 December 2011 and in particular the "lock down" of St. Athan on the same day; the recovery of material from the various locations from which the prosecution team had been working before and during the trial; and the disclosure exercise in the civil proceedings.

21.12 Before turning to those matters, it also requires perhaps, by way of more general background, an appreciation of two basic features of a criminal investigation, prosecution, and trial. First, as might be imagined, a criminal investigation will generate witness statements, exhibits, and interviews with suspects. Second, however, a criminal investigation, and if relevant, prosecution and trial, will also generate a wealth of other material: for example, wholly irrelevant communications between members of the police, CPS, and the counsel team; advices; skeleton arguments, summaries, and schedules; the investigation team's running case management type documents including MIR books, disclosure schedules; timesheets, receipts, and other administrative and personal material. The list of examples of such material could be multiplied infinitely.

21.13 It is perhaps a statement of the obvious, therefore, that there is nothing surprising, and indeed nothing unusual, about a criminal investigation, prosecution, or trial which generates material of that latter kind. Equally, there is nothing surprising, and nothing unusual, about material of that kind generated by an investigation not being registered or scheduled. Much of this type of material, not being investigatory material, would quite properly be considered as so outside the scope of the investigation that it did not require registration.

21.14 The amount of material of that kind was always likely to be greater in Mouncher than other cases because of:

- The length of the investigation;
- The number of officers working on the investigation;
- The working style and practice of Coutts, in particular: if the increasing emphasis on "digital" working may be intended to reduce the proliferation of hard copy material, it does not remove the preference of many to print and retain hard copies of documents, to review them, and then to file them (or simply to allow them to amass);
- The number of entities to which the LW3 team would report and update periodically, in connection with which files of documents and briefings were generated; and
- The different locations from which the prosecution was operated and managed.

21.15 In the days following 1 December 2011, it was necessary to recover material from the three principal such locations:

- The prosecution room at Swansea Crown Court;
- The court room itself at Swansea Crown Court; and
- Cockett Police Station. As will be recalled, because St. Athan was some considerable distance from Swansea Crown Court, it had been decided that a satellite MIR would be operated from this police station on the outskirts of Swansea.

21.16 All of this recovered material was to be transported to St. Athan for safekeeping, and on Wednesday 7 December 2011, DI Peters and seven other officers travelled to Swansea Crown Court to recover the substantial volume of material in the prosecution room and Court 1. As part of the exercise of recovery, all "loose" material was to be bagged or boxed; its location in the room was to be recorded; and each box was to be assigned a number and sealed before being removed.

21.17 In Court 1, the recovery team collected 24 boxes of material. Seven of the 24 boxes were already numbered: 1, 1a, 1b, 1c, 1d, 1e, and 1f. Rather than re-number those boxes 1 to 7, the numbering 1 to 1f was retained and the other seventeen boxes were numbered from 2 to 18.

21.18 In the prosecution room at court, further material was recovered from what DI Peters describes as the "kitchen area" and, located beyond that area, the "Enquiry Room" (also described as the "main room").

21.19 From the kitchen area, 29 boxes were recovered and these boxes were numbered 19 to 47. Not all the boxes contained documents:

- 5 of the 29 boxes were "printer cartridge boxes" (boxes numbered 38-41 and 46);
- 4 of the 29 boxes contained stationary;
- 1 was not a box but in fact a lever arch file and contents.

21.20 In addition to the boxed material, other material was recovered including:

- 3 bags of shedding;
- The contents of a waste bin; and
- A microwave.

21.21 From the main room beyond the kitchen area, 53 further boxes were recovered. These boxes were numbered 48 to 101. Again, not all were in fact "boxes" (e.g. "Box 83" was in fact an envelope marked "Tea Kitty" containing £19.72); not all of the actual boxes contained documents (for example, "Box 81" was marked "ink cartridges"); and not all boxes were assigned a specific number such as those containing new, unused, lever arch files).

21.22 "Boxes" of court material numbered 2 to 101, the further boxes of material marked 1a to 1f, and bags of material – was taken back to St. Athan that same afternoon (2.30pm), unloaded, and the 106 boxes and other material placed in the Outside Actions Room.

21.23 To this material in the Outside Actions Room would come to be added another 19 boxes of material recovered from Cockett Police Station on the following Tuesday, 13 December 2011.

21.24 In total, the process of recovery of material from court and Cockett accounts for a little over half the 227 boxes, or being as precise as possible, 125 numbered boxes of material (in addition to which there were further boxes, which in view of their contents had not been sealed or numbered); there were some bags of material; and there were other miscellaneous items (printers, a scanner, a shredder etc.).

21.25 The balance of the 227 boxes had its origins in material already at St. Athan as at 1 December 2011. To understand how the issue arose, it is necessary to return to the civil claims and to consider the events in preparation for the civil proceedings.

21.26 I have addressed the civil proceedings in chapter 13. Civil claims initiating those proceedings had been made years earlier during the criminal investigation; had been stayed pending the resolution of the criminal proceedings; were resurrected following the collapse of the trial on 1 December 2011; and were, in light inter alia of the emergence of the issue of D7447 and D7448, supplemented by an assertion that material had been destroyed.

21.27 Just as the prosecution in the criminal proceedings had disclosure obligations to discharge, the defendant Chief Constable in the civil proceedings had to comply with his own (less onerous) disclosure obligations. And just as the prosecution in the criminal proceedings had operated its disclosure exercise from St. Athan, so the Chief Constable used those premises for the civil disclosure exercise.

21.28 It was apparent to the Chief Constable that the civil team would need to conduct a complete review of the material arising from LW3 but it was expected that disclosure could be managed entirely electronically and entirely from the existing HOLMES databases.

21.29 That expectation proved to be unduly optimistic and by the spring of 2013, it was apparent that, amongst the very considerable amount of the material at St. Athan that was marked with the relevant HOLMES reference numbers, there were: 125 boxes of recovered material from court and Cockett; and a quantity of "residual" material contained in files, boxes and folders at St. Athan where it was not immediately apparent if the material had been registered on HOLMES. Upon that realisation two things became necessary: first, this "residual" material had to be identified and placed into boxes. It was in the course of identifying, rationalising, and boxing this material (and indeed, perhaps unnecessarily, sorting the contents of, re-boxing and re-numbering the 125 numbered boxes of material from court and Cockett Police Station), that the "227 Boxes" were born (and, to add a further level complication, there were in fact a limited number of additional boxes of material). Second, this boxed material had to be reviewed in order to understand its nature and significance, and whether or not any of it had in fact already been registered on HOLMES, and if it had not been so registered, to register it on a new HOLMES database, known as the HOLMES Lynette White Litigation (LWL) database.

21.30 The residual material so reviewed was identified to fall broadly into three categories and the boxes were colour-coded to reflect their likely relevance:

- RED: for material that was in Coutts' office or the Conference Room and for any of Coutts' and Penhale's working files;
- AMBER PLUS: for material that satisfied the following two conditions: first, that the material was potentially relevant material; and second, that the material appeared not to be comprised entirely of duplicate material, in other words, material already registered on HOLMES;
- AMBER: for material that satisfied the following two conditions: first, that the material appeared not to be potentially relevant; and second, that the material appeared not to be comprised entirely of duplicate material, in other words, material already registered on HOLMES; (the examples given of "amber" material are the MG6C and MG6E schedules and E-Catalogues).
- GREEN: for duplicate and irrelevant material (for example, skeleton arguments, disclosure or trial bundles, reports, personal property, training manuals, administration such as petrol receipts, sickness records, overtime cards).

21.31 The contents of all Red, Amber Plus and Amber boxes were reviewed in their entirety for disclosure purposes and any previously unregistered material was recorded on the new HOLMES LWL database. The Green boxes, given the nature of their contents were not, unsurprisingly, reviewed in any detail.

21.32 Upon review, it was clear that a substantial amount of residual material within the 227 Boxes consisted of copies of the prosecution files of evidence and other documents which had, in fact, been properly registered on HOLMES by LW3. Other boxes contained personal material or material which otherwise did not require to be registered on HOLMES because it was not relevant in any way to the investigation. Such material could not reasonably cause an objective observer disquiet.

21.33 One document within the residual material (from "Box 27"), however, did understandably give cause for concern: it was a document from DC Andrew Morris to Coutts and was found within a box file in the Conference Room: it came to be known as the "Morris Memo". The document was not dated but from its contents appears to have been prepared after 27 September 2005 and bears the typed endorsement from DC Morris to Coutts: "Sir, PLEASE SHRED FOLLOWING CONSIDERATION". Self-evidently, Coutts did not destroy the document, but equally evidently, the matter was of potential interest and significance given its resonance with the earlier concern that the unrelated material D7447 and D7448 had been destroyed and, of course, the May note which twice contained the word "shredded".

21.34 The matter was recorded by SWP as a potential conduct matter, and on 23 September 2013 referred to the IPCC for consideration. The IPCC considered that the matter was suitable for local investigation by SWP, who in turn referred the matter to Operation Dalecrest for independent investigation. Dalecrest interviewed Morris under caution and he gave his explanation through a prepared statement. The memo related to a request to extend the billing period for certain telephone records and Morris stated that it was written

as part of an investigation into the possible leak of sensitive information from LW3 to one of the police officers under suspicion. Morris made the following points:

> "I had an honestly held belief that the [Morris Memo] had no relevance to the disclosure process as it merely clarified a verbal conversation concerning matters external to the allegations made against police and civilian defendants subject to the Phase III investigation."
>
> "If I or the SIO considered the memo to be relevant material that was to be subjected to the disclosure process then it would have been submitted to the MIR."
>
> "During my time seconded to the LW phase III, I have never received an instruction to shred or destroy documentation or any other item. To the best of my recollection it is the only time I have endorsed a document with the request to shred and I have not shredded any relevant LW III documentation."
>
> "It is important to emphasise that it was in no way concerned with identifying disciplinary and criminal offences committed by police officers involved in the original murder investigation in 1988."
>
> "…this memo would have been fed into a SIO policy document or similar such record … It was not a source document."

21.35 Dalecrest found that there was no evidence of misconduct.

21.36 The Morris Memo, and associated material, was disclosed to the civil claimants and none of them sought to rely on it as an example of bad faith.

21.37 In addition to the Morris Memo, Dalecrest considered the issue of the 227 Boxes because the existence of unregistered material had the potential to raise or bear upon concern about the disclosure process more broadly.

21.38 Dalecrest considered the HOLMES LWL schedules and reviewed material of potential relevance from amongst the Red Boxes, in other words, material connected to the SIO and Deputy SIO. Of 534 documents examined, it found 523 to be irrelevant; and of the remaining 11 found to be relevant, 10 had in fact been registered and disclosed elsewhere. It located only one document that appeared to be disclosable but had not been disclosed, corresponding to one quarter of a per cent of the material it reviewed. It found "no evidence […] of any criminality or wilful misconduct".

21.39 A route of appeal lay from Dalecrest to the IPCC and more than one of the police officers sought an appeal relating to a finding involving the 227 Boxes. The IPCC rejected the appeal and concluded that in view of the time that had passed since the investigation, "no person engaged in the MIR on the LWIII investigation could now be expected to accurately recall whether they were individually responsible for any of the documents being unregistered and the reason for that". I agree with that conclusion, and the position is in fact made more difficult than the IPCC there suggests because much of the material at St. Athan was not left in situ but was re-boxed and re-located within St. Athan for the purposes of the disclosure exercise in the civil proceedings.

21.40 In addition to the consideration given by Dalecrest to the 227 Boxes, this issue also arose in the civil claims, because the civil claimants – represented by 10 counsel and 7 firms of

solicitors – received disclosure of all the material from within the Red and Amber boxes registered on HOLMES LWL irrespective of relevance. In addition, the claimants were afforded, and took up, an opportunity over two days to review such further material as they wished to review within the Green boxes. If they had wanted more time, they would doubtless have been given it.

21.41 In view of the nature and breadth of the claims that were advanced, it is reasonable to expect, if not inevitable, that had the disclosure, or the inspection, revealed any further material of consequence, the claimants would have sought to amend their pleadings to bring a claim in relation to this issue and had any material of genuine significance emerged from the inspection, the claimants would have had an opportunity to deploy the material in support of any existing claim. I note that not one of the claimants sought to amend their pleadings to add any claim in relation to the material in the 227 Boxes, or the issue of the 227 Boxes more broadly.

21.42 Patrick Hill attended St. Athan and had access to all 227 Boxes. Following his relatively brief examination, and for all of the reasons set out above, I took the view that further investigation was unwarranted.

21.43 Surrounded by the cloak of anonymity, it is obvious that the confidential disclosure to the Chief Inspector of HMCPSI that 227 boxes of LW3 "unregistered material" had been discovered would cause alarm. The obvious and sinister implications from that revelation have been investigated and found to be unjustified. Such concerns as remain are, I am satisfied, properly to be addressed by the improvements in training identified among the recommendations in chapter 24.

