Neutral Citation Number: [2018] EWHC 3287 (QB)

Case No: A90CF105

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2018

Before :

MRS JUSTICE LAMBERT

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Between:

PHILLIP RUDALL	**Claimant**
- and -	
(1) THE CROWN PROSECUTION SERVICE	
(2) THE CHIEF CONSTABLE OF SOUTH WALES POLICE	**Defendants**

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Mark Spackman (instructed by and for the **Claimant**)
Jonathan Kinnear QC and Claire Palmer (instructed by **Government Legal Department**) for the **Crown Prosecution Service**
Jason Beer QC and Georgina Wolfe (instructed by **Weightmans, Solicitors**) for the **Chief Constable of South Wales Police**

Hearing dates: 11, 12, 13, 16, 17, 18, 19, 20, 23 July and 10 October 2018

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JUDGMENT

Mrs Justice Lambert:

Introduction:

1. This is an action for damages for malicious prosecution, misfeasance in public office and breach of s.6 Human Rights Act 1998. It is brought by Mr Phillip Rudall, a solicitor from Swansea who, between January 2002 and July 2013, was the subject of investigation by the South Wales Police Fraud Squad ("SWP") and two prosecutions by the Crown Prosecution Service ("CPS"):

    a. in 2004, Mr Rudall and his partner, Ms Richards were charged with conspiracy to defraud and perverting the course of justice. In May 2005, after a trial at Swansea Crown Court, both were acquitted by the jury of all charges;

    b. in 2010, Mr Rudall and Ms Richards were charged with a number of offences of laundering the proceeds of a fraudulent "Ponzi" scheme, Lifeclub. In May 2013, the charges were dismissed by HHJ Parry QC at Cardiff Crown Court following his preliminary ruling that the "*sole and decisive*" evidence in the case (exhibit TE/91) was not admissible. In July 2013, the Crown Prosecution Service notified Mr Rudall that it would not be seeking a voluntary bill of indictment against him.

Scope of the Trial:

2. Mr Rudall commenced these proceedings on 25th April 2014, bringing actions against the SWP and the CPS in respect of both failed prosecutions. In November 2016, Phillips J ruled upon the Defendants' application to strike out the claims arising from the first prosecution on limitation grounds and/or for summary judgment in respect of both prosecutions on grounds that the causes of action were either legally or factually defective in some way: see [2016] EWHC 2884 (QB). The application succeeded in part:

    a. all claims arising from the first prosecution were struck out on limitation grounds and the claims for misfeasance in public office and under the Human Rights Act were restricted to alleged wrongful conduct within the 6 years preceding the claim.

    b. Phillips J ruled that, in respect of the first prosecution, the Claimant had no real prospect of establishing that there was no reasonable and probable cause.

    c. Phillips J refused to enter summary judgment in favour of the Defendants in respect of the second prosecution noting that, although there were powerful points deployed by the Defendants which would present the Claimant with significant obstacles at trial, he was not satisfied that the claim based on the 2010 prosecution had no real prospect of success.

    The action, as it advanced towards trial before me therefore was against two defendants but in respect of the second prosecution only.

3. Following opening submissions at trial, the Claimant discontinued his action against the SWP, leaving a single defendant, the CPS.

4. The issues were then further narrowed by the Claimant's concession that, although there remained three pleaded causes of action against the CPS, the claims for misfeasance in

public office and under s.6 Human Rights Act added little and, in any event, were parasitical upon the success of the claim for malicious prosecution. The claim for malicious prosecution was therefore the main subject at trial. I set out the largely uncontroversial legal framework later in this judgment and note at this stage only that the two elements of the tort of malicious prosecution which were in issue before me were (a) whether reasonable and probable cause for bringing the charge was absent and (b) whether the prosecution was motivated by malice. After discontinuing his claims against SWP, the Claimant formally conceded that Mr Lawrence Sherrington, the CPS reviewing lawyer, was the prosecutor for the purposes of the action in malicious prosecution. It followed from this concession that, to succeed, the Claimant must prove that Mr Sherrington had no reasonable and probable cause for bringing the charge and that in bringing the charge Mr Sherrington was motivated by malice. It was the Claimant's case that Mr Sherrington was part of a "prosecution team" which included Counsel (leading and junior) and the police officers, all of whom were motivated by spite and ill-will. Notwithstanding this aspect of his case, the Claimant has always accepted that, following the discontinuance against SWP, it is against Mr Sherrington that he must establish his case. Mr Sherrington is therefore the focus of this case and this judgment.

