Neutral Citation Number: [2018] EWCA Civ 1587

Case No: A2/2017/0884, A2/2017/0874,
A2/2017/0874(A) and A2/2017/0874(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEENS BENCH DIVISION,
MR JUSTICE MITTING
HQ13X02927 and HQ14X01020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2018

Before :

LORD JUSTICE McCOMBE
LADY JUSTICE KING
and
LORD JUSTICE COULSON

- -

Between :

	JONATHAN REES **GLENN VIAN** **GARRY VIAN**	**Appellants**
	- and -	
	COMMISSIONER OF POLICE FOR THE METROPOLIS	**Respondent**

- -
- -

Nicholas Bowen QC and David Lemer (instructed by Freedman Alexander LLP) for the First and Second Appellants; **Stephen Simblet** (instructed by Guile Nicholas) for the Third Appellant
Jeremy Johnson QC, Charlotte Ventham and Catriona Hodge (instructed by Directorate of Legal Services, Metropolitan Police) for the Respondent

Hearing dates: 24 & 25 April 2018

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Judgment Approved**Lord Justice McCombe:**

(A) Introduction

1. These are appeals brought by Mr Jonathan Rees, Mr Glenn Vian and Mr Garry Vian from the order of Mitting J of 22 February 2017 by which (following a trial of a preliminary issue as to liability) he dismissed their claims against the Commissioner of Police for the Metropolis ("MPC") for malicious prosecution and for misfeasance in public office. Permission to appeal was refused by the judge by the same order but permission was granted by Lord Justice Jackson by his order of 30 May 2017. For ease, I will refer to Mr Rees as "Rees", Glenn Vian as "Glenn V" and Garry Vian as "Garry V". No discourtesy is intended thereby.

2. In summarising the facts, and in reaching my own decision on this appeal, I adopt entirely the facts as found by Mitting J, which Mr Bowen QC (for Rees and Glenn V) said that he had to accept, albeit in certain respects (which he did not specify) reluctantly. Mr Johnson QC, for the MPC urged upon us a submission that the appeals amounted to an attempt to undermine the trial judge's findings of primary fact, contrary to the principles re-stated in *McGraddie v McGraddie* [2013] 1 WLR 2477 (to which one might add *Re B (Children)* [2008] UKHL 35 and *Henderson v Foxworth Investments Limited* [2014] UKSC 41). I would emphasise at the outset that this judgment is founded entirely upon the primary facts found by the judge. It will be seen, however, that in certain areas I find myself in disagreement either with the judge's legal conclusions or the secondary conclusions which he draws from the primary facts which he found.

(B) Background

3. As long ago as the evening of 10 March 1987 a man called Daniel Morgan was murdered in a car park to the rear of a public house, known as "The Golden Lion", at Sydenham in southeast London. He was struck, four or five blows to the head, with an axe. The axe was left embedded in his face. The appellants (and a man called Jimmy Cook ("Cook")) were eventually prosecuted for the murder. There were no eyewitnesses. However, an important plank of the Crown case presented against the appellants was the evidence of a man called Gary Eaton ("Eaton"), a man with a known criminal past who suffered from a known personality disorder, who was to claim that he had been present at the scene shortly after the attack on Morgan.

4. After a lengthy debriefing which began in July 2006, Eaton made witness statements on 20 April 2007 (just over twenty years after the murder) in which he claimed to have been present at the scene shortly after the fatal blows had been struck. He said that, on that evening, he had followed Garry V (whom he called "Scott") (one of two brothers) into the car park from the pub lavatory and saw Cook in the driver's seat of a car with Glenn V (who he named as the other brother) in the front passenger seat. He said he saw Morgan's body on the ground close by with an axe embedded in his head. He did not directly implicate Rees, save to say that (as Rees himself had admitted) he had been in the pub on the night in question.

(C) The Criminal Proceedings

5. The appellants and Cook were arrested on suspicion of the murder on 21 April 2008. They were charged with the murder on 23 April. They remained in custody until 3 March 2010, when Maddison J (the trial judge) refused further to extend the custody time limits in the case, following a finding that there had been a significant lack of due diligence in prosecution disclosure.

6. In the criminal proceedings, there were a number of pre-trial applications to Maddison J, including an application under Police and Criminal Evidence Act 1984 s.78, to exclude Eaton's evidence from the trial and as an abuse of process application. These were heard between October and December 2009. On 15 February 2010, Maddison J informed the parties that Eaton's evidence would be excluded, but the trial should proceed.

7. There were then further setbacks to the Crown case. As a result, on 18 November 2010, the Crown withdrew its case against Cook. On 11 March 2011, counsel for the Crown informed Maddison J of their decision to discontinue proceedings against the present appellants and to offer no further evidence against them. Verdicts of "not guilty" were entered accordingly. No jury was ever sworn for the trial.

8. As I have said, the statements made by Eaton were a major plank of the Crown case against the appellants. I will return below to the extent to which he implicated each appellant, according to the findings of Mitting J. The salient feature of the present proceedings, however, and the salient reason why Maddison J decided to exclude Eaton's evidence from the appellants' prospective trial, was that the Senior Investigating Officer ("SIO"), Detective Chief Superintendent David Cook ("DCS Cook") was found to have compromised the de-briefing of Eaton by making and receiving an extensive number of unauthorised direct contacts with Eaton in the period leading up to Eaton's making of his statements, in contravention of express procedures for keeping a "sterile corridor" between the debriefing officers and the investigation team. In the course of the debriefing process, Eaton moved from being unwilling to name directly any of the participants in the murder to naming the three appellants and giving his graphic (as it turned out obviously inaccurate) description of the murder scene.

(D) The judgment of Mitting J

9. Mitting J decided that he was satisfied that, on the facts of the case found by Maddison J as to what DCS Cook did, he had committed the crime of doing an act tending to and intended to pervert the course of justice: see paragraph 186 of Mitting J's judgment. Maddison J's conclusion is quoted verbatim in paragraph 101 of Mitting J's judgment:

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

10. For his part, Mitting J found that DCS Cook "contaminated the source of justice". He continued as follows:

> "187. [I]t is inescapable that Cook did deliberately breach both guidelines and express instructions from his superiors which he knew would be likely to undermine the integrity of the evidence of the potential witness Eaton. Further, what he did put the admissibility of the evidence of Eaton at risk, as in fact happened. …[H]e contaminated the source of justice. He knew what he was doing and did it deliberately. He can therefore be taken to have intended to do it. The ingredients of the crime were present.
>
> 188. I reach that conclusion even though I am not persuaded that Cook intended that Eaton should give false evidence. Although no-one, other than Cook and Eaton can know for certain what he said to him, I believe it to be inconceivable that Cook gave Eaton a detailed account of what he believed had happened, knowing that Eaton had not witnessed it. My strong suspicion – it can be no more than that – is that he encouraged Eaton to say that he was present at the Golden Lion on 10 March 1987 and did witness the aftermath of the murder because he believed that Eaton had been there, but was reluctant to say so, because of fears for his and his family's safety and that inaccuracies in his account would be exposed. I strongly suspect that in the two lengthy calls on 28 and 29 August 2006 (referred to in paragraph 71) he encouraged Eaton to say, at the next debriefing session on 1 September 2006, as he had not done before, that he was present at the scene. I strongly suspect that this was because Eaton had said something to Cook which prompted him to believe that Eaton may have been there. Once he began to tell his story, like Maddison J, I accept that Cook prompted him to name "the brothers" as Scott and Garry. The danger in this was that it encouraged an unstable individual with severe personality and psychiatric problems to say what he thought Cook wanted him to say, whether or not it was true. I am satisfied that something like that is what happened. I do not believe that Eaton was present in the Golden Lion on 10 March 1987 and so did not see what he claimed to have seen. If he had been allowed to give evidence of that before a jury, the course of justice would unquestionably have been perverted, whatever the outcome of the trial."

11. The detailed facts of the case and the reasons why he found that DCS Cook had committed the crime of perverting the course of justice are comprehensively set out in the judgment of Mitting J in a very careful summary of the evidence that was before him. It is not necessary to repeat that exercise in this judgment. Mitting J's judgment bears the neutral citation [2017] EWHC 273 (QB) and a copy is to be found on the BAILII website.

12. Mitting J found, therefore, that DCS Cook was, for the purpose of the present claims, guilty of the offence of doing an act tending to and intended to pervert the course of justice.