22. The claimants' concerns as revealed in their application for a Judicial Review

22.1 As noted in chapter 12, the claimants identified, in their application for judicial review, 10 principal issues which they felt had been left insufficiently examined in, or resolved by, or had assumed insufficient prominence in, the IPCC and HMCPSI reports of their investigations. In light of the evidence and the judgment in the civil proceedings, they have from an informed vantage point revisited those concerns and as I have explained, helpfully and sensibly refined them. The answers to each of the questions raised have been set out above and will summarised very briefly here:

1. *The first issue relates to the location of the missing material from December 2009 to its discovery in January 2012 in DCS Coutts' office. The Claimants' concerns may be summarised by the following questions they ask: Why, when and by whom did the material – identified (not quite correctly) by the claimants as "four copy files (D7447 and D7448)" – come to be stored in DCS Coutts' office? Why was DCS Coutts not aware of the material? Where was the material stored prior to being taken to DCS Coutts' office and who knew about it? What did DCS Coutts instruct, or expect to, be done with the material? And how did he ask or expect that to be recorded?*

   There are only two certain dates when investigating the location at St. Athan of the Iron Mountain box containing D7447, D7448 and the two William Peter Evans witness statements: 4 December 2009 (the date DS Allen left St. Athan and, to the best of his recollection, the last date when he can be sure the box was in his office) and 17 January 2012 (the date DCS Coutts found the box in his office at St. Athan). There is no evidence as to how or why the box was moved that short distance during the intervening two years. I do not consider that the absence of such evidence is suspicious because it would be illogical to suggest that the box was transferred from one room to another at St. Athan for nefarious purposes, let alone was done to cause the collapse of the trial; if either had been the motive then the contents of the box would have been destroyed which would not have been difficult to do in premises where shredding machines were available. The only conclusion that can be reached is that the box is likely to have been moved to Coutts' office simply to create space in the Lead Disclosure Officer's room and was probably done after Coutts had decamped to Cockett Police Station in April or May 2011 after which the office was no longer in active use. The decision to move the box would have been utterly insignificant and wholly unmemorable and the box is likely to have been moved without any detailed analysis or appreciation of its contents. Both rooms were unlocked and accessible and such movement was not recorded. No one has come forward with a recollection of moving the box and it is not reasonable to expect anyone now to recall this event. No trial or inquiry can reveal the answer to every question and this is no exception. When bad faith may confidently be excluded, and when the fundamental errors surrounding the treatment of the material can be well-established, the significance of this question is placed into its proper context.

2. *The second issue relates to the IPCC report's conclusion that DCS Coutts did not give DS Allen an instruction that material should be shredded or destroyed. The claimants are concerned to understand how this conclusion sits: (i) with the contemporaneous notes of DS May and Ms Williams which "on the face of it, strongly tend to indicate that the former was informed by DS Allen in 2010 that the documents had been shredded"; and (ii) with*

DS May's clear impression on 24 February 2010 that DS Allen had informed him material had been shredded.

May's note does not in fact suggest that Coutts instructed Allen to "shred" any document; the note on its face provides that Coutts instructed Allen "to get rid of" D7448 (which in the circumstances is an ambiguous instruction) and as a consequence Allen shredded that material. The note may well be a reasonably accurate record of the conversation but it is clear that the note cannot be factually correct because, of course, D7448 was not destroyed (the note does not suggest Coutts instructed Allen to shred D7447 either). Based on the note and Allen's responses of 28 and 29 November 2011, there is an obvious inference that a document (or documents) was shredded. If that inference is correct, then the most likely document to have been shredded is the PSD Briefing Paper of Chief Superintendent Tim Jones dated 26 June 2009 and, as I have concluded, I am satisfied that it was destroyed. For all of the reasons set out above, there is no evidence to suggest that Coutts ordered its destruction (or the destruction of any material) or that Allen destroyed it in bad faith. The most likely explanation is that Coutts told Allen that the Jones Briefing Paper, given the sensitivity surrounding complaints material, could not be retained at St. Athan, and that whatever form of words he used Allen misconstrued an instruction the meaning of which Coutts considered was self-evident. To shred a copy of an original document that would always be available at the office of PSD is, of course, a world apart from the destruction of an original document in bad faith. Ultimate responsibility must lie with Coutts for failing to make the position clear to Allen, a Lead Disclosure Officer in name but of no meaningful previous experience, and for failing to ensure that, at that stage, a formal written policy was devised to address the management of sensitive documents.

3. *The third to sixth issues each relate to the final fateful days of the trial (28 November 2011 to 1 December 2011) and are closely linked. The Claimants' concerns arise from the failure of the IPCC to address "discrepancies" – described by the claimants as "potentially very troubling" and on their face "striking" discrepancies – between, on the one hand, what Mr Dean QC told the court on 1 December 2011 (which indicated that DS Allen's recollection, though vague, supported the proposition that an instruction had been given by DCS Coutts to shred "the documents") and, on the other, what "the officers" i.e. Coutts and Allen say they told Mr Dean QC (in summary, that no relevant material had in fact been shredded). In the hope of better understanding whether their concerns are justified, the claimants ask first what inquiries the prosecution team made about the missing material between 28 November 2011 and 1 December 2011, what information and explanation was received in response to those inquiries, and whether those inquiries were sufficient? This is the third issue.*

Following the report by May of his telephone conversation with Allen, in the wake of the report by Kingsbury that D7447 and D7448 could not be found, the prosecution swiftly came to the conclusion that D7447 and D7448 had been shredded and the precise circumstances of their destruction were deemed not as important as the fact of their destruction. A series of damaging consequences flowed from that conclusion, not least the failure to have reviewed the material at the secondary disclosure stage (against the backdrop of assurances that everything had been reviewed). Because of the conclusion that D7447 and D7448 had been shredded, a comprehensive search of St. Athan was requested by neither police nor prosecution lawyers and no further search of St. Athan was conducted. I am further satisfied that Dean QC did believe

that DS Allen had confirmed to him a shredding conversation with Coutts though such confirmation was vague (as for a written example of the degree of DS Allen's vagueness and ambiguity see his witness statement of 29 November 2011). Part of that vagueness is likely to have resulted from confusion about the material in question: in Dean's mind, I am satisfied, the conversation on 28 November referred to D7447; in Allen's mind, other material, which – if he may very well not have had it firmly in mind on 28 November, by the following morning he had settled upon as being – the PSD/Jones Briefing Paper. I have found that the prosecution team did act too precipitately and should have sought further time for a detailed review of the evidence, and that if they had done so, the sense of unseemly haste felt by police would have been avoided, but notwithstanding such finding, it was inevitable that the prosecution would have had to abandon the trial albeit for different reasons.

4. *The claimants ask next, given the involvement of the Director of Public Prosecutions on 30 November 2011 in the decision to offer no evidence, what information and explanation was provided to the DPP about the missing material on 30 November 2011, whether it was an accurate account of the information available to the prosecution team, whether it was in the same terms as the account provided to the court on 1 December 2011, and whether it was a "sufficient" account? This is the fourth issue.*

   The information to the DPP came from three sources: Simon Clements' six page "DCMP Update" dated 29 November 2011; Dean and Bennett's six and a half page advice of the same date; and what he was told during the one hour meeting, the only contemporaneous record of which is Clements' three page note dated 1 December 2011. From those three sources, the DPP would have known that Coutts had denied giving any instruction to destroy case material and that Allen had a contrary recollection. Insufficient emphasis was given to Allen's witness statement of 29 November 2011 because it is clear from the advice of Dean QC and Bennett (and elsewhere) that DS May's note was regarded as determinative on the issue "that a deliberate decision was taken to shred a volume of material"; that is what all present at the meeting believed.

5. *Tracing their concern through, the claimants then ask whether the information and explanation given to the court on 1 December 2011 about the missing material was an "accurate and sufficient account" of the information received by the prosecution team? This is the fifth issue.*

   The explanation given to the court on 1 December 2011 had been agreed in advance by counsel, and the relevant representatives of the CPS (Simon Clements), the police (John Penhale), ACPO (Colette Paul) and the IPCC (Tom Davies). I have no doubt that the explanation was understood by all parties to be the truth as it was then believed to be and that information which has since given a new meaning to these events was then either not known or appreciated or was considered of little consequence if not immaterial to what was genuinely and reasonably believed to be the inevitable outcome.

6. *Finally, in relation to the same overarching concern, the claimants ask whether any other inquiries were made and/or steps taken, and in particular whether any searches for the missing material were conducted, prior to a decision being taken to offer no evidence on 1 December 2011? Should more have been done? This is the sixth issue.*

   No search worthy of the name was conducted at St. Athan for the missing documents, this was because it was rapidly assumed that the documents had been destroyed. As

I have already indicated, more could and should have been done but this would have made no difference to the outcome.

7. *Issue seven relates to the Claimants' concern that the police part in the disclosure process had not been examined in detail, or investigated fully. The claimants are concerned that police failings have not been identified sufficiently, and that accountability for, or lesson learning in respect of, such failings had not been fully identified. The claimants identify a non-exhaustive list of failings: (i) the inaccurate and incomplete description of material in schedules; (ii) the failure to record meetings with prosecution witnesses; (iii) the appropriateness or otherwise of the relationship between the police and prosecution witnesses; and (iv) the failure to obtain and disclose third party material and material from LW1 trials in a timely manner.*

   I am satisfied that the police part and failings in the disclosure process have been examined in sufficient detail. The failings of identification and description of material stem from a much more fundamental series of problems, not least the inexperience of the disclosure officers, the inexperience of the Lead Disclosure Officers and the inexperience of disclosure counsel expected to supervise and assist them. Furthermore, the high turnover of disclosure and, in particular, of Lead Disclosure Officers, was a further weakness in the disclosure process. More than enough is known to reach the conclusion that there was no bad faith in the police approach to and participation in disclosure. Furthermore, more than enough is known to learn lessons from those failings. A detailed, decision by decision, examination of the manner in which police officers discharged their disclosure obligations would serve no useful purpose. It is also necessary to be realistic as to what reliably or helpfully may be achieved. It would be impossible at this remove of time faithfully to resurrect/recreate the thinking behind decisions to include or omit a detail in a description in a schedule, or to exclude what is known now from what was known at the time a decision was made that a document was or was not relevant or was or was not disclosable. What can and must be achieved for the future is the improvement in the quality of the disclosure work undertaken nationally and, therefore, improvements in training and guidance. These events will be useful in providing examples of what not to do for the purposes of training and guidance.

8. *Issue eight relates to the Claimants' concern that there were failings in communication and the working relationship between the CPS, counsel, and the police in terms of disclosure, and again that the police part in those failings had not been fully understood.*

   The answer to issue seven applies equally to issue eight. Nothing more need be said.

9. *Issue nine is general and relates to the Claimants' concern that those responsible for relevant failings should be identified, that consideration should be given to whether standards of professional conduct have been breached, and that lessons should be learnt; again, in particular on the part of the police.*

   It is important to understand that the errors of police officers were made in an environment in which first, the police wanted to disclose as much as possible and second, was one strongly influenced by counsel and the CPS. It is inappropriate, therefore, to approach the subject of disclosure failings as one of police responsibility alone. The IPCC, in part, and Operation Dalecrest in particular, have examined police failings and Dalecrest has reached a series of conclusions and punitive or remedial

responses. As already stated, more than enough is known to learn lessons from the collapse of the Mouncher trial. Nothing further is sensibly or justifiably required.

10. *The final issue relates to whether DC O'Connor informed James Haskell about the missing material in December 2010 when it was discovered to be missing for the second time during the secondary disclosure process. The claimants ask: was there a discussion between the two regarding the missing material? If there was, did Haskell issue an instruction to obtain copies of the missing documents or not? If an instruction was issued, which officer was responsible for obtaining copy documents and why they were not obtained? If there was no discussion between Haskell and DC O'Connor, why did DC O'Connor fail to bring the important issue of the missing material to the attention of a superior officer so that further action could be taken?*

    I have concluded on a balance of probabilities that DC O'Connor either did not inform Haskell of the missing documents in December 2010, or if he sought so to do, did not do so with sufficient clarity or emphasis; the former being more likely than the latter. I believe that it is more likely than not that if Haskell was aware that "D" documents were missing at any stage but, in particular, at the secondary disclosure stage, he would have ensured that an explanation was found, would have reported the matter, and would have ensured that the missing documents were replaced with further copies to the best extent that that was possible.

23. Other Matters

23.1 The purpose of this review is to investigate the circumstances of the collapse of the Mouncher trial, but it is inevitable that in the course of that investigation matters of a wider interest will have emerged. I will deal with the principal examples briefly.

IPCC and HMCPSI

23.2 Following the termination of the criminal proceedings (and especially after the finding of the "missing" documents in January 2012) what the public interest required was an effective inquiry into what had gone wrong together with any recommendations to prevent any such failures in the future.

23.3 What happened did not meet that public interest requirement.

23.4 The IPCC and HMCPSI reviews were undoubtedly of value but their ToRs and focus were limited and one of their limitations was due to the fact that these were separate inquiries rather than the single inquiry that could and should have been held. A single inquiry would have been able to look into the failings of both the police and the prosecution lawyers at the same time, to compare and contrast the evidence from either side and then to reach conclusions as to where the responsibility for each failing should lie and thereby enable any recommendations to be more effective. In other words, one overarching investigation looking at all relevant aspects of the criminal investigatory and trial processes. It is not surprising that at the meeting with the DPP on 30 November 2011, there was agreement that there should be a "joint CPS/police internal inquiry, and that at its conclusion there should be a joint report prepared between the CPS and the South Wales Police". It should be noted that that agreement was made at a meeting attended by the CPS, counsel, SWP and the IPCC. It is obvious that the inquiry that would have brought about the maximum benefit was not held.

23.5 HMCPSI and the IPCC do not hold joint inquiries. Sarah Green, Deputy Chair of the IPCC explained in her witness statement in the civil proceedings that there was a Memorandum of Understanding between the two entities, signed in March 2012, primarily concerning the sharing of information, but that it would not be a joint investigation because, "The functions of the two authorities are different. HMCPSI is responsible for the independent inspection and assessment of prosecution services, the IPCC's role is to secure and maintain confidence in the police complaints system." The only statutory provision that would have permitted a joint inquiry involving HMCPSI would have been one under Part 4 of the Police and Justice Act 2006 combining HMCPSI and Her Majesty's Inspectorate of Constabulary (HMIC). Such a joint inspection would have enabled the inquiry to consider the conduct of the police and the CPS and would ordinarily have required the consent and of the Home Secretary.

23.6 As far as I am aware, such a joint inquiry was not even considered and I believe that a very worthwhile opportunity was missed; more would have been discovered and more lessons would have been learnt at a much earlier stage when recollections would have been closer in time to the relevant events; and that can only have been to the benefit of everyone.