5. I need mention three further points relevant to the scope of the trial before me:

    a. first, on the issue of malice, although Phillips J had ruled that the first prosecution could not found a cause of action, it was common ground between the parties that the events underlying, and the fact of, the prosecution in 2004 were potentially relevant to the issue of malice: if the first prosecution was motivated by malice then it was inherently more likely that Mr Sherrington was acting maliciously towards him when he made the charging decision in 2010. The documents in the trial bundles and the witness evidence therefore covered events going right back to the start of the police investigation into Mr Rudall in 2002 including the application for a warrant to search Mr Rudall's premises in 2002 and the decision to charge him in 2004 with conspiracy to defraud and perverting the course of justice.

    b. Given the consensus that the listing for the trial was too short, I ruled at the pre-trial review that the trial before me would deal with liability only.

    c. The trial was before me alone, the question of a jury having been dealt with at a case management hearing in July 2017.

6. At the trial before me, Mr Rudall was represented by Mr Mark Spackman and the CPS by Mr Jonathan Kinnear QC and Ms Claire Palmer. The SWP were represented by Mr Jason Beer QC and Ms Georgina Wolfe, although for the reasons which I have already given, their involvement was limited to opening submissions. I am grateful to all Counsel for their skilful presentation of their respective cases. I am particularly grateful however to Mr Spackman who mastered at short notice the large volume of material in the case, having only been instructed late in the day (for the pre-trial review on 13 June 2018), Mr Rudall having acted as a self- represented litigant up to that point.

The Witnesses

7. I heard evidence from the following witnesses:

a. Mr Rudall: Mr Rudall is now aged 66. He qualified as a solicitor in 1978. After working for the Swansea firm, Smith Llewellyn, he set up his own practice at Caer Street in Swansea undertaking a broad range of private client work. He voluntarily ceased practice in 2004 and has not returned to practice since then. The Schedule of Loss records that over the years since 2004 he has found work in various roles: for example, as a self-employed consultant and more recently as a credit risk manager at Just Cash Flow Plc in London. For much of the period covered by these proceedings, his partner has been Natalie Richards. Mr Rudall is a man of good character: he has no criminal convictions nor has he ever faced proceedings of a regulatory or disciplinary nature.

b. Mr Lawrence Sherrington: a solicitor who qualified in 1976. He started his career in private practice in London and Bolton before joining the Lancashire County Council Prosecuting Solicitor's Department in 1980. ln May 1986 he joined what was then the Director of Public Prosecution's office in North Yorkshire, later becoming part of the CPS in November 1986. In around 1990, he was transferred to the Special Casework team and so took on an advisory role in connection with larger cases. He remained in this job until he joined the CPS Fraud Branch, based in York, from where he was working during the course of the investigation and prosecution of Mr Rudall. Mr Sherrington was the CPS prosecutor for both prosecutions (and for other related prosecutions). He retired in April 2013, but his involvement with the prosecution of Mr Rudall ceased in August 2012 due in part to ill health and for the other reasons which I set out below.

c. Mr Gregg Taylor QC: Counsel practising from 9 Park Place Chambers in Cardiff. Mr Taylor QC was called to the Bar in 1974 and took Silk in 2001. He retired in June 2015. He practised exclusively in criminal work. He was instructed as Lead Counsel for the Crown in both prosecutions. Like Mr Sherrington, he withdrew from the second prosecution in the early autumn of 2012.

d. Mr David Essex Williams: Counsel also practising from 9 Park Place Chambers in Cardiff. He was called in 1975. A significant proportion of his mixed practice was criminal work. He retired from the Bar in 2009 due to ill-health. He was instructed as junior counsel for the Crown and, although not present at either of the trials, he advised in connection with a number of procedural and substantive matters relating to both prosecutions.

e. Mr Ian Lee: a solicitor and, at the relevant time, Specialist Prosecutor for the CPS. He worked from the Organised Crime Division (North) from 2011 based in Manchester and Warrington. He took over as reviewing lawyer from Mr Sherrington in August 2012.

f. Mr Brendan Kelly QC: Mr Kelly QC was called in 1988 and took Silk in 2008. He practises from 2 Hare Court in London specialising in fraud, serious crime and regulatory law. He was instructed by Mr Lee as Lead Counsel for the Crown following Mr Taylor QC's withdrawal from the prosecution in November 2012. He advised on a number of aspects of the case from November 2012 and appeared on behalf of the Crown at the dismissal hearing in April 2013.

g. Mr Kelly QC's junior was Ms Kate Bex (now QC). Although, by agreement, she did not give evidence at the trial before me, her statement was included in the trial bundle for my consideration as part of the evidence.