13. The appellants say that what DCS Cook did led to them being prosecuted maliciously and as a result of misfeasance by DCS Cook in public office. This was tortious and they

are, therefore, entitled to damages.

14. The MPC denies this, while accepting that she would be vicariously liable for either tort if found to have been committed by DCS Cook. On the contrary, it was and is submitted for the MPC that for the purposes of the tort of malicious prosecution, DCS Cook was not a prosecutor; the prosecution was by the Crown Prosecution Service ("CPS") and not by DCS Cook. Even if he was a prosecutor he had reasonable and probable cause to prosecute. He was not malicious and the appellants, who would have been prosecuted anyway irrespective of DCS Cook's wrongdoing, suffered no actionable damage.

15. On this claim, the judge agreed with the argument of the MPC that DCS Cook was not a prosecutor and thus the claim had to fail so far as based on malicious prosecution. The sole prosecutor, he found, was the CPS. However, in the event that he was wrong about that, he considered the other issues under this head of claim.

16. The judge found that there was reasonable and probable cause to prosecute and that DCS Cook was not malicious in the sense to be derived from the decided cases.

17. The judge concluded that the objective evidence, taken from evidence other than Eaton, was sufficient to provide a reasonable prospect of conviction against each appellant and that there was no evidence to suggest that DCS Cook did not believe that such evidence provided reasonable and probable grounds for prosecution.

18. The judge found DCS Cook not to be malicious because, "…even if his methods are open to criticism, his motive was not: it was to bring those he believed to be complicit in the Morgan murder…to justice": paragraph 179 of the judgment.

19. Further, Mitting J held that the appellants would have been prosecuted anyway, irrespective of the flawed evidence of Eaton and DCS Cook's perverting of the course of justice, because the other evidence was sufficient to justify a prosecution.

20. As for misfeasance in public office, the judge directed himself by reference to the speech of Lord Steyn in the House of Lords in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, 191B-194C.

21. There was no dispute that DCS Cook was a public officer. The other elements of the tort were in issue. 1) Was DCS Cook exercising a public power? 2) Was there "targeted malice" on the part of DCS Cook or did he act knowing that he had no power to act as he did and knowing that the act would probably injure the appellant(s)? 3) Did his acts cause loss to the appellants?

22. The judge found in the appellants' favour on questions 1) and 2) above: see paragraphs 181 – 183 of the judgment. In answer to question 1), he found that DCS Cook was exercising a public function as an investigating police officer when he prompted Eaton in the manner that he did: see paragraphs 181-183 of the judgment. Answering question 2), the judge found that intentional perverting of justice was an act which he knew was unlawful and that he did that act deliberately, realising that it would probably injure the

appellants: see paragraphs 184-190 of the judgment.

23. The judge decided the matter against the appellants on question 3); he found that, on the balance of probabilities, prosecuting counsel and the CPS would have decided to prosecute the appellants on the basis of evidence available when they were charged, other than that of Eaton: paragraphs 191-2 of the judgment.

24. Thus, on their claim based in misfeasance, the appellants only lost on the issue of whether they had been caused damage. The judge found that they had not been caused damage, but that all other elements of the tort were satisfied.

25. On the appeal, the MPC seeks to uphold all the elements of the judge's judgment in her favour. There is no contest by the MPC to those areas of the judge's decision which went against her.

(E) Evidence apart from Eaton

26. Before considering these issues, it is necessary to say a little more about the investigations into the murder, prior to the involvement of DCS Cook, and about what evidence against the appellants was available to the Crown over and above the evidence of Eaton. All these matters are covered fully in the judgment below and I merely summarise the material to distil the essence of the surviving criminal case against the appellants, discounting Eaton, in order to explain my own conclusions on the issues arising on the appeal.

27. In April 1987, very shortly after the murder, the appellants and others had been arrested on suspicion of murder and released on bail. While there were suspicions, it was concluded that there was no sufficient evidence to found criminal charges. An inquiry begun in June 1988 by Hampshire Police led to Rees and another being charged with murder, but both were discharged after reference of the case to the DPP and after the advice of leading counsel had been obtained.

28. In 1998, a man called Stephen Warner told police of certain information given to him by (Jimmy) Cook implicating Glenn V and Garry V in the murder. This led to a probe being installed in Rees's business premises. It revealed a short statement by Glenn V about the getaway car and about Cook. This too led to a conclusion that there was circumstantial evidence of motive on the part of Rees but not enough to mount a prosecution.

29. There were then further enquiries in which DCS Cook became involved which led to the arrests of (Jimmy) Cook and the Vian brothers in October 2002. The new evidence included a recorded discussion between the brothers about shortening and deploying a shotgun, suggesting that they had the gun in their possession. The judge found that this evidence was admissible evidence against both brothers of a propensity on the part of each of them to use lethal violence. In December 2002, Rees was also questioned again about the murder, having been produced from prison where he was serving a custodial sentence for a different offence. The results of this further inquiry led to a report of 31 January 2006, drafted by DCS Cook, but signed by an Assistant Commissioner of the

Metropolitan Police. The material had been presented to Treasury Counsel for review and the report recorded that, while the identity of the persons responsible for the murder might now be known, the evidence was insufficient to found a prosecution. As Mitting J said, the evidence might be capable of supporting further evidence that came to light, but worthwhile new evidence would be wanted before prosecution.

30. In the meantime, in December 2004 an approach to the police had been made by a professional criminal called James Ward about the Morgan case. Ward was in custody pending sentence for large scale drug trafficking in the company of Garry V and others. He was seen by DCS Cook and a Detective Chief Inspector in February 2005; a note was taken by a higher investigation officer of HM Customs and Excise. Ward wanted "some help", i.e. a "text" that might mitigate punishment upon future sentence. According to the note, as the judge recorded, after a little prompting by DCS Cook, Ward gave information, or at least confirmed police suspicions, that the Vian brothers and Cook were involved in the murder and that Rees had wanted it done. The judge found that what emerged was that, while Ward was willing to give information he was not willing to give evidence in relation to the Morgan case. While a text was provided by the DCI, on 27 July 2005, Ward was sentenced to 17 years imprisonment for the drug trafficking. Confiscation proceedings followed. Faced with this, Ward made further contact with DCS Cook. This resulted in an offer by DCS Cook for Ward to be fully debriefed, an offer which Ward accepted.

31. The judge found that the resulting debriefing of Ward was a "text book exercise", conducted from 23 May 2006 to the signing of a witness statement by Ward on 9 November 2006. The tenor of the evidence proposed to be given by him was summed up by Mitting J as follows (at paragraph 45 of the judgment):

> "45. …The end result was a 32 page witness statement signed by Ward on 9 November 2006. In it, he states that in 1993 or 1994 Garry Vian told him that Glenn Vian had killed Morgan and that Jimmy Cook had driven the car and that Rees had ordered the murder. Garry Vian said that he played no part in the murder but was close by driving a second car. Again in 1994, Glenn Vian had told him that he would "do" Ward's troublesome tenant with an axe "the same as Morgan". Later, he said that he had been paid for the murder in instalments – he believed £20,000 or £25,000. He said that Glenn Vian referred to it as "the Golden Wonder murder". He also described an incident in 2001/02 in Garry Vian's kitchen. Garry and Glenn Vian were in the kitchen. Rees arrived and there was an argument about Rees's ex-wife, their sister. During the argument Glenn Vian picked up a knife and cut Rees across the face. He said that Garry Vian then said to Glenn Vian,
>
> > "That's fucked that I was going to ask him for some more money off the Morgan thing." (6/4660 – 4691)."

32. As Mitting J found "Ward got his reward". On 9 March 2007, in proceedings under s.74 of the Serious Organised Crime and Police Act 2005, for 13 further drugs trafficking offences and 9 others taken into consideration, Ward was sentenced to 4 years' imprisonment and his sentence of 17 years previously imposed was reduced to one of 5 years' imprisonment. The evidence he had produced, subject to potential exclusion under

s.78 of PACE, was admissible as evidence against Glenn V of committing the murder and against Garry V of his presence nearby. It was of limited further effect and was only admissible as hearsay against Rees if, "in the unlikely event" (per Mitting J), the trial judge ruled that it would be admissible in the interests of justice under Criminal Justice Act 2003 s.114(1)(d).