23.7 There is in existence, however, a delayed but very welcome joint inspection by HMCPSI and HMIC into disclosure performance in the Crown Court, and although the Criminal Justice Joint Inspection Business Plan 2016/2017 states that it will "look for solutions to the

problems identified in managing disclosure effectively drawing on issues from R v Mouncher and wider practitioner experience", it will in fact be examining cases other than those "dealt with by complex casework units and the central casework divisions". I have been advised that that joint inspection will wait for this report before it will report, later in 2017.

SHOULD SWP HAVE INVESTIGATED ITSELF?

23.8 There were obvious advantages to the investigation that was conducted: they are principally those of convenience, practicality and cost. In addition, SWP wanted to demonstrate that it had the capability and professionalism to manage this investigation, there was an important element of confidence building in the decision to have SWP investigate SWP; confidence building within both the Constabulary and the public. All worthy objectives, but the decision plainly carried a number of attendant disadvantages.

23.9 A principal disadvantage is that the decision was bound to provoke public concern and achieve the opposite of what was intended namely, a lack of confidence in the investigation. The three original defendants, understandably, have no confidence in LW3 especially after the circumstances in which the trial collapsed. This is an obvious flaw in what happened but there were two others which though not as obvious had a more corrosive effect.

23.10 First, recruitment and retention of staff was a particular problem caused in part by the atmosphere within SWP against those investigating serving and retired SWP officers; there has already been reference to this. The effect on staffing is impossible to calculate precisely but it is clear from what Coutts has told me, and I accept, that the deep "loathing" felt in some quarters was a significant factor in dissuading experienced and able officers from putting themselves forward for the investigation, or if they did, from remaining on it.

23.11 Second, the impact from "trying too hard" in an effort to gain approval and dispel any concerns that the investigation was anything other than independent and objective. Mr Justice Wyn Williams made the following two observations, the first at paragraph 471:

> "471. … Paragraph 6 of Mr Coutts' witness statement contains an account of what he knew of the history surrounding Lynette's murder prior to his appointment as SIO. In 1988, at the time of the murder, Mr Coutts was a detective constable based in Pontypridd (a town approximately 12 miles from Cardiff). He knew a number of the persons who had been involved in LW1 but he, personally, played no part in the original investigation. Over the years that followed Mr Coutts worked with a number of the Claimants and he knew Mr Gillard socially. He says that he disclosed his contacts with all these persons to Mr Cahill before his appointment was confirmed and there is no reason to doubt what he says. He, Mr Coutts, felt that he would be able to conduct an investigation impartially and objectively notwithstanding his knowledge of some of the persons involved in LW1 and, evidently, Mr Cahill agreed."

23.12 And the other at paragraphs 562 – 564:

> "562. In my judgment, Mr Coutts and Mr Penhale were entitled to conclude that there should be no disclosure of information to the Claimants prior to their arrests and that, thereafter, disclosure prior to interviews under caution should be phased and strictly controlled.

> 563. All that said, I am left with the feeling that Mr Cahill, Mr Coutts and Mr Penhale were determined to do all that they could to ensure that there could be no public perception that the Claimants were being treated in any kind of favourable way. In my judgment, they were almost bending over backwards to ensure there was no appearance of bias in favour of suspected police officers. That was an instinct which was wholly understandable given the history of this case. However, it may well be that those arresting officers who had reservations about some aspects of the treatment of the Claimants were correct to be concerned.
>
> 564. There is one aspect of the arrests about which I am convinced their concerns were justified. In my judgment, there was no proper justification for arresting the Claimants and other police suspects at or about 6am in the morning at their homes. By my reckoning, none of the persons arrested were less than 50 years old at the time of arrest and most were significantly older. Many, if not all, lived at home with their families. It would have been straightforward to obtain information about the suspects' usual lifestyle and plan their arrests accordingly. In my judgment there was no possibility that any of the suspects would seek to evade arrest. Their arrests related to events which had occurred 17 years previously and there had been considerable speculation that arrests of police officers would follow the arrests of the core four and other civilian suspects. As I have described some of the suspects had offered to attend at a police station voluntarily. In my judgment, the evidence of Mr Coutts and Mr Penhale that the suspects were arrested in the early morning simply because that was the best way of ensuring that they would be at home when the officers arrived was unconvincing. I cannot escape the conclusion that co-ordinated arrests at or about 6am in the morning had more to do with Mr Cahill, Mr Coutts and Mr Penhale demonstrating their determination that police officers should be subject to the same kind of arrest regime as has become common in relation to persons of interest to the media who have been arrested in comparatively recent times on suspicion of serious offences. I find it difficult to conceive of any justification for arrests at 6.00 a.m. in the morning in relation to any of the Claimants. I am fortified in that view, of course, because a number of the arresting officers shared my concern."

23.13 There is an important difference between trying hard and trying too hard to achieve impartiality. Impartiality (and ensuring its appearance) is a commendable aspiration but forcing or exaggerating such an objective is artificial and can create problems. As Mr Justice Wyn Williams put it, "almost bending over backwards to ensure there was no appearance of bias in favour of suspected police officers" is not a normal position for investigating police officers and it caused difficulties over and above those identified by Mr Justice Wyn Williams.

23.14 One was what happened in the LW3 investigation. I have no doubt that the rather shambolic treatment of D7447, D7448, the William Peter Evans witness statements and the Jones Briefing Paper was primarily due to the fact that the relevant police officers were over cautious or over keen to demonstrate that complaints material could and would be kept separate from the SWP officers who were both part of the investigation and also subject of complaint. I do not believe that there would have been such a degree of sensitivity if SWP had not been investigating itself and, of course, it was the mismanagement of D7447, D7448, the William Peter Evans witness statements and the Jones Briefing Paper that was the direct cause of the collapse of the trial. It was as if LW3 police officers were so determined to maintain their distance from the complaints material (especially in relation to those against whom complaints had been made) that they abandoned their instincts and simple common

sense; that is what human beings are capable of doing when they act in an enforced or artificial manner.

24. Conclusions and Recommendations

24.1 With the considerable assistance of Patrick Hill, I have sought to respond to each of the original defendants' concerns as raised in their application for judicial review and to fulfil the requirements of my ToR. Not acting under the Inquiries Act 2005, I have not had powers of compulsion but as events have unfolded, I have not needed them. SWP, CPS, IPCC, HMCPSI, NPCC and Dalecrest have each provided all the material I have requested in accordance with my ToR. The only witness who declined to be interviewed or to assist was a retired police officer, DC John House, and as I explain in chapter 25, he was not central.

24.2 I did not set out to answer every single question raised by these events: that would have been of no benefit either to the original defendants or to the public, neither would it have been consistent with my ToR. It is the fundamental issues that matter such as those raised in the application for judicial review and by the facts themselves. I have been guided by the desire of the original defendants to know what happened, by their concerns and by their much wider and commendably altruistic purpose of ensuring that these events or anything like them will never happen again.

24.3 There would have been no benefit, for example, in reviewing each of the many thousands of decisions as to whether material was either relevant or disclosable, or to consider each of the 4,500 requests for disclosure and the responses to them. The utility of such a microscopic examination of long past judgements and assessments would have been negligible and wholly disproportionate. Once good faith has been established on the evidence, it is the management of the disclosure process that matters, not the minutiae. I have no doubt that a public inquiry into these events would benefit no one and any material addition to the understanding of the investigation and prosecution, even if one were to emerge, would again, I believe, be of negligible value and wholly disproportionate to the effort and cost involved.

24.4 Another reason why a public inquiry would now be unnecessary and ill-advised is that the principal witnesses have reached the stage of witness fatigue. They have already been asked many times about events which took place many years ago; events which on the majority of occasions were unremarkable at the time and in respect of which there are no contemporaneous notes. It is not only time that dulls the memory; the making of multifarious accounts does as well, witnesses being unable to distinguish between a receding memory of what happened and the various accounts previously given not only by themselves but by others. Witnesses have no doubt read the reports and the civil judgment, or are at least aware of their content, and it is clear from the civil proceedings that some witnesses saw the statements of others and that some were present in court, as they were entitled to be, during the evidence of others. Distant memories of what happened, multiple previous accounts thereof and the recollections and findings of others will have become interwoven and confused. The truth becomes more difficult to determine and revelations more and more unlikely to be made. I believe that the mine is empty and further excavation pointless.

24.5 In conducting a detailed analysis of complex events, there is always a danger of becoming too close to them and not seeing them in their wider context. On occasions, therefore, it is important to stand back and do just that.

24.6 It is imperative to emphasise that the Core Four/Mouncher investigation and prosecution was highly unusual: unusual in that it lasted 8½ years (considerably longer than most complex investigations and prosecutions) and unusual in the width and breadth of the issues and sub-issues which arose during the twists and turns and varied developments of the previous 23 years. All of those features made Mouncher a quite exceptional investigation and prosecution. It would be wrong, however, to conclude that because of the rarity of those features, lessons cannot be learnt from the mistakes that were made. The principles of disclosure are common to all cases and it is very much to be regretted that post collapse, neither the CPS nor the police sought to respond more quickly to what was quite simply an embarrassment on a national scale. Disclosure catastrophes at this level are not so commonplace that they can be marginalised let alone ignored. Public confidence in these institutions can only be maintained if they demonstrate a very real desire to learn from mistakes and to respond to them quickly. The IPCC and HMCPSI reports were published on 16 July 2013 and that was the occasion on which lesson learning should not only have been discussed but changes soon thereafter implemented. Now, over two-and-a-half years later (and over five years after the collapse of the trial) the winds of change have not been impressive. Immediate, unthinking and emotional reactions assist no one but that stage has long passed.

24.7 The conclusion that there was no bad faith or malice in what led to the collapse of the trial, either amongst the police officers or the prosecution lawyers, is the most important conclusion of all because much flows from it. This was an investigation and a prosecution in which much went wrong and from which lessons must be learnt. The inevitable question is could it happen again? These events, of course, will never be repeated but the fundamental causes of the problems may well arise in the future in one form or another: poor management by the CPS at the beginning; instruction of counsel too junior in call and of too little experience; the inability of the criminal trial system to flush out disclosure issues and to bring them before the judge; too narrow a disclosure test applied; the late appointment of a trial judge resulting in a lack of early active management of the case; inadequate skills, training and experience of disclosure police officers (in particular Lead Disclosure Officers); inability to retain disclosure officers; lack of instruction to police officers as to how to deal with sensitive documents; over-reliance on disclosure counsel including in relation to matters outside their instructions; insufficient formality in making and recording advice; inadequate supervision of officers and of counsel; and a lack of appreciation of the significance for disclosure purposes of material generated within the investigation as opposed to material physically received from outside.

24.8 I am satisfied, for the reasons expressed in chapter 20, that the prospect of similar errors being repeated to the extent they were in Mouncher is now less, but errors of judgment can never be eliminated. As Lord Justice Gross reported in his first review, one experienced judicial consultee (Spencer J) remarked that "disclosure is only as good as the person doing it". The individual is much more important than a 400 page manual. The same applies, of course, to a number of other important roles and to decisions which must be made in the course of a long and detailed prosecution.

24.9 The main hope is that through the publication of this report, the original defendants will now know in detail what happened and will now appreciate that the collapse of the Mouncher trial was due to human failings and not wickedness. It is also hoped that at least three further objectives might be achieved: first, that a "strict" interpretation of the law applicable to disclosure and a begrudging or reluctant attitude to disclosure, which most

criminal practitioners have experienced far too often, will be consigned to the past and a new spirit of openness, generosity and common sense will prevail; second, that defence lawyers will respond appropriately and play their part by engaging in the disclosure process and not holding problems back until the trial is about to start or is underway; and third, that debate and concern may be stimulated over the issues raised so that lessons might be learnt and that the errors identified will not be repeated. Many a cynical, battle weary practitioner will say that the first and second of those further objectives are unattainable and pure fantasy; I hope they are wrong.

CONCLUSIONS

24.10 The following are the principal conclusions reached on a balance of probabilities:

- Bad faith played no part in the disclosure errors of which there were many.
- Bad faith played no part in the collapse of the trial.
- DCS Coutts did not want sensitive material kept at St. Athan but his intention was not set out in any written policy, as it should have been, and the nature of his instruction to DS Allen cannot now be determined with any precision but it was unlikely to have been clearly expressed.
- Whatever the instruction, DS Allen believed he was acting in accordance with it when he shredded the PSD Jones Briefing Paper. A further copy of this document was later, separately, considered by Haskell who determined that it was irrelevant to the investigation. The Jones Briefing Paper was a summary by Chief Superintendent Jones of material held by PSD. The document shredded was a copy, or an identical version, of a document which was held by PSD and would continue to be held by PSD for the foreseeable future.
- In reaching the conclusion that no further evidence should be offered, the prosecution team did act too precipitately, but irrespective of any further inquiries that could and should have been made, the trial would still have collapsed, albeit for different reasons. The prosecution was in much worse shape than anyone had then anticipated.
- There was not a comprehensive search at St. Athan for the missing documents between 28 November 2011 and 1 December 2011.
- The turnover of Lead Disclosure Officers was too high and the majority of those selected for the role, and the role of Deputy Disclosure Officer, were too inexperienced for an investigation and prosecution of this scale and complexity.
- The training of disclosure officers, and in particular Lead Disclosure Officers, was inadequate; too much was expected of them.
- The prosecution was inadequately managed by the CPS from the very beginning and this had repercussions throughout the investigation and prosecution.
- Counsel instructed, especially Bennett and Haskell, were too inexperienced for an investigation and prosecution of this scale and complexity.

- In 2010, DS May did not inform Haskell that D7447 and D7448 were missing from their expected location at St. Athan.
- In 2010, DC O'Connor did not inform Haskell that D7447 and D7448 were missing from their expected location at St. Athan.