8. Other figures featuring in the narrative giving rise to the claim, but who did not give evidence are:

   a. Financial Inspector Thomas (Tommy) Eynon: Port Talbot National Crime Squad (subsequently Serious Organised Crime Agency "SOCA").

   b. Detective Sergeant Critchley: SWP. Fraud Squad. Retired from the force in September 2006.

   c. DC Richard "Dick" Jones: SWP officer. Fraud Squad. Retired from the force in April 2004 but continued providing ad hoc support to the investigation as a civilian financial investigator.

   d. DC John Grey: SWP officer. Fraud Squad. Retired from the force in November 2012 but continued providing part time support in civilian capacity.

9. Statements from the SWP officers were included in the trial bundles in anticipation of them being called as witnesses on behalf of SWP. I had read those witness statements as part of my pre-trial preparation. However, given that neither Mr Spackman nor Mr Kinnear called them to give evidence, the contents of the statements has formed no part of my judgment. I have put them out of my mind. Mr Spackman invites me to draw an adverse inference from the fact that the CPS did not call the police officers, relying on *Wisniewski v Manchester Health Authority* [1998] EWCA Civ 596. It is convenient to deal with the point now. I do not find that the absence of evidence from police officers either supports the Claimant's case or undermines that the CPS. The reason for the CPS not calling the officers is straightforward: the claim having been discontinued against the SWP, there was no need for it to do so. Mr Spackman accepted that the person against whom he must establish his case was Mr Sherrington. All of the relevant topics upon which Mr Spackman would have wished to cross examine the police officers could be, much more appropriately and effectively, covered in his questioning of those witnesses who were on the list to be called. Given these facts, it would have been surprising if the CPS had chosen to call evidence from the SWP officers or from FI Eynon of the NCS. I decline therefore to draw an adverse inference from the CPS not calling the police officers to give evidence.

10. I also read statements from Ms Alison Saunders and Ms Alison Levitt, both of the DPP's office in order to rule upon Mr Rudall's application for a witness summons requiring their attendance at trial. I ruled against him on the point. Having done so, I have put their evidence to one side also.

11. It is against this outline that I set out below the salient uncontroversial facts which I have drawn from the 14 bundles of documents which form part of the trial papers.

The Background Facts

i) Michael Richards and Martin Roydon Evans

12. At some point in the 1990s, Mr Rudall's professional path crossed with those of two men: Michael Richards (Richards) and Martin Roydon Evans (Evans). Evans and Richards had

met in prison when Richards was serving a sentence for making counterfeit currency notes and Evans for conspiracy to obtain property by deception. Both men feature prominently in the events giving rise to this litigation. They have been described in the documents before me as "career criminals," although this is a label which Mr Rudall disputes on the basis that both men had legitimate and lawful business interests. It is not in dispute however that from around the mid-1990s Richards and Evans incorporated a number of fraudulent enterprises, including:

a. Ostrich Centre Ltd (OCL): this was an ostrich breeding farm which attracted substantial public investment. The proceeds were then transferred abroad and dissipated. Mr Evans was due to stand trial on 6th March 2000 at Swansea Crown Court on charges of theft and fraudulent trading relating to OCL but, in February 2000, he absconded to Marbella. He was subsequently arrested in France and extradited. In April 2006, Mr Evans pleaded guilty to trading with intent to defraud creditors and was sentenced to 4 years' imprisonment.

b. Aurum Marketing Ltd (AML): a company incorporated in February 1997 based ostensibly on the promotion of a "healthy enzyme" food. Again, it attracted considerable public investment. The Director was Richards and the Company Director his wife, Natalie Richards. In 1999, Richards was convicted at Cardiff Crown Court of trading standards offences in relation to AML and fined £30,000 and ordered to perform Community Service. On a costs appeal from the Companies Court in July 2000, Mummery LJ, described the scheme as "a swindle" operated by Richards. In drafting the opposition to the petition and in the Court of Appeal, AML was represented by Mr Rudall.