33. The various investigations into Ward's crimes, including money laundering, generated a number of documents including those stored in the 18 crates, which were ultimately found to yield material potentially helpful to the defence in the Morgan murder proceedings. It was the failure to disclose this material which led to Maddison J refusing to extend custody time limits in March 2010, as already mentioned.

34. As an extra source of evidence, there was also a witness statement of 15 November 2006 from a man called Terry Jones. He had no convictions, but claimed to be an associate of Garry V. The judge summarised Jones' evidence as follows:

> "57. In it, Jones gave a detailed explanation of his knowledge and dealings with Garry Vian (since 1983 – 84), Glenn Vian whom he had met "plenty of times", Ward and Jimmy Cook. He said that Garry Vian had told him that Morgan was murdered because he was looking into Garry Vian and others dealing drugs – he knew too much. He was not sure whether Garry Vian had said that he had done the murder, but definitely understood from him that he was there at the time and involved. Garry Vian believed that Jimmy Cook may have been a "grass" about drugs and feared that he might become an informant about the Morgan murder, because he was only involved as the driver.
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> 58. Jones's evidence was admissible evidence of participation in murder by Garry Vian. …"

The judge said that he had no reason to doubt that Jones would have been willing to give evidence at trial.

35. Finally, there was evidence from Andrew Docherty. In August 2002, he had been convicted of manslaughter and robbery and had been sentenced to 18 years' imprisonment. He had a number of other convictions for serious offences. According to him he had begun living with the mother of the Vian brothers in 1988 and, in the same year, had begun working for Rees in his private investigation business. He had provided a statement to investigators in 1989, saying that he had heard nothing since the murder which might have assisted the police. He refused, apparently in robust terms in August 2003, to provide any further assistance. When visited in January 2008, he gave rather different information. It was summarised by the judge as follows (at paragraph 107):

> "107. …He said he knew who had been involved in the murder: Glenn Vian had killed Morgan with the axe and was accompanied by Jimmy Cook. He knew this, because Glenn Vian had told him himself. Docherty also said that Glenn Vian had told him that Rees had instigated the murder, but not because of his affair with Harrison. He said that he was present when the final instalment of

> £8,000 was paid by Rees to Glenn Vian and saw Rees hand over £8,000 to him. There was no doubt about what the money was for, because he heard the conversation between them. He maintained that Garry Vian had not been present at the murder. …"

He repeated this and added to it in his statement of 19 February 2008 as recited by the judge:

> "109. …He said that, while he was working at Southern Investigations, after the release of Rees and Goodridge (on 11 May 1989 – see paragraph 16 above) Glenn Vian, who was really angry and looking for Rees, told him that Rees had instigated the murder. Glenn Vian said that he and Jimmy Cook were paid by Rees to do it. He was still owed £8,000 by Rees as the final payment for the job. He said that Jimmy Cook had been the getaway driver, but that he had swung the axe and killed Morgan.
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> 110. Docherty said that a few weeks later he saw Rees counting money out of or into a brown envelope on his desk. Glenn Vian came into the office and went in to see Rees. Docherty saw the brown envelope he'd seen on Rees's desk, sticking outside of Glenn Vian's inside jacket pocket. Glenn Vian said that Rees had just paid him the £8,000 owing from Morgan's murder."

36. The judge summed up the evidential status of Docherty's evidence as follows (in paragraph 112):

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

(F) Arrests and Charging

37. The arrests and charging decisions were apparently based largely on a report dated 13 June 2007, prepared by another officer (DCI Beswick) but signed by DCS Cook as SIO. The judge records that the primary purpose of the report was to seek legal advice as to whether the appellants (and others) should face criminal charges in respect of Morgan's death. It is worth quoting the judge's resume of the crux of the report, which appears at paragraphs 114 to 115 of the judgment as follows:

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

> "The new evidence is primarily from two resident informants and it is appreciated that many difficulties exist when relying on such persons at trial. However a great deal of effort has been directed at verifying their accounts and their criminal history, the majority of their respective accounts has been corroborated and significant extra charges have been preferred against them…Ward was subject to a lengthy prison sentence before deciding to give evidence in this case, and it would undoubtedly be difficult to mount a prosecution on his evidence if given in isolation…Eaton on the other hand was not in custody and by giving evidence to this inquiry has admitted serious offences for which a custodial sentence is highly likely. He freely chose to place himself in such jeopardy in order to give evidence."
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> The significance of Eaton's evidence was emphasised in the first sentence of paragraph 1779.
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> 115. Although the prospect of new evidence from Ward was the catalyst for Operation Abelard II, it was accepted from inception that,
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> > "Evidence from Ward in isolation was unlikely to be sufficient to prosecute this case." (Paragraph 873).
>
> Ward's evidence was accurately summarised in paragraphs 1065 – 1142. …"

38. It was said by the judge that the evidence of Eaton was generally summarised accurately in the report for the CPS, but that it was "inaccurate or incomplete or both" in one major respect. That deficiency was that the report failed to note the critical inaccuracy of the positioning of Eaton's car at the murder scene, giving rise to the clear inference that Eaton had not been at the scene at all. The judge said that the report should have noted the discrepancies; he said the conclusion demonstrated "wishful thinking" in compilation of the report. The judge added, however:

> "118. A more significant omission was the absence of any reference to the repeated telephone calls by Cook to Eaton and, as Maddison J found, the fact that he prompted him to name, with only partial accuracy, the brothers Scott and Glenn. Beswick denies all knowledge of Cook's contact with Eaton other than for welfare purposes. I accept his denial; but Cook knew and this report went out under his name.
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> 119. The upshot was that the uncritical picture painted of the evidence of Eaton was not a true reflection of its worth. The report laid heavy emphasis on the new evidence of Eaton without exposing or analysing its deep flaws."

This omission was, of course, unknown to Beswick who had drafted the report.

39. The judge summarised the evidential position as against each of the appellants, as

submitted to the CPS and counsel, at the date of the relevant decisions, as follows, in paragraph 121 of the judgment:

> "121. The evidence submitted to the CPS and Treasury Counsel before the decisions to arrest and charge were made, in respect of the claimants only, can be summarised as follows
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> **Glenn Vian** (paragraphs 1785 – 1802 of the report). Ward's evidence of Glenn Vian's admission to him; the product of the probe on 19 October 2002 (paragraph 26 above); Eaton's eyewitness evidence; and Docherty's evidence about Glenn Vian's admission to him and his receipt of money from Rees.
>
> **Garry Vian** (paragraphs 1802 – 1812 of the report). Garry Vian's admissions to Ward and Jones that he was present at the scene of the murder; Eaton's evidence; and the product of the probe on 19 October 2002.
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> **Rees** (paragraphs 1825 – 1837 of the report). Eaton's evidence about drug trafficking and money laundering; the undisputed fact that Rees was responsible for bringing Morgan to the Golden Lion, a public house which neither of them normally frequented; Eaton's evidence that Jimmy Cook spoke to him there; Lennon's statement that Rees had sought to have Morgan killed long before the murder; Rees's lies about telephone calls on the night of the murder, in particular the 12 minute call at 9.04 pm and his lies about his journey after leaving the Golden Lion; and, potentially, Docherty's evidence about counting out the money for Glenn Vian. The report, however, contained one accurate significant statement about the case against Rees in paragraph 48,
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> > "The new witnesses identified by Operation Abelard II do not confirm whether or not Rees commissioned the murder."
>
> …"

40. On this basis, as the judge found the relevant decision (made at some time in the period 21-23 April 2008, as noted above) to charge the appellants was made by the CPS, advised at all stages by Treasury Counsel, which excluded any role for DCS Cook as a prosecutor. The MPC accepts, however, for the purposes of the tort of malicious prosecution, there may be more than one person that is "a" prosecutor in any individual case. Indeed, the judge himself indicated that he might have granted permission to appeal on that point, but for his other conclusions which, in his view, rendered that point academic.

41. I would note at this stage that the report presented to the CPS had indicated that the evidence of Ward in isolation was unlikely to be sufficient to prosecute the case and the new evidence did not confirm whether or not Rees commissioned the murder. The other evidence (such as it was), without Ward and Eaton, had never been regarded as sufficient at any earlier date to justify a prosecution.

(G) The Appeals

42. I turn to the issues on the appeals. It is convenient to address these in the same order as the judge, dealing with malicious prosecution first, and then the misfeasance claim.