RECOMMENDATIONS

24.11 The following are the principal recommendations:

- The NPCC should introduce national minimum standards and a national accreditation process for disclosure officers. Disclosure is a specialism: not an exercise in reading material and drawing up lists. Appropriate recognition of that fact is necessary and minimum standards and accreditation are necessary to ensure a raising of standards nationally.
- The NPCC and College of Policing should introduce a national training programme for disclosure; there can be no justification for regional differences.
- Disclosure officers must, in addition to being trained to adopt the appropriate mindset and approach to external material received by the investigation, be better trained to appreciate that they may come into possession of internally generated information that requires to be recorded, registered, reviewed, and revealed. Any note of relevance must be submitted promptly into the disclosure process.
- Disclosure training should, in addition, emphasise the continuing obligation on disclosure officers, throughout an investigation, and in the course of a disclosure exercise, to seek to ensure that all relevant information has been identified; and that if at any stage they discover, or it otherwise appears, that material or information is missing, that must be recorded appropriately (for example in an officer's report) and again submitted into the disclosure process. The absence of relevant material may of course, in appropriate circumstances, be itself disclosable (for example missing or incomplete notes of contact with witnesses).
- In all training delivered, the potential significance of failures in disclosure should not simply be stated but underscored by using appropriate examples from actual cases including Mouncher. The use of real examples of disclosure failings is important to ensure that the appropriate message is received.
- Everyone – police officer or staff – working in a Major Incident Room should receive specific training in the standard procedures (MIRSAP), should receive a copy of MIRSAP, and should in addition receive disclosure training. The potential significance of failures to adhere to MIRSAP should be emphasised by using examples, including examples drawn from Mouncher. Everyone working in the MIR should understand that they may come into possession of material or information that triggers disclosure obligations.
- The training that any officer receives in the use of HOLMES should extend to the potential for HOLMES to restrict access to sensitive material. More broadly, there is, again, no good reason why HOLMES training should not be agreed nationally.

- In relation to third party disclosure, police correspondence should be re-reviewed and standard correspondence agreed nationally. The standard letter should include provision for the third party to particularise the material disclosed, and to specify any condition sought on the treatment, storage, or return of the material.

- Any officer inspecting third party material must identify the material he has inspected. A standard form is preferable to a pocket notebook or day book and should be agreed nationally for that purpose. Equally, any officer inspecting third party material must identify the material he or she has requested. This should be done formally, and the police must make a record. Again, there is no reason why a standard form should not be agreed nationally.

- The NPCC and College of Policing should introduce a national standard and guidance regarding quality reviews of a disclosure officer's work.

- The officer appointed to oversee the SIO on complex investigations ("PIP 4") should, as in the course of that supervision, periodically review the SIO's policy logs and ensure that all relevant matters are covered.

- The NPCC and College of Policing should introduce policy or guidance for the storage, management, and handling of sensitive complaints material both electronically (such as on HOLMES and scanning) and physically within the investigation.

- The NPCC and College of Policing should introduce a log/template to facilitate the management of the conduct and recording of disclosure quality reviews. The log/template should be cross-referenced to relevant sections of the Prosecution Strategy Document and Disclosure Management Document. In addition, any areas which prove commonly to be problematic (for example block lists, or details for inclusion in describing unused material) should be specifically flagged for review.

- The manner in which disclosure requests are made, and responded to, should be reviewed. A log/template, ideally one available and maintained on the Digital Case System, setting out the date of request, material sought, relevance and issue to which the material goes, paragraph in the Defence Statement (if applicable), and the prosecution response should be introduced. This would avoid the need for proliferating correspondence, would enable the parties to keep swift track of requests, and would permit the court to be informed of the nature and extent of issues as they emerge.

- The manner in which quality assurance exercises are conducted by the CPS should be reviewed: the CPS should introduce a log/template which requires any review, whether by the CPS reviewing lawyer or the Gateway Review lawyer, to identify those specific items that have been reviewed.

- The CPS should consider implementing the view expressed by Mr Justice Sweeney that almost every contact with a witness should be disclosed. Contact with witnesses is likely to be sensitive and any discussion about the case and the evidence is likely to be disclosable. Save, for example, any discussion of irrelevant personal details, court arrangements and trial dates, such contact should always be carefully considered for the purposes of disclosure. The need to make notes of such contact is obvious.

- The use of phrases such as "strict interpretation of the disclosure rules" must cease and any support for them actively withdrawn. The abiding principle must be "if in doubt disclose" and nothing must be permitted to qualify or diminish it.

24.12 If some of the recommendations I have made appear basic or straightforward that is because they are; the experience of Mouncher shows that disclosure failings, and in particular the most damaging failings, need not be complex.

25. Methodology

25.1 I received a very considerable quantity of material from the IPCC, HMCPSI, CPS, and SWP, including a significant volume of material from the civil proceedings heard before Wyn Williams J. Like Wyn Williams J, I formed the view that contemporaneous documentary material was likely to be of greater assistance to me, where available, than the recollections of witnesses asked to contribute yet further detail in relation to matters now of some age, and in relation to which they have given accounts on more than one occasion.

25.2 Be that as it may, following the receipt of the civil judgment in that case, I identified those central witnesses who it appeared may be able best to advance my understanding of the essential matters to be considered. As summarised in the claimants' supplementary grounds, it was of concern to ensure that the "additional investigations" be conducted in a manner that "enabled the main participants in the events to be directly questioned and an overview formed of the balance of the evidence". The claimants provided a list of those witnesses they considered to be the main participants who therefore should be seen, and I received evidence formally from police officers, CPS lawyers and counsel. I made clear to each that it was not my intention to revisit ground that had been well covered elsewhere, and I endeavoured not to do so. In respect of nearly every witness seen, in addition to questions of my own, the witnesses were asked a series of questions provided on behalf of the claimants.

25.3 As foreshadowed above, an inevitable degree of "investigation fatigue" or "witness fatigue" was on occasions present but the interviews were nonetheless worthwhile and I should record that the response from those SWP police officers and staff I asked to interview was overwhelmingly cooperative. That is as true for retired as serving police officers. All save one agreed to be interviewed. And over the course of five days at Bridgend, I interviewed the SIO, Christopher Coutts, the Deputy SIO John Penhale, four Lead Disclosure Officers Mark Allen, Robert Rowlands, Gary O'Connor, and Eddie May; and a selection of other SWP witnesses: Tim Jones, Mike Monks, Collette Paul, Kelly Frazier, and Carole Williams; accompanied by a Police Federation representative or a friend where requested and always with a SWP lawyer present. Although not through any unwillingness to be interviewed in person, I received a written response from Arthur Kingsbury. Only one police officer refused my invitation for an interview: DC John House. DC House, who is retired, initially agreed to be seen but later refused on the basis that he had "nothing more to add or assist" (the same police officer having also declined to assist in the civil proceedings). Regrettable as that is, DC House cannot, on any sensible view, be described as central to the matters that I have had to consider, or necessary to their fair determination; he was not a "main participant"; and the claimants have never suggested that he is a witness the investigation needed to see.

25.4 Of Counsel, I interviewed Nicholas Dean QC (now His Honour Judge Dean QC), and James Haskell in person, and have, given his accepted comparative lack of involvement in the disclosure process, and the other evidence already available to me, received a written response to a limited number of questions asked of James Bennett.

25.5 Of the CPS, I interviewed Simon Clements and Howard Cohen and received a response in writing from Carmen Dowd. I also met members of the Independent Advisory Group including Professor Griffiths.

25.6 In addition to those witnesses, and in view of the lesson learning element of the investigation, I have met ACC Stuart Prior (NPCC Disclosure Lead) and DSU Kate Meynell (Deputy Disclosure Lead), Graham Marshall and David Hinman. I have also met Sue Hemming, the CPS National Disclosure Champion. Where necessary, I followed up in writing and received further written assistance from those officers and others.

25.7 My ToR permited this inquiry to employ an administrator but I decided not to on the ground that it would not be cost effective. An administrator would only be of use if he or she had a working knowledge of the evidence and the background and I took the view that the time necessary for such acclimatisation would be disproportionate to the value which would be added. Much of the administration therefore fell to Patrick Hill for whose efforts in that field and, much more importantly, in the investigation itself, I am immensely grateful.

Richard Horwell QC
3 Raymond Buildings
Gray's Inn
26 April 2017

POST SCRIPT

This report was completed in January 2017 and afterwards followed the process of "Maxwellisation". I am indebted to the many who replied and each response has been considered and amendments made where and when appropriate. I am very happy to make it clear that if I had been satisfied that any one person had lied to me I would have so stated in this report. Where I have preferred one person's recollection to that of another I have done so on all of the evidence, it is not implicit in any such finding that the individual whose recollection I have rejected was lying.

Finally, for ease of writing and, much more importantly, ease of reading, I have in the main used just surnames to identify the main participants. No discourtesy was intended.

APPENDIX I

CHRONOLOGY

MOUNCHER INVESTIGATION CHRONOLOGY	
14 Feb 1988	Lynette Deborah White was murdered in the early hours of this morning (a Sunday) in the bedroom of Flat 1, 7 James Street in the Butetown district of Cardiff. Her body was discovered by police in the bedroom just after 9pm.
1988-1990	Lynette White's murder was investigated by the South Wales Police. The investigation was led by DCS Williams. At the start, DI Powell of Divisional CID was responsible for the day-to-day investigation. The investigation became known as Lynette White 1 or LW1.
4 March 1988	The scientist's findings from the examination of the scene were reported to the police: traces of 'foreign' blood had been found on Lynette White's jeans and sock and on a skirting board and a wall of the room in which her body had been found. The blood found on the jeans and sock was AB group.
16 March 1988	Pamela Mathews, who lived at 18 St. Clair Court, told police officers that she had seen suspicious activities during the early hours of Saturday 13 February 1988 at 19 St. Clair Court where Leanne Vilday lived. Vilday was a prostitute and a friend of White and she rented the premises at Flat 1, 7 James Street.
21 March 1988	Another scientist reported to the police that further tests carried out on some of the 'foreign' blood found on Lynette White's jeans revealed the presence of the Y-chromosome which is only found in the blood of a male.
10 April 1988	Paul Atkins interviewed during which he gave four mutually inconsistent accounts, one of which was that he had murdered Lynette White.
12 April 1988	Pamela Mathews made a witness statement in which she described seeing Psaila disposing of property in a rubbish chute and later looking 'scared and nervous' in the early hours of Saturday 13 February 1988.
17 May 1988	Vilday was drunk in the North Star Club in Cardiff and claimed that she had been present when White was murdered and that Stephen Miller and Yusef Abdullahi had murdered her.
15 June 1988	Vilday was questioned under hypnosis by Dr Una Maguire in Wigan, nothing new was revealed and at the time Dr Maguire was of the opinion that Vilday "had seen nothing that would help further".
Aug 1988	DI Powell was moved to other duties and DI Mouncher of the Serious Crime Squad became responsible for the day-to-day investigation into Lynette White's murder.
1 Nov 1988	Pamela Mathews was interviewed and corrected her previous statement. She now said that the suspicious activities observed at 19 St. Clair Court were during the early hours of the Sunday morning and not the Saturday morning and added that Angela Psaila, who lived with Vilday, knew more than she had revealed to the police.

10 Nov 1988	Violet Perriam, secretary of the Cardiff Yacht Club, was interviewed and made a statement that she had seen four 'coloured' men 'arguing and jumping around' outside 7 James Street at 1.30am on 14 February 1988. She stated that two had familiar faces and that she would recognise them if she saw them again, but that she did not know the names of any of them. This was regarded as a breakthrough in the investigation notwithstanding the fact that it had taken Perriam nine months to come forward with this account.
16 Nov 1988	Perriam was further interviewed and she named two of the four men as 'certainly' Rashid Omar and 'almost certainly' John Actie.
17 Nov 1988	Psaila was further interviewed. She first said that she had not seen anyone outside 7 James Street in the early hours of 14 February 1988. She then mentioned for the first time that Miller and other men had come to her flat at 19 St. Clair Court (some 75 metres from 7 James Street) at 2am on 14 February 1988 looking for Lynette White. Having said that John Actie and Ronald Actie had not been with Miller she then changed her account again and identified both of them as having been outside 7 James Street in the early hours of 14 February 1988 with Miller together with Yusef Abdullahi and Anthony Paris. Psaila also said that a black taxi driven by Jack Ellis had been outside 7 James Street.
22 Nov 1988	Paul Atkins, Mark Grommek (who lived above Flat 1, 7 James Street) and Psaila gave further and often new accounts of events. Atkins described his movements in Flat 1, 7 James Street – by this stage his fingerprints had been found in the premises.
2 Dec 1988	Psaila was the victim of an assault which she reported to the police. She gave a sample of her blood to assist the police in the investigation; it was found to be AB group.
6 Dec 1988	Jack Ellis, Angela Psaila, Leanne Vilday, Mark Grommek and Paul Atkins were interviewed as witnesses at Butetown Police Station. Grommek was at the police station for 10½ hours, the remaining three were in the police station for more than 12 hours. Psaila said that she had observed certain events outside 7 James Street from 19 St. Clair Court and Vilday said that she run over to James Street from St. Clair Court and had gone inside Flat 1 where she saw the body of Lynette White. Vilday named Martin Tucker and Atkins as being outside the flat and Ronald Actie, Stephen Miller, Abdullahi and a 'black man' as being inside the flat. When interviewed, the taxi driver Jack Ellis denied that he had been outside 7 James Street in the early hours of 14 February 1988.
7 Dec 1988	On the basis of the evidence then available from Psaila, Vilday, Grommek and Atkins (they would later come to be known as the Core Four), Stephen Miller, Yusef Abdullahi and Ronald Actie were arrested (as were Rashid Omar, Martin Tucker and Tony Miller (Stephen Miller's brother)).
9 Dec 1988	Anthony Paris and John Actie were arrested.

9/10 Dec 1988	The Forensic Science Service advised the police that some of the 'foreign' blood found at the scene *could* have been that of Angela Psaila because as a result of the sample she gave on 2 December 1988 her blood is AB group. Notwithstanding the presence of the Y-chromosome, the scientists were of the view that the 'foreign' blood *could* be a mixture of Psaila's blood with that of a male. Up until this point the investigating police officers believed that the 'foreign' blood could only have been that of a male. [The 'foreign' blood was much later found to be that of Jeffrey Gafoor.]
10 Dec 1988	Tony Miller released without charge.
11 Dec 1988	A very important day: Psaila was brought back to the police station and gave an account that differed significantly from the ones she had given before. Psaila made a further statement which accounted for the presence of what was believed to have been her blood at the scene. This was the first time that Psaila had said that both she *and* Vilday had been inside the flat at the relevant time and that they had witnessed the murder. On the same day, Vilday also made a further statement which matched Psaila's latest account. In addition to both Psaila and Vilday now saying that they had witnessed the murder, there were other significant changes to their accounts: Psaila's has asserted that she had seen a black taxi driven by Jack Ellis outside the scene; that motor vehicle now became a dark coloured Cortina not driven by Jack Ellis. Vilday's account that Martin Tucker was outside the flat was not repeated (the failure to put Tucker at the scene occurred on the day Tucker was released). Perriam also made a statement in which she withdrew her previous statement that Rashid Omar had 'certainly' been present in the room. This withdrawal statement was made *after* Omar had been released from custody on 11 December 1988. As an example of the conditions in which these significant changes occurred: Vilday was at the police station on a 'voluntary' basis from 2.15am to 7.30pm.
11 Dec 1988	Stephen Miller, Yusef Abdullahi, Anthony Paris, Ronald Actie and John Actie were charged with the murder of Lynette White. Rashid Omar and Martin Tucker were released without charge.
Feb 1989	Old style committal proceedings at Cardiff Magistrates' Court: Angela Psalia, Leanne Vilday and Mark Grommek gave evidence for the prosecution.
3 Oct 1989 – 26 Feb 1990	Miller, Abdullahi, Paris, John Actie and Ronald Actie stood trial for murder at Swansea Crown Court. They have become known as the 'Cardiff Five'. The principal evidence for the prosecution was that of the Core Four and Miller's confession. The first trial was stopped at a late stage due to the death of the trial judge, Mr Justice McNeill. He died just before he was due to sum-up.
14 May 1990 – 22 Nov 1990	The second trial, also at Swansea Crown Court, was before Mr Justice Leonard. Psaila, Vilday and Grommek were called by the prosecution. The prosecution abandoned Atkins and did not call him but he was called by the judge on the application of the defence for both sides to cross-examine. After Atkins had left the witness box, the judge directed the jury to disregard Atkins' evidence because he was such an unreliable witness who agreed to any version of events that was put to him. Miller, Abdullahi and Paris were convicted of murder: the 'Cardiff Three'. The two Actie cousins were acquitted.

10 Dec 1992	Court of Appeal quashed the convictions and criticised the police officers who interviewed Miller for adopting techniques of interrogation which were wholly contrary to the spirit and in many instances the letter of the Codes of Practice under PACE.
June 1999 – May 2000	South Wales Police commissioned a review of the original murder investigation part of which involved an independent assessment by two retired Lancashire Constabulary senior detectives, William Hacking and John Thornley. Hacking and Thornley were highly critical of the original investigation and made 107 recommendations. In addition to any inadequacies of the investigation, Hacking and Thornley were concerned that so many witnesses had changed their statements over time to the detriment of the original defendants and this gave rise to unease as to the integrity and objectivity of the original murder investigation. Hacking and Thornley concluded that there was sufficient evidence to warrant a criminal investigation into the police handling of witnesses.
30 July 1999	The Lay Advisory Group (LAG) was established. Later, in January 2001, its name was changed to the Independent Advisory Group (IAG).
23 Aug 2000	After the Hacking and Thornley Review had been completed, South Wales Police launched a further investigation with the aim of identifying the murderer: Operation Mistral. This investigation has become known as Lynette White 2 or LW2.
2001-2002	Due to the advances in DNA extraction and profiling, a DNA profile was obtained for the 'foreign' blood found at the scene. There was no match to any profile on the DNA database. Each of the original five defendants provided samples and no match was identified. Each of the Core Four provided samples and no match was identified.
27 Feb 2003	Eventually, it was discovered that the DNA profile was similar to that of a 14 year old boy whose DNA was on the DNA database. Jeffrey Gafoor is the boy's uncle and he was identified as a potential suspect. Gafoor was seen on this day and he provided a sample for DNA profiling.
28 Feb 2003	Whilst the results were awaited, the police kept observation on Gafoor and he was seen buying a large quantity of paracetamol from three shops before returning home. It was suspected that he might attempt to kill himself and police forced an entry into his home. It was clear that Gafoor had taken an overdose of paracetamol. He was arrested for the murder of Lynette White and taken to hospital. On the way to the hospital, Gafoor confessed to the murder of Lynette White.
4 March 2003	Gafoor was released from hospital and interviewed over the course of two days. Gafoor's DNA matched that identified from the 'foreign' blood found at the murder scene. There is no direct link between Gafoor and the original five defendants or with the Core Four. On 6 March 2003 he was charged with murder. Gafoor was represented by Bernard de Maid who had represented Yusef Abdullahi. De Maid instructed John Charles Rees QC who had been counsel to John Actie.

4 July 2003	Gafoor pleaded guilty at Cardiff Crown Court to the murder of Lynette White. In mitigation, John Charles Rees QC said that Gafoor had acted alone. Gafoor was sentenced by Mr Justice Royce to life imprisonment. The minimum term was later (19 October 2005) set at 12 years and 8 months.
7 July 2003	The Chief Constable of South Wales Police, Sir Anthony Burden, issued an apology for the wrongful conviction and imprisonment of the Cardiff Three.
7 July 2003	Detective Supt (later DCS) Coutts was appointed SIO to lead the South Wales Police investigation, "To identify and investigate any criminal or disciplinary offences arising from the original investigation". DI Penhale (later DCI) was the Deputy SIO. DCC Cahill was appointed the ACPO overseer. This investigation became known as Lynette White 3 or LW3. DCS Coutts remained the SIO throughout, a period of over eight years. DCI Penhale was Deputy SIO throughout though at times he had other responsibilities: he was with the Home Office between 2007 and 2010 (although during this time he attended some LW3 meetings) and afterwards was SIO on other investigations as well. Due to the scale and complexity of events, this became a substantial police investigation and it required the use of a Major Incident Room (MIR): later, the Ministry of Defence premises at RAF St. Athan were chosen for this purpose.
1 Sep 2003	The Cardiff Five were designated as victims in the investigation.
11 Sep 2003	First meeting between SIO Coutts and the CPS. Ian Thomas was appointed the CPS senior reviewing lawyer. He was then based at CPS Casework Directorate at Ladywood House, Birmingham (where this case was then located). The case was transferred to CPS London in January 2006. Thomas remained in the role of CPS senior reviewing lawyer until July 2007.
1 Oct 2003	Angela Psaila, Leanne Vilday, Mark Grommek and Paul Atkins were arrested. They became known as the Core Four.
24 Aug 2004	The investigation had been referred to the Police Complaints Authority (PCA) and it was re-referred to the IPCC when this replaced the PCA. It was later decided that the LW3 investigation should be a 'supervised investigation' and it was supervised by Tom Davies, the IPCC Commissioner for Wales.
16 Dec 2004	James Bennett instructed as junior counsel by the CPS. Bennett was called in 2002.
13 April 2005	Five police officers were arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Gillard, Daniels, O'Brien, Page and Seaford. They were the first to be arrested and between this date and 26 June 2007 there was a total of 10 arrest phases. This part of the investigation to arrest serving and retired police officers (and one scientist) was known as Operation Rubicon.
21 April 2005	Four police officers were arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Greenwood, Pugh, Coliandris and Cuddihy.
19 May 2005	Three police officers were arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Jennings, Murray and Stephen.

3 June 2005	Nicholas Dean QC was instructed by the CPS though not as trial counsel. He was instructed to advise on the specific issue of a potential conflict of interest which defence lawyers may have had in representing two of the suspects. His advice is dated 15 June 2005. In October 2005 he was instructed as trial counsel. Dean QC took silk in 2003.
20 July 2005	Three police officers were arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Powell, Mouncher and Evans.
Sep 2005	CPS Headquarters Casework Directorate was disbanded and this case was transferred to the newly formed Special Crime Division. Carmen Dowd was its head and she remained in this role until May/June 2008.
Oct 2005	Dean QC instructed as leading counsel.
12 Oct 2005	One police officer was arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Morgan.
16 Nov 2005	One police officer was arrested on suspicion of committing offences of conspiracy to pervert the course of justice and misconduct in a public office: Lott.
Jan 2006	Howard Cohen, was tasked to assist Ian Thomas by providing 'strategic oversight' of the case.
12 Jan 2006	One police officer was arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Williams.
12 April 2006	One police officer was arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Davies.
9 Aug 2006	The "Review Note" by Dean QC and Bennett was completed. They reviewed all of the evidence and advised that the investigation against some of the suspects was worth continuing but also advised that there was insufficient evidence against 5 of the civilian suspects and 8 of the police officer suspects. They also decided that 'on balance' it was not in the public interest to prosecute the Core Four due to the importance of securing them as witnesses when considering a prosecution of the police officers.
5 Oct 2006	In a note dated this day, Dean QC concluded that it was in the public interest to prosecute the Core Four.
11 Dec 2006	The senior forensic scientist in the original investigation, John Whiteside, was arrested on suspicion of perverting the course of justice and perjury but was not charged.

26 Feb 2007	Contrary to the advice of counsel, the CPS senior reviewing lawyer, Ian Thomas, decided that it was in the public interest to prosecute the Core Four and he signed the MG3 (the charging decision). This decision was approved by the DPP. On this day Psaila, Vilday, Grommek and Atkins were charged with perjury. Atkins and Psaila had indicated that they would not engage in a s.73 SOCPA agreement. Vilday and Grommek had both been interviewed for the purpose of providing a s.73 statement but neither had in fact signed such a statement. Thomas introduced the system of E-Catalogues for disclosure whereby police officers could bring to his attention documents they considered might undermine the prosecution or assist the defence. DS Jayne Hill was the Lead Disclosure Officer.
5 March 2007	Psaila, Vilday and Grommek appeared at Cardiff Magistrates' Court and were sent to stand trial at Cardiff Crown Court.
6 March 2007	Atkins appeared at Cardiff Magistrates' Court and was sent to stand trial at Cardiff Crown Court.
12 March 2007	First appearance of the Core Four at Cardiff Crown Court.
26 June 2007	One police officer was arrested on suspicion of committing offences of conspiracy to pervert the course of justice, false imprisonment and misconduct in a public office: Hicks.
July 2007	Ian Thomas was moved to another post in the CPS, due to poor health, and in September 2007 was replaced by Gaon Hart as the reviewing lawyer in the case of the Core Four.
July 2007	Ian Thomas's departure required the employment of disclosure counsel and James Haskell was instructed by the CPS as the disclosure junior. DS Jayne Hill was still the Lead Disclosure Officer. The HMCPSI Review at paragraph 6.16 and 6.17 concluded that the decision to instruct Haskell was made far too hastily and on an unsatisfactory basis. Haskell was called in 2004.
7 Sep 2007	Gaon Hart appointed as the reviewing lawyer to replace Ian Thomas. Cohen continued in his 'strategic role' but general work on the case was also divided between himself and Hart. Cohen took responsibility for disclosure and worked together with Haskell. Cohen signed off the disclosure schedules from phase 13 to phase 19 (only a CPS lawyer can sign off a disclosure schedule). Hart was to focus on review decisions.
27 Sep 2007	Ronald Actie died.
7-9 Jan 2008	Core Four's application to stay the proceedings as an abuse of the process rejected by Mr Justice Lloyd-Jones.
March 2008	A new team of about 10 disclosure officers was recruited and Haskell gave them a one day disclosure training session before secondary disclosure in the Core Four prosecution commenced. Leading up to the trial of the Core Four a section 8 disclosure application was made which was dismissed. There was no complaint by the Core Four about the prosecution's performance of its disclosure obligations.
13 June 2008	Simon Clements appointed Head of the CPS Special Crime Division Directorate which was responsible for this prosecution.

4 July 2008	CPS had instructed the consultant forensic psychiatrist, Dr Joseph, to give an opinion as to whether or not Atkins was fit to plead. Dr Joseph concluded that Atkins was not fit to plead and his report was received on this day.
9 July 2008	At a Director's Case Management Panel (DCMP) it was decided that it was not in the public interest to continue the prosecution against Atkins.
11 July 2008	By letter dated this day, the CPS informed Atkins that the prosecution had been discontinued against him. Although this decision had been approved at a DCMP, the decision was principally that of Gaon Hart as the reviewing lawyer but Hart had also sought a written advice from Bennett. Bennett had agreed that Atkins should not be prosecuted but considered that a 'trial on the facts' might be appropriate. In addition, there was other psychiatric and psychological evidence which established that Atkins was suggestible and unreliable and Hart was concerned about the impact this evidence would have on the case against two police officers in particular (DC Jennings and DC Stephen) against whom Atkins was the main witness. Both police officers were then on police bail (they were both later charged).
17 July 2008	At a meeting with the CPS, Dean QC and police officers criticised Hart's decision to discontinue the prosecution against Atkins for having been taken precipitately and without due consultation with them. Dean QC, for example, had been on holiday when the decision was taken.
Oct 2008	ACC Colette Paul appointed ACPO overseer.
7 Oct 2008	The trial of the remaining three from the Core Four was listed to start before Mr Justice Maddison. There were further applications of abuse of process which were also rejected. Each defendant was indicted on three counts of perjury relating to the evidence given at the committal proceedings and at each of the two Crown Court trials. Psaila and Vilday pleaded guilty. Grommek pleaded not guilty, his defence was duress, but on 27 October 2008 changed his plea to guilty after the close of the prosecution case following a ruling by the judge that on the evidence the defence of duress was not available in law.
5 Nov 2008	Dean QC and Bennett's second review of the evidence completed following the convictions of Psaila, Vilday and Grommek. They advised that there was a realistic prospect of conviction against the remaining suspects.
12 Nov 2008	Three stage meeting held by the CPS. The CPS were concerned about the relationship of counsel and the police to the CPS. The intention was to clear the air and to have a fresh start. Dean QC and Bennett were reminded that they were instructed by the CPS and that it was Division policy not to share counsel's advices with the police. Dean QC 'vehemently' disagreed with this policy and said that the police did not trust the CPS because they did not believe that the CPS had taken this case as seriously as it should have done. When the police were brought into the meeting, Dean QC asked Asker Hussain of the Special Crime Division to explain this policy to the police. DCC Cahill, the ACPO overseer, observed that the atmosphere of the meeting had been 'icy'.
1 Nov 2008	Keir Starmer QC became DPP.