Malicious Prosecution

43. The judge identified the five elements of this tort in paragraph 136 of the judgment as follows. The claimant must show:

i) He was prosecuted by the defendant.

ii) The prosecution was determined in his favour.

iii) The prosecution was without reasonable and probable cause.

iv) It was malicious.

v) He suffered actionable damage.

44. As the judge noted in his permission to appeal decision, and as submitted by Mr Johnson QC for the MPC on the appeals, question i) was academic, if the judge was right in his conclusions on the other points. It is, however, the starting point for this part of the case and I propose to address all the five questions in order, not least because, in my judgment, an examination of question i) throws some light upon the other questions bearing upon this aspect of the appellants' claims.

Question 1: Were the appellants prosecuted by the defendant?

45. As already noted, the MPC accepts vicarious responsibility for any tortious liability of DCS Cook. She also accepts that, in principle, there may be more than one prosecutor in an individual case. As the judge noted in paragraph 144 of the judgment:

> "144. The case law establishes that an individual or group of individuals may be treated as the prosecutor where
>
> i) they alone know the facts about the alleged offence.
>
> ii) they deliberately misstate the facts to the person who makes the decision to lay the charge and so start the criminal process.
>
> iii) they intend that there should be a prosecution.
>
> iv) the person who decides that the charge should be laid and prosecution brought cannot be expected to and does not form an independent judgment on the question whether or not a charge

should be laid and if so which."

He also cited a passage from the judgment of Brooke LJ in *Mahon v Rahn* [2000] 1 WLR 2150, paragraph 269 as follows:

> "269. In a simple case it may be possible to determine the issue quite easily by asking these questions. (1) Did A desire and intend that B should be prosecuted? (2) If so, were the facts so peculiarly within A's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment? (3) Has A procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both?"

46. Brooke LJ's analysis drew upon the lead authority in this area, namely *Martin v Watson* [1996] AC 74, in which the only full speech in the House of Lords was that of Lord Keith of Kinkel, with whom all other of their Lordships agreed. The case involved a charge of indecent exposure, brought by the police at the instigation of the alleged victim. The prime statement of principle appears at pp. 86G-87A and was cited by the judge, as follows:

> "138. Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant."

47. Mr Simblet, for Garry V, who took the lead on this point for all the appellants, helpfully drew our attention to certain other passages in the speech of Lord Keith in which he quoted from authorities from other jurisdictions. Of these passages Lord Keith said (at p. 84H) that he was of the view that they should be accepted as valid in English law also.

48. The first of these authorities was a Privy Council decision on an appeal from India: *Pandit Gaya Parshad Terwari v Sardar Bhagat Singh* (1908) 24 TLR 884. In giving the advice of the Board to His Majesty, Sir Andrew Scoble said:

> "If, therefore, a complainant did not go beyond giving what he believed to be correct information to the police and the police, without further interference on his part (except giving such honest assistance as they might require), thought fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to the

> knowledge of the complainant, if he misled the police *by bringing suborned witnesses to support it*, if he influenced the police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him." (my emphasis)

49. Secondly, in *Commonwealth Life Assurance Society Ltd. v Brain* (1935) 53 CLR 343 in the High Court of Australia, Dixon J cited the *Pandit Gaya Parshad Tewari* case, and said:

> "The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. If the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in doing so are joint wrongdoers with him."

After reference, thirdly, to *Watters v Pacific Delivery Service Ltd.* (1963) 42 DLR (2^{nd}) 661 (in the Supreme Court of British Columbia) and *Commercial Union Assurance Co. of N.Z. Ltd. v Lamont* [1989] NZLR 187 in the Court of Appeal of New Zealand, Lord Keith cited finally the *American Law Institute, Restatement of the law of Torts* 2d (1977) s.653 as follows:

> "When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings. If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution, or that the information furnished by him upon which the official acted was known to be false."

50. The judge referred to certain passages in the judgments in this court in *AH(unt) v AB* [2009] EWCA Civ 1092, which were also relied upon by Mr Johnson QC before us. This was a case in which AB alleged that she had been raped by AH. After the lapse of some time she complained to the police, who persuaded her to give evidence. She did so and AH was convicted, but his conviction was quashed on appeal. Blake J held that she was not the prosecutor and that decision was upheld on appeal. First, it was not proved

that she had the desire and intention that AH should be prosecuted, but also (per Sedley LJ at paragraph 3):

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

At paragraph 47, Sedley LJ added:

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

51. Wall LJ and Moore-Bick LJ agreed. Wall LJ said, at paragraph 59,

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

Finally, Moore-Bick LJ said:

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

52. The concept of depriving the prosecuting authority of exercising a proper independent judgment in this context was referred to by Richardson J in the New Zealand case of *Commercial Union etc. v Lamont* (supra) and in *Ministry of Justice v Scott* [2009] EWCA Civ 1215. In the latter case, the Ministry's application to strike out a malicious prosecution claim, brought against them by virtue of the conduct of five prison officers in complaining of assault by the claimant, failed. The decision was upheld on appeal.

The claimant had been prosecuted and acquitted. Pill LJ, with whom Dyson LJ (as he then was agreed) said (at paragraph 40):

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

He continued, at paragraph 43, with this:

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

Longmore LJ added that he did not find it plain that the CPS were able to exercise independent judgment when advising the prosecution; the relevant prosecutor "…had little option but to accept the account given by the prison officers".

53. On this aspect of the present case, Mitting J held that the CPS, advised by Treasury Counsel, reached the decision to prosecute in the exercise of independent judgment on the basis of all the material of which they were aware (paragraph 146 of the judgment). Referring to the CPS prosecutor (a Mr Sampson), Mitting J said:

> "146. …His information was necessarily incomplete, because of the actions of Cook. Nevertheless, for Cook to be treated as the prosecutor, the law requires to be stated in a manner not established by existing authority. For the claimants to succeed on this issue, the law must be that an investigator who, by his deliberate conduct in relation to an important element of a case, prevents the independent decision-maker from reaching a fully informed decision, is to be treated for that reason alone as the prosecutor. There is a difference between making it "in practical terms virtually impossible for the CPS to exercise independent discretion" and making the exercise of that discretion more difficult, because of the deliberate concealment of an important fact. In my judgment, the latter lies on the wrong side of the line for determining whether or not someone other than the CPS is to be treated as the prosecutor for the purpose of the tort of malicious prosecution. Applying the principles derived from the authorities, Cook's conduct did not make it virtually impossible in practical terms for the CPS, advised by Treasury Counsel, to exercise their independent discretion. They were provided, 10 months before charges were laid, with a detailed and, with the qualifications expressed, reasonably accurate summary of the evidence gathered over 20 years about the murder and those believed to have been complicit in it. The raw material on which

> that summary was based was supplied to the CPS: they had discs of all of the debrief interviews with Ward and Eaton and Docherty. The only significant fact which they were not told was that Eaton's evidence had been improperly prompted by Cook. Further, not only were the CPS able to exercise an independent discretion, they did so. The advice proposed that all five claimants should be charged with conspiracy to murder and all five were arrested for murder on 21 April 2008. Only Rees, Glenn and Garry Vian and Jimmy Cook were charged with murder. Fillery was charged only with doing an act tending and intended to pervert the course of justice. The likelihood is that this decision was taken after arrest and before charge, but even if it had been made before arrest, it would still have been the independent decision of the CPS.
>
> 147. For those reasons, I have decided that Cook is not be treated as the prosecutor so that, for that reason, the claimants have failed to prove the first of the elements of the tort."

54. Mr Johnson supports this reasoning. He argues that the judge properly analysed the evidence on whether DCS Cook was a prosecutor for these purposes and submits that what he did was no more than the rape complainants, in the reported cases, who supplied false evidence to the police, but were not liable. He argues that this was not a case in which all the information was known to DCS Cook and he was not to be a witness. The police did not support a murder charge (as ultimately brought) but only conspiracy to murder. The case against the appellants was not, he reminds us, based entirely upon the evidence of Eaton. It was on the case as a whole that the CPS made their charging decision.

55. Mr Simblet submits that DCS Cook acted precisely in the manner envisaged by Lord Keith in *Martin v Watson* as entailing liability. He knew that the evidence supporting the prosecution was insufficient without Eaton's suborned testimony which he put before the CPS in apparently unblemished form. He did not truthfully present the final report to the CPS, leaving that authority to exercise an independent judgment on the basis of evidence that he considered true and reliable. Thus, an independent exercise of judgment by the CPS was impossible, because they had to work on the assumption that the evidence of the crucially important witness, Eaton, was not only capable of belief, but was thought to be properly presentable to the court.

56. For my part, I accept these submissions of Mr Simblet. It seems to me that the judge's conclusions at paragraph 146 fail to take fully into account the position of DCS Cook, as the most senior police officer in the case, presenting a case to the CPS for a prosecution decision. By virtue of the judge's other express findings, DCS Cook was intending to pervert the course of justice in suborning Eaton and then knowingly presented the fruits of that criminal offence to influence the charging decision. DCS Cook presented Eaton as an eyewitness to the murder scene.

57. In assessing whether the CPS and Treasury Counsel were able to exercise a truly independent judgment, it is necessary to stand back from the printed word and, postulating the reverse of the facts as they were, to ask what effect it would have had on

their judgment if they had been told that the SIO had deliberately presented to them a case in which the evidence of the only supposed eyewitness had been improperly procured by that officer by acts intended by him to pervert the course of justice. The case otherwise was supported only by evidence, not to mince words, of extremely "dodgy" witnesses and some circumstantial material. In my judgment, on this hypothesis, it is inconceivable that, in such circumstances, the CPS would have advised that murder charges be brought, without DCS Cook having been removed from the process entirely and a fresh review of the material having been prepared from which his malign influence had been removed.

58. It seems to me that the case falls squarely within what this court said in *AH(unt) v AB*. DCS Cook deliberately manipulated the CPS into taking a course which they would not otherwise have taken (Sedley LJ). The decision to prosecute was "overborne and perverted" (c.f. Wall LJ) by DCS Cook's presentation of the material to the CPS with the implicit suggestion that its procurement was not tainted in the manner that it was.

59. This is not to say, as Mr Johnson submitted it was, that the mere provision of false information to a prosecuting authority leading to a prosecution makes the provider a prosecutor. I accept that the test is, as he argued, "drawn more restrictively". However, the cases are fact specific: see in this respect the very different results reached in not entirely dissimilar cases in *Martin v Watson* and in *AH(unt) v AB*. This present case was one in which DCS Cook took it upon himself to present to the independent prosecutor for a prosecution decision a case which he knew included an important feature procured by his own criminality. There is nothing more likely to have "overborne or perverted" the decision to prosecute. The CPS were deprived of their ability to exercise independent judgment.

60. In my judgment, therefore, DCS Cook was undoubtedly a "prosecutor" in the sense decided by the authorities.

Question 2: Was the prosecution without reasonable and probable cause?

61. As the judge recorded in paragraph 156 of the judgment, in *Glinski v McIver* [1962] AC 726 at 758, Lord Denning said the prosecutor had to be,

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

Alternatively, in the words of Lord Devlin (at p. 768) in the same case,

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

And the facts upon which the question has to be answered,

> "…are those, and only those known to the defendant at the material time."

The test has objective and subjective elements.

62. Again, as the judge noted,

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

He added that by virtue of s. 10 of the Prosecution of Offences Act prosecutors are obliged to apply the relevant Code which at the time stated:

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

63. In setting himself the task of answering this question, the judge said this (at paragraph 158 of the judgment):

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

64. As already noted, the judge identified, at paragraph 121 of the judgment, the elements of evidence that implicated each of these appellants. From that most helpful summary, it is possible to extract the elements in each case that relied upon the evidence of Eaton. The judge concluded that there was sufficient admissible evidence (objectively), if one excluded the evidence of Eaton, to negate an allegation of objective want of reasonable and probable cause: see paragraph 164 (Glenn V); paragraph 167 (Garry V) and paragraph 172 (Rees).

65. The judge also found that, in each case, that there was no evidence that DCS Cook "did not believe that it [i.e. the residual evidence] provided reasonable and probable grounds for prosecution, so that the subjective element of the test was also satisfied".

66. In paragraphs 160 and following of his judgment, the judge sets out the bases upon which he found that there was, objectively speaking, sufficient evidence to sustain a prosecution of the appellants for murder. In my judgment, it is not possible to reject that analysis of the *admissible* evidence against each appellant, which (if it stood alone) could have supported a possible case against each of them, without reliance upon Eaton. That is not the same as saying that the prosecution *would* have been brought on the basis of that evidence if the CPS had known of the serious misconduct of DCS Cook. That is the "causation" question that arises at the end of the claims founded on both torts to which I will return in due course. In such circumstances, however, in my view, it is not possible to accept the appellants' challenge to the judge's finding of an *objective*

reasonable and probable cause for the prosecution that was brought.

67. In this respect, there is at least some further support for the MPC's position in that the prosecution continued even after the exclusion of Eaton's evidence, suggesting clearly that there was at least *admissible* evidence to sustain the prosecution even at that stage. The decision to continue a prosecution already in course does not, however, dictate the question of whether such prosecution would have been started based on the same slender material.

68. The question remains whether DCS Cook, assuming that he was a prosecutor, was without *subjective* "reasonable and probable cause" for instigating the prosecution, merely because of what the judge took to be his belief in the sufficiency of the other evidence (apart from that of Eaton). Apart from anything else, there was no evidence that he ever gave his mind to any such question at the time of the decision to prosecute. Clearly, he relied upon the case which he presented to the CPS as a whole, *including* Eaton, as his grounds for a prosecution and he never had to address the question of the sufficiency of the evidence *excluding* Eaton.

69. Does a prosecutor have *subjective* reasonable and probable cause for a prosecution if he presents a case heavily reliant upon evidence which, because of his own misconduct, he knows is "certain or at least highly likely" to be ruled inadmissible by any trial judge?

70. I am not aware of any case in which this question has arisen. Certainly, none was cited to us and the leading case on the subject of subjective "reasonable and probable cause that was cited to us – *Glinski v McIver* (supra) – does not deal with the matter directly.

71. In that case, the House of Lords was exercised by the issue of the correctness of a common question put to juries in this type of case. The question was, "Did [the respondent] honestly believe [on the relevant date], that the appellant was guilty of the offence [charged]?"

72. The ratio is, I think, encompassed sufficiently in the headnote to the report of *Glinski v McIver* in these terms:

> "Held, (1) that it is for the judge to determine whether there was want of reasonable and probable cause, and for the jury to determine any disputed facts relevant to that determination on which he needed their help (post, pp. 742, 768, 779).
>
> (2) That the question of want of honest belief is relevant to that of want of reasonable and probable cause (post, pp. 742, 753, 768).
>
> (3) But that that question should be put to the jury only if there is affirmative evidence of want of honest belief (post, pp. 744, 752, 768).
>
> (4) That in the present case there was no such evidence, nor other evidence of want of reasonable or probable cause for the prosecution: and that the appeal should accordingly be

dismissed."

Our present question was not, therefore, directly in issue. Mitting J focussed for assistance upon the speeches of Lord Denning and Lord Devlin from which he quoted, as noted above.

73. The full paragraph of Lord Denning's speech, from which Mitting J quoted is, I think, helpful. Lord Denning said that there were reasons why a judge should be careful before asking of a jury the question posed in that case: "Did the defendant honestly believe that the accused was guilty?" His Lordship continued:

> "In the first place, the word "guilty" is apt to be misleading. It suggests that, in order to have reasonable and probable cause, a man who brings a prosecution, be he a police officer or a private individual, must, at his peril, believe in the *guilt* of the accused. That he must be sure of it, as a jury must, before they convict. Whereas in truth he has only to be satisfied that there is a proper case to lay before the court, or in the words of Lord Mansfield, that there is a probable cause "to bring the [accused] "to a fair and impartial trial": see *Johnstone v. Sutton*. After all, he cannot judge whether the witnesses are telling the truth. He cannot know what defences the accused may set up. Guilt or innocence is for the tribunal and not for him. Test it this way: Suppose he seeks legal advice before laying the charge. His counsel can only advise him whether the evidence is sufficient to justify a prosecution. He cannot pronounce upon guilt or innocence. Nevertheless, the advice of counsel, if honestly sought and honestly acted upon, affords a good protection: see *Ravenga v. Mackintosh* by Bayley J. So also with a police officer. He is concerned to bring to trial every man who should be put on trial, but he is not concerned to convict him. He is no more concerned to convict a man than is counsel for the prosecution. He can leave that to the jury. It is for them to believe in his guilt, not for the police officer. Were it otherwise, it would mean that every acquittal would be a rebuff to the officer. It would be a black mark against him, and a hindrance to promotion. So much so that he might be tempted to "improve" the evidence so as to secure a conviction. No, the truth is that a police officer is only concerned to see that there is a case *proper* to be laid before the court." (my emphasis)

I would emphasise Lord Denning's reference (twice) in this passage to the need for the prosecuting police officer to be satisfied that there is a "proper" case to lay before the court.