19 Dec 2008	Psaila, Vilday and Grommek were sentenced by Mr Justice Maddison to 18 months' imprisonment. In opening, Nicholas Dean QC accepted that police officers were responsible for procuring the false accounts which the three defendants had given through a combination of pressure, bullying and suggestion. The judge sentenced on that basis.
5 Feb 2009	Simon Clements chaired a conference at Ludgate Hill at which all relevant lawyers and police officers were present. The evidence against the suspects was scrutinised and the credibility of the Core Four was considered.
12 Feb 2009	Gaon Hart completed his review of the evidence and concluded that there was *not* a realistic prospect of conviction against any of the police officer or civilian suspects.
24 Feb 2009	Dean QC strongly disagreed with the Gaon Hart review and responded to it in a further advice. Dean QC maintained that there was a realistic prospect of conviction.
25 Feb 2009	Simon Clements convened a case conference for lawyers only. Clements indicated he agreed with the assessment of Dean QC. Hart maintained his view that there was not a realistic prospect of conviction: the difference of opinion lay principally in the conflicting views as to the credibility of the Core Four. Resolution between the two opinions proved impossible.
27 Feb 2009	DPP Keir Starmer QC chaired a DCMP at which he decided that it was his personal opinion that there was a realistic prospect of conviction but in the light of the disagreement between leading counsel and the reviewing lawyer, the DPP directed that Clements, as Head of Division, should have responsibility for the charging decision. Clements subsequently concluded that there was sufficient evidence to provide a realistic prospect of conviction against each of the 15 suspects (13 police officers and two civilians) on each prospective charge. Hart stood down as the reviewing lawyer and he was not replaced until September 2009 by Michael Jennings.
2 March 2009	Cohen signed the MG3 (the charging decision) and District Judge Daphne Wickham issued summonses against those to be charged to attend City of Westminster Magistrates' Court on 24 April 2009.
3 March 2009	CPS announced that 13 police officers and two civilians would be prosecuted for offences of conspiracy to pervert the course of justice and perjury.
March 2009	Dean QC raised the question of instructing a second silk or a very experienced junior to assist him but a fourth counsel was not instructed.
March 2009	Primary Disclosure commenced. Top of Haskell's written guidance for disclosure dated 13 November 2008 was the relevance of anything that suggested that the original defendants were responsible for the murder.
24 April 2009	Those charged (save for Massey) were sent to the Crown Court to stand trial.
21 May 2009	Massey sent to the Crown Court to stand trial.
5 June 2009	Preliminary hearing at the Central Criminal Court before Mr Justice Calvert-Smith.

July 2009 (Before 22 July)	DS Allen and Haskell visited SWP **PLSD** where they met lawyer Rachel Davies to consider if any third party disclosure was necessary. They requested copies of five sets of documents being civil claims against SWP by five police officers, one of whom was Carole Evans. On or soon after 28 July 2009, DS Allen received the copies of the five sets of documents requested from PLSD.
23 July 2009	DS Allen and DC Lane visited the **IPCC** office in Cardiff and viewed 14 groups of material to consider if any third party disclosure was necessary. They requested copies of documents relating to four complaints by John Actie against police and two witness statements by William Peter Evans. DS Allen collected these documents from the IPCC a few days after 23 July 2009.
24 July 2009 – 4 Aug 2009	DS Allen came into possession of the documents requested from the **IPCC** and SWP **PLSD**. Save for the two witness statements of William Peter Evans from the IPCC, these documents were later registered on the HOLMES database as **D7447** (IPCC) and **D7448** (PLSD). In respect of the material from the IPCC, the IPCC requested a "firewall" so that the LW3 team would not have general access to it (one of William Peter Evans' statements, for example, made complaints against DCS Coutts and DCI Penhale as well as other police officers). Due to the sensitive nature of these documents, all of this material was kept in DS Allen's office at St. Athan as opposed to the MIR office at St. Athan to maintain the integrity of the complaints process as against those officers who were subject of the complaints.
4 Aug 2009	DC Rowlands created an E-Catalogue for the documents received from the IPCC on 24 July 2009. These were entered on the E-Catalogues as comprising *four* documents: *one* statement of complaint from *Peter Evans* and *three* complaints against police by John Actie. There were four errors in this process: first, this was done *before* this material had been entered on the HOLMES database which is why the E-Catalogue entries did not contain the HOLMES reference numbers. Second, only three out of the four of John Actie's complaint files were included on the E-Catalogue. Third, William Peter Evans was described as Peter Evans and fourth, only one statement from William Peter Evans was entered and not two. For these reasons, these documents were later referred to as the 'four documents'. There was no E-Catalogue for the five files relating to civil claims against South Wales Police received from the SWP LSD.
12 Aug 2009	James Haskell considered the documents entered on the E-Catalogue: William Peter Evans' 'statement' was considered 'not relevant' and 'no need to schedule' – it therefore was not referred to in the MG6C. The '*three*' John Actie complaint files were considered 'relevant' but in respect of the one item which a police officer had thought disclosable, Haskell wrote 'it is unclear to what extent John Actie's credibility will be in issue. In any event, I am unconvinced that this does undermine John Actie' and that it should be scheduled on the MG6C to be 'reassessed if it is apparent from the DCS that John Actie's credibility is in issue'.

18 Aug 2009	Carole Williams registered documents on the HOLMES system as: D7447 "IPCC document regarding complaints by John Actie against SWP" and D7448 "Five files in relation to civil claims against SWP by John Murray, Carole Evans, Michael Daniels, Erica Coliandris and Adrian Morgan".
19 Aug 2009	DS Allen attended the offices of **PSD** where he had access to all material held in relation to LW3. He selected the Jones Briefing Paper.
20 Aug 2009	Allen collected a copy of the Jones Briefing Paper and brought it to St. Athan. It was not entered on HOLMES though was considered, amongst other PSD documents, by both Haskell and Clements for the purposes of relevance and whether it should be registered on the MG6C. Both Haskell (2 February 2010) and Clements (11 April 2011) later advised that the PSD material was not relevant and should not be registered on the MG6C.
28 Aug 2009	DS Allen updated the HOLMES database for D7447 by identifying that it comprised *four* separate complaints by John Actie together with a brief description of each and the dates of each incident. There was now a discrepancy between the descriptions on the E-Catalogue (three) and the HOLMES database (four). The location of D7447 was shown as "Incident Room St. Athan". Similarly, DS Allen made a (slight) amendment on the HOLMES database for D7448. The entry now contained more detail as to the nature of the complaints and the contents of the files. The location of D7448 was also shown as "Incident Room St. Athan" ("MIR"). D7447 and D7448 (and the two William Peter Evans witness statements) were not located in the MIR but were all kept in the same Iron Mountain box in DS Allen's office at St. Athan due to their sensitive nature. DS Allen did not record anywhere the fact that D7447, D7448 and the two William Peter Evans witness statements were being kept in his office nor his rationale for keeping them there.
Sep 2009	Michael Jennings became the senior reviewing lawyer for the CPS. Howard Cohen continued in his 'strategic' role.
14 Oct 2009	Howard Cohen signed the primary disclosure schedule which comprised 3,284 pages and was contained in seven lever arch files. Within the schedule was material identified as D30, it was described as: "The victim contact log. This documents police contact with John Actie, Ronnie Actie, Miller, Paris, Abdullahi during phase 3 of the enquiry". D30 was not identified as relevant and was marked 'CND' (clearly not disclosable).
28 Oct 2009	DC House updated HOLMES and moved both D7447 and D7448 to a state of "no reading required".
4 Dec 2009	DS Allen left the LW3 investigation to work for PSD. He recollects that the Iron Mountain box containing D7447 and D7448 was still in his office when he left. DS May briefly became Lead Disclosure Officer before leaving LW3, at which stage Robert Rowlands took over the role.

24 Feb 2010	DS May having returned to the LW3 investigation as Office Manager carried out an audit of material in the MIR with a view to all of it being scanned and found that D7447 and D7448 were missing from their expected location. There is an entry in DS May's notebook for this day recording a conversation he had with DS Allen in which DS Allen is recorded as having said that D7447 was shredded because Haskell had decided it was not relevant and that D7448 was shredded after DCS Coutts had told him "to get rid" of it because it contained complaints, including one from Carole Evans, whose husband (William Peter Evans) had made official complaints against DCS Coutts and others. DS Allen denies having had such a conversation and, as is now known, the documents were not shredded. DS May was informed where the original copies of the material were being held. HOLMES was updated on the same day by Carole Williams to reflect the location of the original documents: D7447 with the IPCC and D7448 with PLSD at Police HQ Bridgend. Ms Williams recalls that DS May came off the telephone shocked and annoyed and said "He's shredded them". She also has a note for this day which records that DS May had spoken to DS Allen who had informed him that the copies of D7447 and D7448 had been destroyed. DS May says he told Haskell about the missing documents, Haskell is adamant he did not.
15 April 2010	Attorney General entered a nolle prosequi against DC Rachel O'Brien – one of the 13 charged police officers – on account of her being too ill to stand trial.
Sep 2010	By this time A/DS O'Connor had taken over the role of Lead Disclosure Officer. Defence Statements were served and this triggered secondary disclosure which was completed in two stages.
31 Oct 2010	Stage 1 of secondary disclosure: a further MG6C containing 112 pages was served. This was in response to specific disclosure requests. Stage 2 followed which involved a complete review of all previously undisclosed material whether classified as relevant or irrelevant. This was not completed until January 2011. The material itself was reviewed and not the E-Catalogues and, therefore, any comments made in the E-Catalogues were not seen. In Haskell's note on secondary disclosure dated 21 October 2010, he emphasised the importance of specifically looking "for any material, which not only suggests that the original defendants were responsible for the murder, but also any material that suggests that they might have had some involvement, motive or that they had some knowledge or connection with Gafoor". Another relevant issue identified by Haskell was any material that suggested that Gafoor did not commit the murder.
16 Nov – 2 Dec 2010	Applications to dismiss by 8 of the 12 police officers before Mr Justice Sweeney. These applications were dismissed.

13 Dec 2010	During the secondary disclosure process, D7447 and D7448 were again found to be missing, this time by DC Morris. DC Morris spoke to DC O'Connor and DC O'Connor says that he then spoke to James Haskell who advised him that he (Haskell) had already seen the documents and made the primary disclosure assessment himself. Haskell says that no such conversation took place. DC Morris made handwritten amendments to the secondary disclosure catalogue: D7447 "with IPCC" and D7448 "with Legal Services". The original documents were not requested and, therefore, cannot have been reviewed for the purposes of secondary disclosure. This was a significant disclosure failing.
20 Jan 2011	Yusef Abdullahi died.
31 Jan 2011	Howard Cohen stopped working on this case.
14 March 2011	Abuse of process arguments dismissed by Mr Justice Sweeney who then directed that there should be two separate trials. The first would be against eight of the (now remaining) 12 police officers together with the two civilians Perriam and Massey. The remaining four police officers would be tried in the following second trial.
April 2011	Michael Jennings ceased being the senior reviewing lawyer (he had been seconded to the Attorney-General's office) and due to the proximity of the trial he was replaced by Simon Clements who remained in that role until December 2011.
April/May 2011	DCS Coutts stopped working at St. Athan. Due to the impending trial a satellite MIR was established at Cockett Police Station and DCS Coutts worked either there or at the Prosecution Team Room at Swansea Crown Court.
9 May 2011	The trial was due to commence on this day but the trial date was put back to 4 July 2011 due to two of the defendants then being unfit to stand trial. The week commencing 9 May 2011 was used for various legal arguments which included disclosure and especially the disclosure of the 'auto-index' material.
4 July 2011	The first of the two trials commenced at Swansea Crown Court before Mr Justice Sweeney. This first trial, *R v Mouncher* and *others*, involved the following eight police officers: Graham Mouncher, Richard Powell, Thomas Page, Michael Daniels, Paul Jennings, Paul Stephen, Peter Greenwood and John Seaford together with two civilian defendants: Violet Perriam and Ian Massey. The case was largely based on what had happened in November and December 1988 when the witness statements of the Core Four had changed so dramatically. The remaining four police officers: Wayne Pugh, John Gillard, John Murray and Stephen Hicks were due to face a separate trial after the first had been completed.
8 Sep 2011	In relation to D30, Mr Justice Sweeney ordered that all contact material relating to witnesses yet to give evidence should be provided to the defence. The D30 material was provided without any further review but once received it became clear that the details of a number of meetings were missing. As a result the prosecution sought to identify any records of these meetings such as the notes taken by the CPS and by Miller's solicitor. This further material was disclosed on 3 November 2011.