74. Lord Devlin, at pp. 766-767, said:

> "This makes it necessary to consider just what is meant by reasonable and probable cause. It means that there must be cause (that is, sufficient grounds; I shall hereafter in my speech not always repeat the adjectives "reasonable" and "probable") for

> thinking that the plaintiff was probably guilty of the crime imputed: *Hicks v. Faulker*. This does not mean that the prosecutor has to believe in the probability of conviction: *Dawson v. Vandasseau*. The prosecutor has not got to test the full strength of the defence; he is concerned only with the question of whether there is a case fit to be tried. As Dixon J. (as he then was) put it, the prosecutor must believe that "the probability" of the accused's guilt is such that upon general grounds of "justice a charge against him is warranted": *Commonwealth Life Assurance Society Ltd. V. Brain*. Perhaps the best language in which to leave the question to the jury is that adopted by Cave J. in Abrath v. North Eastern Railway Co.: "Did [the "defendants"] honestly believe the case which they laid before the "magistrates?"

I note the requirement that the prosecutor *is* concerned with whether "there is a case *fit to be tried*" (my emphasis).

75. In my judgment, it is entirely clear that the case presented by DCS Cook to the CPS was not a "proper" one, nor was it "fit to be tried". It included (and relied strongly upon) evidence, on the judge's finding, procured by DCS Cook's own acts which were intended by him to pervert the course of justice. There is no evidence that he gave any thought to the question whether there was a fit or proper case to be laid before the court *absent* that tainted evidence. In such circumstances, I cannot see that DCS Cook could be found to have honestly believed that there was a "proper" case to lay before a court. Indeed, as the appellants forcefully pointed out to us, Mr Johnson QC presented no specific argument to us on this aspect of the case, other than (inferentially) by support for the judge's finding that DCS Cook believed that the case (without Eaton) provided "reasonable and probable cause" – as to which, as I say, there was no evidence whatsoever.

76. For these reasons, while I cannot disagree with the judge that there may have been objectively sufficient evidence (absent Eaton) to provide reasonable and probable cause to prosecute, I find it impossible to say that, as a prosecutor, DCS Cook believed that he had reasonable and probable cause to lay murder charges against these appellants.

Question 4: Was the prosecution malicious?

77. Mitting J began his judgment by citing the short statement about "malice" by Lord Devlin in *Glinski v McIver* at p. 766:

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

78. This statement receives some amplification from the commentary on this aspect of the tort in Clerk & Lindsell on Torts 22nd Edn. (2018) at 16-55, p. 1199 as follows:

> "**Improper motives** The Privy Council in *Williamson v Attorney General of Trinidad and Tobago* made it clear that "[a]n improper and wrongful motive lies at the heart of the tort" and "must be the

driving force behind the prosecution". "Malice in this context has the special meaning common to other torts and covers not only spite or ill-will but also improper motive." The proper motive for a prosecution is, of course, a desire to secure the ends of justice. If a claimant satisfies a jury, either negatively that this was not the true or predominant motive of the defendant or affirmatively that something else was, he proves his case on the point. Mere absence of proper motive is generally evidenced by the absence of reasonable and probable cause. The jury, however, are not bound to infer malice from unreasonableness; and in considering what is unreasonable they are not bound to take the ruling of the judge.

> "Absence of reasonable cause, to be evidence of malice, must be absence of such cause in the opinion of the jury themselves, and I do not think they could be properly told to consider the opinion of the judge on this point if it differed from their own —as it possibly might and in some cases probably would—as evidence for their consideration in determining whether there was malice or not."

79. The essentials of the tort of malicious prosecution, including the element of honest belief in guilt were also stated by Diplock LJ (as he then was) in *Dallison v Caffery* [1965] 1 QB 348 at 371 in these terms:

> "To prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably lies on the person prosecuted. A person, whether or not he is a police officer, acts reasonably in prosecuting a suspected felon if the credible evidence of which he knows raises a case fit to go to a jury that the suspect is guilty of the felony charged. This is what in law constitutes reasonable and probable cause for the prosecution.
>
> One word about the requirement that the arrestor or prosecutor should act honestly as well as reasonably. In the context it means no more than that he himself at the time believed that there was reasonable and probable cause, in the sense that I have defined it above for the arrest or for the prosecution, as the case may be. The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where that test is satisfied, the onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what ex hypothesi he would have believed had he been reasonable (*Herniman v. Smith, per* Lord Atkin). In the nature of things this issue can seldom seriously arise."

80. Before the judge, counsel for the appellants invited a finding of malice from the absence

of evidence from DCS Cook as to his motive. The judge declined to make such a finding. His reasons appear, in essence, from paragraphs 176 and 179 of the judgment, as follows:

> "176. …There is clear contemporaneous evidence of his state of mind immediately before the start of Operation Abelard II, contained in two documents: the Chipperton note of the discussion with Ward on 2 February 2005 and the Yates report of 31 January 2006, drafted by Cook. He clearly believed that he knew who had commissioned and committed the murder. All that could not then be done was to prove it. I am satisfied that he shared the view expressed by Treasury Counsel, noted in paragraph 275 of the Yates report, already cited. I am satisfied that he believed that, in the evidence of Ward and Eaton and, later, of Docherty, he and his team had found the evidence by which his beliefs could be proved to the satisfaction of a jury. The fact that he overstepped the mark – even to the point of committing the criminal offence of doing an act tending and intended to pervert the course of justice – does not alter his state of mind which was, I am satisfied, to bring those he believed to be complicit in the murder to justice.
>
> …
>
> 179. I am satisfied that, even if Cook's methods are open to criticism, his motive was not: it was to bring those he believed to have been complicit in the Morgan murder and in covering it up to justice. Accordingly, none of the claimants, even Fillery, has established the fourth element of the tort."

81. Can it be the law, as assumed by the judge, that because a prosecutor believes a person is guilty of an offence, he prosecutes that person without malice (in the sense of dishonesty), even if the case which he presents to prove guilt is heavily reliant on the evidence of a witness which he has procured by subornation amounting to a criminal intention to pervert justice? In my judgment, that is not the law. Before probing the matter more, I would hold that bringing a prosecution in that manner is not "bringing a criminal to justice" at all.

82. That this is the position appears from the passage in the judgment of Diplock LJ which I have just quoted. The requirement of honesty on the part of a prosecutor (i.e. lack of malice) is "no more than that he himself believed that there was reasonable and probable cause, in the sense that I have described it above … for the prosecution". That is, did he believe that the "credible evidence of which he knows raises a case *fit to go to a jury* that the suspect is guilty of the offence charged" (my emphasis added)?

83. On this basis, DCS Cook could not have believed that the case that he presented was "fit to go to a jury". The suborned evidence of Eaton, which DCS Cook knew was tainted and not fit to be presented to a jury negated the possibility of a "fit" case, on the basis of the material upon which he invited the CPS's prosecution decision.

84. As Diplock LJ said, "In the nature of things this issue can seldom arise". Here it does arise and, in my judgment, it should be answered in the sense that I have just given. DCS Cook was "malicious" in what he did.

85. This view is, I think, supported by what Lord Toulson said about the element of "malice" in *Willers v Joyce* [2016] UKSC 43 at paragraph 55 as follows:

> "Malice is an additional requirement. In the early cases, such as *Savile v Roberts*, the courts used the expression "falso et malitiose". In the 19th century "malitiose" was replaced by the word "malicious", which came to be used frequently both in statutes and in common law cases. In *Bromage v Prosser* (1825) 4 B & C 247, 255, Bayley J said that "Malice, in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse." His statement was cited with approval by Lord Davey in *Allen v Flood* [1898] AC 1, 171. (For a recent discussion of the nineteenth century understanding of the meaning of "malicious" in the law of tort, see *O (A Child) v Rhodes* [2016] AC 219, paras 37-41.) As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the clamant can prove that the defendant brought the proceedings in the knowledge that they were without foundation (as in Hobart CJ's formulation). But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process. In the *Crawford* case Mr Delessio knew that there was no proper basis for making allegations of fraud against Mr Paterson, but he did so in order to destroy Mr Paterson's business and reputation.

86. It seems to me that DCS Cook was seeking deliberately to misuse the processes of the court and that the case that he presented to the CPS was not bona fide.

87. In making this judgment, I do not rely upon the failure of DCS Cook to give evidence as justifying the inference that his part in the prosecution case was malicious. It is not necessary to do so. The judge has found that his role was tainted by criminality of a serious kind. If, as I think he was, he was a prosecutor in this case, then it seems to me that the judge's finding renders him malicious.

88. Mr Simblet relied upon the case of *Gibbs v Rea* [1998] AC 786, a case in which the majority of the Privy Council found that malice could be inferred from the absence of evidence from the police officer who had sought the search warrant in issue. I refer to that case only for a citation in the majority opinion of the Board (given by Gault J) from the judgment of Lord Tenterden CJ in *Taylor v Williams* (1831) 2 B & Ad 845, 857 in

which the Chief Justice had said,

> "Why might not the forbearance of Taylor to give evidence at the trial…raise an inference that his motive was a *consciousness, that he had no probable cause for instituting the prosecution*." (emphasis added)

The italicised words serve to indicate that a prosecutor is guilty of malice if he is conscious that the case that he presents is not fit to go before the court.

89. Mr Simblet rounded off this submission and the reference to *Gibbs v Rea* thus:

> "…the dishonest pursuit of a case even in a "noble cause" is always malicious prosecution. It is an improper motive to act knowingly unlawfully. Pursuit of the ends of justice must mean pursuit by honest and lawful means, not just the conviction of the guilty at any cost. It is approaching perverse not to infer malice from the absence of reasonable and probable cause, particularly where Cook has failed to give any evidence as to why he had done what he did."

90. It is difficult to express the matter better, even if (as I think is the case) it is not necessary to rely upon any inference of malice from the absence of evidence from DCS Cook at trial. Moreover, I would certainly not characterise Mitting J's conclusion in his judgment as "approaching perverse". However, in the manner in which dishonesty in prosecution is analysed by Diplock LJ in *Dallison v Caffery*, DCS Cook's criminal conduct demonstrated the necessary malice.

91. For these reasons, I consider that DCS Cook's belief (as found by the judge) that the appellants were guilty of the murder cannot prevent the prosecution having been malicious. He knowingly put before the decision-maker a case which he knew was significantly tainted by his own wrongdoing and which he knew could not be properly presented in that form to a court. To find that the element of malice was not satisfied in this case, to my mind, would be, quite simply, a negation of the rule of law.

Question 5: Have the appellants suffered actionable damage?

92. The judge did not answer this question directly in the section of his judgment dealing with malicious prosecution. However, in the later part of his judgment dealing with misfeasance in public office he did examine whether the misfeasance by DCS Cook, which he found in all other elements proved, had caused loss to the appellants: see the judgment paragraphs 191 and following. That is the same question as arises with regard to malicious prosecution and can be addressed in a composite fashion. However, it is probably better to do so formally under the head of misfeasance in public office, which is where the judge dealt with it. I will turn to that now.

Misfeasance in Public Office

93. The appeals on the issue of misfeasance in a public office can actually be dealt with much more shortly. This is because the judge found in the appellants' favour on every issue, except on the question of whether any loss had been caused to them. The judge found that DCS Cook had committed this tort by what he did in relation to the subornation of Eaton. As I have already recorded, at paragraph 186 of the judgment, the judge found expressly that what DCS Cook did amounted to the crime of doing an act tending and intended to pervert the course of justice. He found that he was acting in the exercise of his public functions as an investigating police officer (Judgment paragraph 183). It was found that DCS Cook had contaminated the source of justice; that he knew what he was doing and he had done it deliberately. Thus, it was held that DCS Cook had done the unlawful act, as a public officer, and did not have an honest belief that it was lawful. See the judgment paragraphs 185 and 189. The judge also found that there was no difficulty in finding that DCS Cook realised that his conduct would probably injure the claimants: paragraph 190 of the judgment.

94. However, as already indicated, the judge found that no loss was caused to any of the appellants (paragraphs 191 et seq.).

95. The judge found that the question of loss must be determined by what would have happened if Eaton's evidence had never been thought to be available (paragraph 191). He noted that he had had no evidence on this point from any CPS prosecutor or from counsel who conducted the prosecution. He noted the submission to him on behalf of the appellants that he should draw an inference adverse to the MPC from the absence of such evidence. He declined to do so. His reasoning can be taken from the short passages in paragraphs 191 and 192 as follows:

> "191. …A deliberate decision was made to continue the prosecution after Maddison J ruled that on 15 February 2010 that the evidence of Eaton was inadmissible. Even after the loss of the evidence of Ward, Mr Hilliard stated on 24 January 2011 that it was still the intention of the Crown to proceed with the case against Rees and Glenn and Garry Vian on the evidence which remained. (21/18475). These are relevant, but not conclusive statements of intent because it may be more difficult to cease to prosecute a case than to decline to prosecute in the first place.
>
> 192. Nevertheless, I am satisfied on the balance of probabilities that prosecuting counsel and the CPS would have decided to prosecute Rees and Glenn and Garry Vian on the basis of the evidence available when they were charged other than that of Eaton. I have explained why there was reasonable and probable cause to prosecute the three of them on that evidence. The evidential test in paragraph 5.2 of the 5th edition of the CPS Code would have been easily satisfied in the case of Glenn and Garry Vian and satisfied, by a smaller margin, in the case of Rees. I am also satisfied that the CPS and Treasury Counsel would have concluded that it was in the public interest to prosecute, despite the age of the offence, given its seriousness, its impact upon Morgan's family and the length and complexity of the investigation, all factors which under paragraphs 5.7 and 5.10(e) and 5.12 of the 5th edition of the CPS Code would have tended to

support the bringing of a prosecution."

96. I believe that, from what I have said already, it can be seen that I respectfully disagree with these reasons. For my part, I am prepared to accept that there was admissible evidence, over and above that of Eaton, which might just have passed the test of being a case to answer by the appellants. However, in the absence of evidence from the sources mentioned, we are in as good a position as the judge to determine whether (on the balance of probabilities) a prosecution would have been brought on the date it was (23 April 2008), if it was known a) that Eaton's evidence would not have been admissible at trial and b) that the reason why it would not have been admissible was that the SIO in the case had obtained that evidence by committing the crime of doing an act tending to and intending to pervert the course of justice.

97. As I have said elsewhere already, I find that it is inconceivable that any properly informed prosecutor, or counsel advising him or her, would have countenanced the preferring of charges on the relevant date based, as these were, on the report of an SIO who had procured a significant plank of the proposed Crown case by committing the crime which the judge held that DCS Cook had committed. Such a prosecutor would, I am convinced, have wanted DCS Cook, and any influence deriving from him, to be cleared from the scene and a fresh untainted assessment made of the remaining evidence before considering again whether a prosecution should be brought. Given the circumstances, the prosecutor would have wanted to be assured that the taint of DCS Cook's conduct had not otherwise affected the investigation. The case would have had to be assessed from an unaffected point of view.

98. Further, the prosecutor would have noted that much of the remaining evidence had previously been rejected as giving sufficient ground for a prosecution and that some of the other evidence later obtained had come from witnesses of highly doubtful credibility. In reaching a decision, in my judgment, the technical admissibility of the other evidence would only have been a part of the judgment call for the CPS. There would have been other issues, as I have sought to explain. As Mr Simblet submitted, the learned judge focused solely on the technical admissibility of the remaining evidence at the date of the prosecution decision (without Eaton) but without taking into account what Mr Simblet (I think accurately) described as the "stench" that would have been given off by the apparent results of the investigation by DCS Cook's actions while at the very top of the investigation team.

99. I do not ignore the fact that the prosecution was not abandoned immediately after Maddison J had ruled against the admissibility of Eaton's evidence. However, continuing with a long running prosecution is one thing and deciding to initiate one is another. Maddison J's reasoned judgment on Eaton's evidence was not delivered until a year after his decision to exclude it was communicated to the parties. His ruling was given on 15 February 2010 but his judgment was only handed down on 25 March 2011, shortly after the Crown had discontinued the prosecution. In February 2010, it may have been thought that there was just enough, as I put it to counsel in argument, "to keep the damaged aircraft in the air sufficiently long enough to clear a hedge", but that did not mean that the aircraft would have taken off at all if the pilot had realised that it was so seriously damaged already when it was still sitting on the airfield before take-off.