28 Oct 2011	With the prosecution case almost completed, the jury was released for (what was intended to be) three weeks for legal argument to proceed in their absence. Time was given for preparation and the legal argument commenced on 8 November 2011. Due to the events that followed, the jury was in fact absent for more than four weeks.
31 Oct 2011	Howard Cohen retired from the CPS.
3 Nov 2011	Further D30 material disclosed – see entry for 8 September 2011 above.
8 Nov 2011	Legal argument began. The submissions included abuse of process relating to late and inadequate disclosure, an improper relationship between the LW3 investigating police officers and the original defendants (based on the recent D30 disclosure); and no case to answer.
9-14 Nov 2011	DCS Coutts, A/DS O'Connor, Cohen, DS May, Clements and Matthew Gold (solicitor for Stephen Miller) gave evidence about the disclosure exercise and in particular the D30 meetings before Mr Justice Sweeney in an abuse of process application.
28 Nov 2011	This was a Monday and no ruling on the abuse of process application had yet been given. During the trial concerns had been frequently expressed about the adequacy of disclosure by the prosecution. In order to test the prosecution claim that all relevant material had been disclosed, Mr Justice Sweeney ordered the prosecution to provide that material which police officers had identified as disclosable or potentially disclosable on the E-Catalogues but which the prosecution lawyers had regarded as not disclosable. D7447 was within this order but could not be found in its expected location in the MIR office. • The account of police officers is that no one was asked to conduct a thorough search of St. Athan. • DS May remembered the conversation with DS Allen on 24 February 2010 and informed Dean QC and others. He later went to St. Athan where he found his day-book which contained his note of that conversation. DS May was asked not to speak to DCS Coutts or to DS Allen and was asked to make a statement for submission to the court the following day. • It was discovered that D7448 was also missing. DS May requested that the original documents, of which D7447 had been a copy, should be obtained from the IPCC. • During the evening Dean QC spoke on the telephone to DS Allen and DCS Coutts. DS Allen had a vague recollection of a conversation with Coutts about shredding material, but says it was general and not about the material in relation to which Dean was asking him questions. He was asked to make a statement and told not to discuss these matters with anyone. DCS Coutts said that he had never given an instruction to destroy any case material, copies or otherwise. DCS Coutts was told not to attend court the following day.
29 Nov 2011	Dean QC informed the judge in chambers that D7447 (and D7448) had been shredded and he sought and was granted an adjournment to 1 December 2011.

30 Nov 2011	DPP Starmer chaired a meeting attended by Clements, Dean QC, Bennett, ACC Paul, DCI Penhale and IPCC Commissioner Tom Davies at which it was decided to offer no further evidence.
1 Dec 2011	The prosecution offered no further evidence against all 10 defendants because it could no longer have confidence in the disclosure process as a result of the "apparently deliberate destruction" of documents. A full and detailed review of all of the circumstances in which the decision to offer no evidence was taken was promised. In addition to what had been said in court, the CPS issued a public statement.
1 Dec 2011	South Wales Police voluntarily referred the facts to the IPCC as a "recordable conduct matter" and the premises at St. Athan were "locked down" and access was restricted to PSD alone.
2 Dec 2011	IPCC decided that an IPCC Independent Investigation should be conducted. Sarah Green was the Commissioner with oversight and responsibility and Andrew Riley the investigator.
8 Dec 2011	For the same reason, no evidence was also offered against the remaining four defendants in the second trial: Pugh, Gillard, Murray and Hicks.
19 Dec 2011	ToR for the IPCC investigation agreed.
21 Dec 2011	Solicitors representing Stephen Miller, Anthony Paris and John Actie ("the three claimants") wrote to the Home Secretary requesting a public inquiry under the Inquiries Act 2005.
10 Jan 2012	Home Office declined the request for a public inquiry and referred to the ongoing IPCC investigation.
13 Jan 2012	The DPP invited Michael Fuller of HMCPSI to look into the collapse of the *R v Mouncher* trial.
17 Jan 2012	DCS Coutts was retiring and he was allowed supervised access to St. Athan in order to remove personal property from his office. He was accompanied by Senior Investigative Assistant David Jenkins from PSD. DCS Coutts found D7447, D7448 and William Evans' two statements in an Iron Mountain box in his office. Iron Mountain storage boxes are used by the IPCC but not by the SWP.
27 Jan 2012	ToR of the IPCC investigation amended to include the fact that the missing documents had been found.
13 Feb 2012	IPCC issued a press statement announcing the ToR for its investigation.
9 March 2012	The three claimants issued proceedings for a Judicial Review with the aim of securing a public inquiry.
13 April 2012	MoU agreed between IPCC and HMCPSI to share evidence.
17 July 2012	Mr Justice Mitting refused permission for a Judicial Review. Notice of the renewal of the application for a Judicial Review was later served.
25 July 2012	ToR for Operation Dalecrest agreed.
30 Nov 2012	IPCC announced that it had completed its investigation and would publish its findings in the middle of 2013 on the same day as HMCPSI published its report.

16 July 2013	IPCC and HMCPSI Reports published.
16 Sep 2013	Home Secretary informed the court of her decision not to hold a public inquiry.
25 Nov 2013	Dean QC appointed a Circuit Judge assigned to the Midland Circuit.
10/11 Feb 2014	Preliminary hearing for the Judicial Review proceedings in Cardiff.
14 Feb 2014	Michael Fuller of HMCPSI received a telephone call from a 'retired police officer' (whom he has treated in confidence – the name of the caller has not been disclosed), informing him that 227 'unregistered' boxes had been found relevant to LW3. Michael Fuller contacted the IPCC and passed on this information.
21 March 2014	Home Secretary proposed a settlement to the three claimants of a QC led review instead of a public inquiry.
2 July 2014	Operation Dalecrest Report published.
20 Feb 2015	ToR for the Mouncher Investigation agreed.
2 March 2015	The Mouncher Investigation commenced.
12 Oct 2015 – 17 Dec 2015	Civil trial at the Cardiff County Court before Mr Justice Wyn Williams. 15 claimants (the 13 police officers who were charged in LW3 and two further police officers who were arrested but not charged – PC Coliandris and DC Morgan) had issued proceedings against the Chief Constable of South Wales Police for complaints of: false imprisonment, misfeasance in public office, malicious prosecution and claims under Article 8 of the Human Rights Act 1998.
14 June 2016	Judgment of Mr Justice Wyn Williams handed down.
19 Jan 2017	Report of the Mouncher Investigation completed.

APPENDIX 2

LIST OF PRINCIPAL PERSONS

THE CARDIFF FIVE

Stephen MILLER	Convicted and conviction quashed on appeal
Yusef ABDULLAHI	Convicted and conviction quashed on appeal (now deceased)
Anthony PARIS	Convicted and conviction quashed on appeal
Ronald ACTIE	Acquitted (now deceased)
John ACTIE	Acquitted

THE CORE FOUR

Leanne VILDAY	19 St. Clair Court	Convicted of perjury
Angela PSAILA	19 St. Clair Court	Convicted of perjury
Mark GROMMEK	Flat 2, 7 James Street	Convicted of perjury
Paul ATKINS		

DEFENDANTS IN THE LW3 PROSECUTION

First Trial

Graham MOUNCHER

Richard POWELL

Thomas PAGE

Michael DANIELS

Paul JENNINGS

Paul STEPHEN

Peter GREENWOOD

John SEAFORD

Violet PERRIAM

Ian MASSEY

Second Trial

Wayne PUGH

John GILLARD

John MURRAY

Stephen HICKS

LW3 LEAD INVESTIGATING POLICE OFFICERS

DCS Christopher COUTTS	SIO
DCI John PENHALE	Deputy SIO

LW3 LEAD DISCLOSURE OFFICERS

DCI Jayne HILL	February 2007 – February 2008
DS Mark ALLEN	February 2008 – December 2009
DS Edward MAY	December 2009
DC Robert ROWLANDS	January 2010 – September 2010
DC Gary O'CONNOR	September 2010 – December 2011

CROWN PROSECUTION SERVICE

Sir Kenneth MacDONALD QC	DPP: 2003 – 2008
Sir Keir STARMER QC	DPP: 2008 – 2013
Carmen DOWD	Head of Special Crime Division: 2005 – 2008
Simon CLEMENTS	Head of Special Crime Division: 2008 – 2011
	Reviewing Lawyer 2011
Ian THOMAS	Reviewing Lawyer: 2003 – 2007
Howard COHEN	Role of 'strategic oversight': 2006 – 2011
Gaon HART	Reviewing Lawyer: 2007 – 2009
Michael JENNINGS	Reviewing Lawyer: 2009 – 2011

COUNSEL

Nicholas DEAN QC	Took silk in 2003 – Instructed in October 2005
James BENNETT	Called in 2002 – Instructed in December 2004
James HASKELL	Called in 2004 – Instructed in July 2007

OVERSIGHT

Tom DAVIES	IPCC Commissioner for Wales
DCC Stephen CAHILL	ACPO oversight: 2003 – 2008
ACC Colette PAUL	ACPO oversight: 2008 – 2011
Chief Sup Tim JONES	Head of SWP PSD
Prof Margaret GRIFFITHS	Chair of IAG

APPENDIX 3

Terms of Reference for the Mouncher Investigation

1. Purpose of Investigation

1.1 Stephen Miller, John and Ronald Actie, Yusef Abdullahi and Anthony Paris were wrongfully prosecuted, and stood trial in 1990, for the murder of Lynette White in 1988. Stephen Miller, Yusef Abdullahi and Anthony Paris were convicted and sentenced to life imprisonment, whilst John and Ronald Actie were acquitted. Ronald Actie and Yusef Abdullahi are deceased. The three remaining victims of the miscarriage of justice, Stephen Miller, John Actie and Anthony Paris, are the claimants in this case.

1.2 The 2011 trial (*R v 'Mouncher and others'*) of police officers who were charged with perverting the course of justice relating to the 1990 convictions collapsed. The Leading Counsel for the Crown indicated that "the prosecution can no longer sustain a position maintaining that the court and the Defendants can have the required confidence in the disclosure process" and formally offered no further evidence, inviting the court to direct the jury to return not guilty verdicts.

1.3 The purpose of this Investigation is to understand (with the assistance of the investigations which have already taken place) how this came about. 1.4In addition, this Investigation will consider the subsequent suggestion that 227 boxes of material have been found which should have been, but were not, disclosed.

2. Mode

2.1 This Investigation is not carried out as an inquiry under the Inquiries Act 2005.

2.2 Should there be a requirement for this Investigation to be converted into a statutory inquiry under the Inquiries Act 2005, the QC leading the Investigation shall inform the Home Secretary. The Home Secretary will thereafter determine whether to exercise the powers conferred to her under the Act and convert the Investigation to a statutory inquiry under the Act.

2.3 A Minister can decide to convert an existing non-statutory inquiry to a statutory inquiry under the Inquiries Act 2005 if the original inquiry meets certain conditions. These are considered to apply to this Investigation. For completeness, the conditions are set out in section 15 of the 2005 Act as follows:

(a) particular events have caused, or are capable of causing, public concern, or

(b) there is public concern that particular events may have occurred.

3. Scope

The Investigation will explore the following;

3.1 The reasons why Leading Counsel for the Crown gave the indication quoted above, and the prosecution was therefore abandoned.

3.2 The Investigation will consider how the 227 boxes of documents were overlooked and the contents not considered for the purposes of disclosure in 3 the prosecution. It will also determine whether the reasons for the boxes being overlooked were addressed by the Dalecrest investigation, and if not to carry out such further investigation as necessary to address that matter.

3.3 The Investigation will cover all questions of resources, performance and conduct which are identified as a result of points 3.1 and 3.2 and which have not been resolved by the previous investigations. For the avoidance of doubt, in determining what has not been resolved by these earlier investigations, with particular regard to the disclosure failures, regard will be had to the Claimants' submissions in the judicial review proceedings (as set out in their Skeleton Arguments dated 17th January 2013 and 13th January 2014, the Supplementary Grounds of 3rd October 2013, the witness statement of M Fuller HMCPSI of 28th February 2014 and the Claimant's submissions of 10th March 2014).

3.4 The Investigation will consider why this prosecution was abandoned, including in particular the issues set at 3.1 to 3.3, and will have regard to:

(a) the Investigation Team's findings in relation to points 3.1 – 3.3

(b) the findings already made by the Independent Police Complaints Commission (IPCC) in its report dated 16 July 2013

(c) the findings already made by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) in its report dated May 2013, and

(d) the findings already made by Operation Dalecrest.

If the Investigation is unable to reach a conclusion on the said matters it will explain why not, and will identify what, if any, further steps could enable such a conclusion to be reached.

3.5 What lessons are to be learnt from the process for recording, retaining and disclosing unused material that was adopted in *R v Mouncher and others*? Have appropriate steps been taken in the light of the lessons to be learned? If not, what further steps should be taken?

4. Details

4.1 The Investigation will be carried out by Mr Richard Horwell QC, who will be supported by junior barrister, Mr Patrick Hill, and an administrator ("the Investigation Team"). The Investigation will begin on 2 March 2015 and will aim to provide a report on key findings by Summer 2015. The Home Office Senior Responsible Officer (SRO) will be Mr David Lamberti. The Claimants and the Deputy Chief Constable for South Wales Police will be afforded the opportunity to comment on the appointed QC.

4.2 In carrying out this work, the Investigation Team will:

- have access to all files held by the Crown Prosecution Service and Counsel for the Crown;

- agree a suitable protocol for managing documentation so that it can have access to all relevant documents held by South Wales Police relating to the R v Mouncher trial and those relating to the collapse of the trial;
- have access to any files the Investigation Team considers necessary to carry out their investigation, for example those held by other police forces, the IPCC, HMCPSI and the Home Office;
- have access to the Judicial Review material (CO/2602/2012) including all pleadings, evidence, and the written statements filed;
- be able to speak to anyone (including serving police officers);
- provide monthly updates to the Home Secretary who will thereafter distribute the updates to all stakeholders, including but not limited to the Claimants, the Crown Prosecution Service and South Wales Police;
- take into account any representations made by or on behalf of stakeholders in respect of the topics of the Investigation, who should be spoken to, documents to be considered and the methodology to be adopted (which will clearly be for the Investigation Team to determine).
- Consider requests by the Claimants to view documents.