100. I think (with respect) that the judge was wrong in finding, on the evidence before him, that the prosecution would have been started in April 2008 if the CPS and counsel had known the true facts about what DCS Cook had done. There was, in truth, no evidence on that point at all.

101. In reaching my conclusion, I have not found it necessary to deal with the alternative argument on causation, based upon *Bailey v Ministry of Defence* [2009] 1 WLR 1052, which is addressed by the judge in paragraph 193 of the judgment. This same argument, significantly amplified, was the subject of further argument both in writing and orally at the hearing before us. Counsel for the MPC objected to the point being raised, and so amplified, at such a late point in the appeal proceedings, having not been advanced (at least not directly) in the initial grounds of appeal. I decline, therefore, to extend this judgment by deciding whether the appellants should be permitted to raise the argument at all in this court. It is not necessary to do so.

102. For these reasons, I consider that the appellants did establish, on the primary facts found by the judge, that they had been caused loss for the purposes of both the tort of malicious prosecution and the tort of misfeasance in public office.

(H) Conclusion

103. I am conscious that in this judgment I have not dealt with ground 5 of the Grounds of Appeal presented on behalf of Rees and Glenn V. This was a ground alleging procedural unfairness and an appearance of bias in the judge's approach to the evidence of Docherty as it affected Rees. Given my conclusions above, I have not found it necessary to deal with this ground. I would only say that I did not find the arguments in support of it at all compelling. Nothing that I saw gave me any reason to think that the judge conducted this difficult trial and delivered his judgment other than with fairness and conspicuous care.

104. I would allow the appeals.

Lady Justice King:

105. I agree that for the reasons found in the judgments of both McCombe LJ and Coulson LJ (both of which I have seen in draft), this appeal must be allowed.

106. I would endorse, without reservation, the conclusion of McCombe LJ that DCS Cook was a prosecutor who acted maliciously. McCombe LJ observes that any other finding would be a "negation of the rule of law" [91], and Coulson LJ that it would be "contrary to basic principle". I agree that that is undoubtedly the case and, in my view, any other conclusion would, in the eyes of the general public, defy common sense.

107. This is a case where no one has been tried or convicted of a particularly brutal murder. It is of importance that where serious and damaging findings of malicious prosecution and of misfeasance in public office are sought against the MPC in such a case, that the public can understand and appreciate the logic of the outcome. With respect to this very experienced judge, the outcome which he reached namely, that although acting corruptly

DCS Cook was not also acting maliciously, may well appear to be counterintuitive to any ordinary member of the public.

108. To say that DCS Cook, a prosecutor guilty of perverting the course of justice by creating false evidence against the appellants, was, on account of his belief in their guilt, not acting maliciously, is rather like saying that Robin Hood was not guilty of theft. One understands the motivation in each case, but any seeming endorsement of such dishonest behaviour, particularly within the police force, leads as McCombe LJ puts it, to a (serious and unacceptable) "negation of the rule of law".

Lord Justice Coulson:

109. I agree that, for the reasons set out in detail by McCombe LJ, this appeal should be allowed. I wanted to add some words of my own because I am conscious of both the expertise of the judge at first instance and the careful judgment which he produced, from which we are now departing. However, I am satisfied that this court is not reconsidering the fact-finding exercise already carried out by Mitting J: rather, it is correcting his errors of principle and then, with the right approach in mind, addressing the facts which he set out in his judgment.

110. I consider that, in accordance with the authorities, DCS Cook was a prosecutor: paragraphs 55-58 of McCombe LJ's analysis admit of no other conclusion. Equally, I am in no doubt that DCS Cook acted maliciously: as McCombe LJ notes at paragraph 91, any other finding, on the facts of this case, would be a negation of the rule of law. It would be contrary to basic principle to find, as the judge did, that a senior policeman can pervert the course of justice to create false evidence against the appellants, but not be guilty of malice simply because he personally believed them to be guilty of Daniel Morgan's murder. That would amount to an endorsement of DCS Cook's criminal conduct and his view that the ends justified the means, which I emphatically reject.

111. Furthermore, the finding of malice seems to me to make it impossible for this court to reach any conclusion (on the facts as found by the judge) other than that the prosecutor – in this case DCS Cook – did not have the necessary *subjective* belief that there was RPC. The appellants made detailed submissions to the effect that, not only could the respondent not show subjective RPC, but that this was not an element of the case that the respondent had ever properly grappled with. They said that, in consequence, they won on causation. Mr Johnson QC did not address that in his submissions. In my view, for the reasons summarised by McCombe LJ at paragraph 75, this means that, regardless of the position in respect of *objective* RPC, the appeal must succeed.

112. There is however a fourth difficulty for the respondent which, in my view, is also fatal to the respondent's case. That concerns the inter-relationship between DCS Cook's wrongful acts and the evidence of Eaton. The criticality of Eaton's evidence can be summarised as follows:

i) Before Operation Abelard II, there was no reasonable and probable cause to prosecute the appellants. That was why they had not been prosecuted. As a result

of Abelard II, it was decided that there was sufficient evidence to prosecute them.

ii) The report prepared by Beswick about Operation Abelard II said that there was "new and compelling" evidence to justify prosecution (Judgment, paragraph 114). That evidence was from Ward and Eaton. However, the report expressly said that Ward's evidence "in isolation was unlikely to be sufficient to prosecute this case" (Judgment, paragraph 115).

iii) Accordingly, on the analysis in Mitting J's judgment, the critical element in the decision to prosecute the appellants after so long was the new evidence of Eaton.

iv) However, as DCS Cook knew, Eaton's evidence was entirely contaminated by his unlawful actions. That was subsequently confirmed when Eaton's evidence was ruled by Maddison J to be inadmissible.

v) On one view, therefore, the absence of Eaton's evidence removed the critical element in the decision to prosecute in 2008, which in turn meant that there was no RPC.

113. But in my view, the analysis cannot stop there. Although Mitting J rightly said that, for the purposes of RPC and causation, he had to assume that Eaton's evidence had never been available (see paragraphs 158 and 191 of the Judgment), that was only half the exercise he was obliged to do. In my view, he had to go on and ask himself whether the criminal proceedings would have been commenced against the appellants in circumstances where, not only was Eaton's evidence unavailable, but where it was also known that his "new and compelling" evidence had only been obtained through the criminal conduct of the Senior Investigating Officer. In other words, it was insufficient for the judge merely to subtract Eaton's evidence from the equation; he also had to consider the contaminating effect of DCS Cook's criminal conduct, across the case as a whole, when deciding whether or not the appellants would have been prosecuted.

114. That was not a question that the judge asked himself. If he had done so, given our views on malice and subjective belief, and given all the circumstances of this case, I consider that he would inevitably have concluded that there was no RPC, and that therefore both the malicious prosecution case and the misfeasance case (which only failed before Mitting J on causation) would have succeeded.

115. There is one final point that I would wish to make. The key question with which both Mitting J and this court have wrestled was whether or not, absent Eaton and the actions of DCS Cook, there was the necessary RPC. Considerable court and judicial resources have been expended on endeavouring to answer this question: the original trial took 3 weeks, and the appeal a full one and a half days, involving 6 counsel, including 2 QCs. And yet it is likely that the answer to that very question was contained in the contemporaneous documents relating to the original decision to charge, for which the CPS did not waive privilege.

116. I accept that the CPS are entitled not to waive privilege for such documents and we have

been scrupulous to avoid drawing any adverse inference at all from their absence, even though this has allowed the appellants to submit that the CPS and/or police have a policy of disclosing the charge documents when it helps them, and not when it does not. That submission was based on the fact that, in the similar case of *Mouncher v Chief Constable of South Wales* [2016] EWHC 1367 (QB), privilege in this same class of documents was waived.

117. It seems to me that, in circumstances where the funding for both the Court Service and the CPS comes out of the same MoJ budget, and at a time when budgetary constraints within the MoJ are all-pervasive, it is an obvious waste of valuable resources for courts to spend time trying to answer complex hypothetical questions without sight of the documents that are likely to contain the answers. This issue needs to be considered at the highest level of the CPS: I am not satisfied that its consequences have been fully grasped by those responsible for defending this (and other similar) claims.