5. Reporting

5.1. The Investigation Team will submit a report to the Home Secretary by Summer 2015 setting out its key findings and conclusions arising out of paragraphs 3.1-3.3, including whether the Investigation:

(i) has identified information that has not previously been considered by the IPCC, HMCPSI or Operation Dalecrest and which should lead to an investigation into any conduct matter on the part of any police officer;

(ii) has identified further information which should be passed to the Director of Public Prosecutions;

(iii) has been unable to access any relevant evidence and, if so, why, and whether a public inquiry would have a significantly better chance of doing so.

5.2 If the report referred to at paragraph 5.1 includes findings on the conduct of the Crown Prosecution Service and/or prosecuting counsel, the Investigation Team will submit it jointly to the Home Secretary and Attorney General.

6. Publication

6.1. The Home Secretary intends to publish the report. Upon the report being submitted to the Home Secretary, she will decide on both the timing of the disclosure of the report and key evidence to the Claimants and publication. Stakeholders will be given notice of the decision to publish and will be given an opportunity to make representations. If the report includes findings on the conduct of the Crown Prosecution Service and/or prosecuting

counsel, the Home Secretary will consult the Attorney General on the timing of the disclosure of the report and key evidence and publication.

APPENDIX 4

Terms of Reference for the IPCC Inquiry

- To establish the date that each of the four specific copy files of documents came into the possession of the Disclosure Team on the Lynette White 3 investigation.
- To establish what disclosure process each of the four specific copy files of documents was subjected to by any police officer or police staff member and any recording process used to detail that disclosure process.
- To establish if any decision was made to destroy any of those four specific files of documents and if so whether any police officer or police staff member properly recorded the reasoning and rationale for such a decision.
- To establish the movements and location of the four specific copy files of documents from the time they originally came into the possession of the Lynette White 3 investigation until their discovery on 17 January 2012 still in the possession of South Wales Police.

To identify whether any subject of the investigation may have committed a criminal offence and, if appropriate, send a copy of the investigation report to the Director of Public Prosecutions (DPP) for him to decide whether criminal proceedings are to be brought.

To identify whether any subject of the investigation may have breached their standards of professional behaviour. If such a breach may have occurred, to determine whether that breach amounts to misconduct or gross misconduct and whether there is a case to answer.

To consider and report on whether there is organisational learning, including:

- Whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated.
- Whether the incident highlights any good practice that should be disseminated.

APPENDIX 5

Terms of Reference for the HMCPSI Inquiry

- Whether the prosecution team (CPS and counsel) approached, prepared and managed disclosure in this case effectively, bearing in mind the history, size and complexity of the investigation and prosecution.

- Whether the prosecution team (CPS and counsel) complied with their disclosure duties properly, including all relevant guidance and policy relating to disclosure, in light of the extensive material generated in this case.

- Whether the existing legal guidance is appropriate for cases of similar size and complexity; and

- To make such recommendations as it feels appropriate in light of the examination and findings out above, including, if appropriate, recommendations about CPS policy and guidance and/or systems and processes, and CPS arrangements for handling of cases of similar size and complexity.

APPENDIX 6

The E-Catalogue

LYNETTE WHITE PHASE III - POST CHARGE ANALYSIS OF UNUSED MATERIAL

DC 2537.

DOCUMENT NO	ISSUE DESCRIPTION	IS THE MATERIAL CAPABLE OF HAVING ANY IMPACT ON THE CASE. 2.1	CAN ITEM BE BLOCK LISTED. 6.10.	DOES IT UNDERMINE	DOES IT ASSIST	COMMENTS
1	statement of complaint Peter Evans Makes complaint re search of premises and arrest of wife Carole Evans Complains about D/Supt Penhale, ACC Cahill, Tom Davies IPCC and Dc Gari Jefferies and the Police Authority					
2	Complaint of racial abuse by Police officers towards John Actie October 2005 Appears to undermine Acties credability asa complaint appears to be malicious and Investigating officer suggested in a report of considering prosecuting Actie for wasting Police Time					T

LYNETTE WHITE PHASE III - POST CHARGE ANALYSIS OF UNUSED MATERIAL

DC 2537.

DOCUMENT NO	ISSUE DESCRIPTION	IS THE MATERIAL CAPABLE OF HAVING ANY IMPACT ON THE CASE. 2.1	CAN ITEM BE BLOCK LISTED. 6.10.	DOES IT UNDERMINE	DOES IT ASSIST	COMMENTS
3	Complaint following drug search of John Actie 3 October 2006 alleged false imprisonment assault harassment use of force and abuse of authority etc against searching officers and appeal against finding of no case to answer (Appears to be irrelevant)					
4	Complaint July 05 of assault after being sprayed with CS Spray Louisa Place after being requested to assist police by Supt Bob Tooby (Appears to be Irrelevant)					

APPENDIX 7

The MG6C

Form MG 6C

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RESTRICTED

POLICE SCHEDULE OF NON-SENSITIVE UNUSED MATERIAL

R v MOUNCHER & OTHERS

URN:

The Disclosure Officer believes that the following material, which does not form part of the prosecution case, is NOT SENSITIVE

Holmes URN	Material Type	Description and Relevance	Location	Note	FOR CPS USE: *Enter: D = Disclose to defence I = Defence may inspect CND = Clearly not disclosable *	COMMENT
		THE ORIGINAL SUSPECT INTERVIEWS OF MILLER.				
D7447	EDITED DOCUMENT	MATERIAL FROM IPCC RELATING TO FOUR SEPARATE COMPLAINTS BY JOHN ACTIE AGAINST THE SOUTH WALES POLICE. FIRST COMPLAINT (JULY 2005) WHEN HE WAS SPRAYED WITH CS SPRAY; SECOND COMPLAINT (OCTOBER 2005) WHEN HE WAS ALLEGEDLY RACIALLY ABUSED; THIRD COMPLAINT (OCTOBER 2006) WHEN HE WAS SUBJECT TO STOP AND SEARCH; AND FOURTH COMPLAINT (APRIL 2007) WHEN HE WAS ALLEGEDLY VERBALLY ABUSED. ALL FOUR COMPLAINTS WERE UNPROVEN.	INCIDENT ROOM ST ATHAN	ZH	CND	
D7448	EDITED DOCUMENT	FIVE FILES WHICH RELATE TO CIVIL CLAIMS BROUGHT AGAINST SOUTH WALES POLICE BY JOHN MURRAY, CAROLE EVANS, MICHAEL DANIELS.	INCIDENT ROOM ST ATHAN	ZH	CND	

Signature: [signature] **Name:** DS MARK ALLEN

Date: 14TH OCTOBER 2009

Reviewing Lawyers signature :

Print Name:

Date:

RESTRICTED

2006/07(1)

Form MG 6C

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RESTRICTED

POLICE SCHEDULE OF NON-SENSITIVE UNUSED MATERIAL

R v MOUNCHER & OTHERS

URN:

The Disclosure Officer believes that the following material, which does not form part of the prosecution case, is NOT SENSITIVE

Holmes URN	Material Type	Description and Relevance Give sufficient detail for CPS to decide if material should be disclosed or requires more detailed examination (For guidance refer to the Prosecution Team Disclosure Manual and Attorney General's Guidelines)	Location State precisely where the item can be found / located	Note	FOR CPS USE: *Enter: D = Disclose to defence; I = Defence may inspect; CND = Clearly not disclosable *	COMMENT
		ERICA COLIANDRIS AND ADRIAN MORGAN IN 2008. THE CLAIMS ALLEGE FALSE IMPRISONMENT AND PERSONAL INJURY. EACH FILE CONTAINS DOCUMENTS INCLUDING A CLAIM FORM, CONSENT ORDER AND CORRESPONDENCE BETWEEN THE PARTIES. ALL CIVIL CLAIMS HAVE BEEN STAYED PENDING THE OUTCOME OF THE CRIMINAL PROCEEDINGS.				
D7449	EDITED DOCUMENT	1ST STATEMENT OF WALA CHRISTINE HOLMES DATED 02/03/88. STATES "ABOUT 2 WEEKS AGO I SAW A PHOTOFIT PICTURE IN THE PAPER. THIS PICTURE LOOKS EXACTLY LIKE A FELLA I'VE SEEN ON MANY OCCASIONS IN EAST CANAL WHARF AND AROUND TESCOS IN CARDIFF. I CAN'T REMEMBER THE FIRST TIME I NOTICED HIM BUT I KNOW HE'S BEEN AROUND A WHILE. HE'S ALWAYS	INCIDENT ROOM ST ATHAN	ZJ	CND	

Signature: [signature] Name: DS MARK ALLEN

Date: 14TH OCTOBER 2009

Reviewing Lawyers signature :

Print Name:

Date:

RESTRICTED

2006/07(1)

APPENDIX 8

The Entries on Holmes

RESTRICTED

Document State of Indexing Record

Incident ID: 62WH020309A88

Document Number: D7447

Priority: HIGH

Registration Date: 18/08/2009

Subject XRef Desc: 18/08/2009 DOCUMENT FROM IPCC RE COMPLAINTS BY N9 ACTIE

Class Code:

Class Name:

Urgent Marking: N

Free Format: N

Document Summary: 18/08/2009 INDEPENDENT POLICE COMPLAINTS COMMISSION DOCUMENT REGARDING COMPLAINTS BY JOHN ACTIE AGAINST SOUTH WALES POLICE

Current Queue States

Registration:	REGISTRATION COMPLETE	Reading:	READING NOT REQUIRED
Typing:	TYPING NOT REQUIRED	Indexing:	READY FOR INDEXING
Proof Reading:	PROOF READING NOT REQUIRED	Approval:	APPROVAL REQUIRED
Court Printing:	COURT PRINTING NOT REQUIRED		

Cross References (4)

Reference	Use	Description
CATEGORY	SUBJECT	INDEPENDENT POLICE COMPLAINTS COMMISSION (IPCC) -
CATEGORY	INDEPENDEN	MATERIAL FROM IPCC IN RELATION TO 4 SEPARATE COMPLAINTS BY N9 ACTIE AGAINST SOUTH WALES POLICE ALL OF WHICH WERE UNPROVEN
CATEGORY	PHASE 3 AL	MATERIAL FROM IPCC IN RELATION TO 4 SEPARATE COMPLAINTS BY N9 ACTIE AGAINST SOUTH WALES POLICE ALL OF WHICH WERE UNPROVEN
CATEGORY	PHASE 3 IN	MATERIAL FROM IPCC IN RELATION TO 4 SEPARATE COMPLAINTS BY N9 ACTIE AGAINST SOUTH WALES POLICE ALL OF WHICH WERE UNPROVEN

TAG	VALUE
09A881	NEW

Security Level: 1

MGForm:

Other Information: THIS DOCUMENT IS HELD BY THE IPCC

Assessment Log

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Document State of Indexing Record

Incident ID:	62WH020309A88
Document Number:	D7448

Priority: HIGH

Registration Date: 18/08/2009

Subject XRef Desc: 18/08/2009 FILES RE CIVIL CLAIMS AGAINST SOUTH WALES POLICE

Class Code:

Class Name:

Urgent Marking: N

Free Format: N

Document Summary: 18/08/2009 FIVE FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY JOHN MURRAY, CAROLE EVANS, MICHAEL DANIELS, ERICA COLIANDRIS AND ADRIAN MORGAN

Current Queue States

Registration:	REGISTRATION COMPLETE	Reading:	READING NOT REQUIRED
Typing:	TYPING NOT REQUIRED	Indexing:	READY FOR INDEXING
Proof Reading:	PROOF READING NOT REQUIRED	Approval:	APPROVAL REQUIRED
Court Printing:	COURT PRINTING NOT REQUIRED		

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62WH020309A88 SWPDES017146 SL9999 Printed on: 25/01/2012 11:34

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Document State of Indexing Record

Incident ID: 62WH020309A88

Document Number : D7446

Priority : HIGH   Registration Date : 18/08/2009

Cross References (8)

Reference	Use	Description
CATEGORY	SUBJECT	FORCE SOLICITOR AND CIVIL ISSUES - BRIEFINGS AND D
CATEGORY	FORCE SOLI	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN
CATEGORY	ARREST AND	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN
CATEGORY	ARREST AND	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN
CATEGORY	ARREST AND	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN
CATEGORY	ARREST AND	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN
CATEGORY	ARREST AND	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN
CATEGORY	TRIAL OF 5	5 FILES IN RELATION TO CIVIL CLAIMS AGAINST SOUTH WALES POLICE BY N45 MURRAY N241 EVANS N53 DANIELS N65 COLIANDRIS AND N264 MORGAN

TAG	VALUE
09A881	NEW

Security Level : 1   MGForm :

Other Information : THIS DOCUMENT IS HELD BY THE LEGAL SERVICES DEPARTMENT AT POLICE HEADQUARTERS BRIDGEND

Assessment Log

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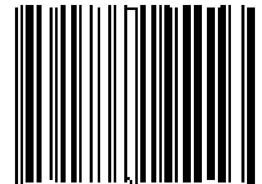
APPENDIX 9

DS May's Note

The following is a typed version of the handwritten note made by DS Eddie May in his MIR notebook on 24 February 2010. The note was made shortly after the telephone conversation DS May had with DS Allen in relation to material that could DS May could not find:

"D7447 + D7448 contacted DS Mark Allen @ PSD – he stated that both docs were copies of info held by IPCC + our legal services. James Haskell had looked at D7447 and decided it wasn't relevant to our enquiry so Mark shredded them (they were scheduled on the MG6C phase 13). With regards D7448 the complaints include Carol Evans whose husband had made official complaints against SIO and others – SIO instructed Mark to get rid of them so he shredded them. Originals are with IPCC + legal services, Holmes updated."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