13. In 1999, another company, Lifeclub (Linked Investment Finance for Enterprise) was registered in Panama by Evans and Richards. It operated through an internet bank account in the Paritate Bank in Riga, Latvia. Whatever the true nature of its business (whether internet gaming or just internet investment, illegitimate or otherwise) it attracted world-wide appeal and within a short period of time many millions of dollars had been paid into the bank account in Latvia. It was central to the second prosecution that the scheme was a fraudulent enterprise: a so-called Ponzi scheme, in which Evans and Richards re-distributed investors' money to a relatively small number of early investors, and which, in the absence of any investment of the fund by Evans and Richards, collapsed and closed abruptly in November 2000. During the course of Lifeclub's short life, large sums of money were paid out to Evans and Richards, their friends and family and to other companies which they operated.

14. Two other companies, Pencilvania Business Corporation (PBC) and Golden Financial Specialists (GFS) were also operated by Evans and Richards. They were thought to be similar fraudulent schemes. Both companies held bank accounts with the Paritate Bank in Riga, Latvia.

15. Running in tandem with an investigation by the SWP Fraud Squad into the Richards/Evans complex financial dealings was a separate investigation being run by the National Crime Squad. This was an investigation into drug trafficking and money laundering, code-named Operation Darwin. A number of people were arrested and charged with conspiracy to supply Class A drugs. In 2004 Mr Evans was convicted for his part in drug trafficking and money laundering and was sentenced to 24 years imprisonment (later reduced on appeal to 21 years' imprisonment). I do not know whether Evans remains in prison. Richards however died in a jet-ski accident in 2000.

ii) **Operation Wolfram: the SWP Fraud Squad Investigation into Mr Rudall and Natalie Richards**.

16. Mr Rudall's role as company solicitor to OCL and to AML, together with his relationship with Richards (speaking at his funeral, acting on behalf of his Estate) and his apparently very close personal relationship with Ms Richards following the death of her husband in 2000, drew him to the attention of the SWP Fraud Squad officers who were investigating Richards' and Evans' money-making schemes. In a series of meetings 2001/2002 it was noted that "*investigations into other people regarding OCL, Aurum and Darwin all seem to lead back to the involvement of Rudall at some point."* On 15 January 2002 a formal police inquiry into Mr Rudall was commenced on the basis that Mr Rudall was "*strongly suspected to be involved in money laundering, perverting the course of justice, theft and conspiracy to defraud".*

17. Mr Sherrington (who had conduct of the OCL, AML and Darwin investigations) was instructed to direct and advise the inquiry and Mr Taylor QC and Mr Essex Williams (who were also prosecuting OCL, AML and Darwin) were instructed. The investigation was code-named "Operation Wolfram".

iii**) The Application for a Search Warrant of Mr Rudall's Office**.

18. As part of the investigation Mr Rudall's business premises in Caer Street, Swansea were to be searched.

19. There are two particular aspects of the search warrant application which the Claimant relies upon as support for his case on malice: the contents of the Information which it is contended deliberately included wrong and/or misleading references to Mr Rudall being suspected of involvement in drug trafficking and the procedural route taken to obtain the search warrant which, it is said, was selected with the intention of depriving the Claimant of the protection which would have been afforded by an application to a Circuit Judge.

20. A draft Information was prepared by DC Jones in which he listed the names of the people and companies in respect of which the police intended to seize material during the search. Recognising that a search of a solicitor's office was not straightforward, Mr Sherrington obtained a written advice from Mr Essex Williams on 11 April 2002 and a further advice from Mr Taylor QC on 30 April 2002. Both advised, albeit for different reasons, that the appropriate procedural route was, ex parte to the Magistrates, under s.8 Police and Criminal Evidence Act 1984 ("PACE") rather than by way of an on notice application to a circuit judge under s.9 PACE. Mr Essex Williams believed that the s.8 route was appropriate as privileged material would be seized, Mr Taylor QC that the s.8 route was appropriate because Mr Rudall was the suspect and so the "on notice" procedure under s.9 was not appropriate.

21. Mr Taylor QC recognised that the premises would contain a vast amount of material covered by privilege ("*no doubt Phillip Rudall has honest clients for whom he is doing bona fide work*"). Mr Taylor QC's advice recorded that neither s.8 nor s.9 PACE permitted the seizure of privileged material and that such material was "*taboo.*" Mr Taylor QC advised that the way in which the search was conducted would be important: the police team undertaking the search would need to be familiar with the "*ins and outs*" of the case and able to make a judgement as to what might constitute bona fide privileged material on the spot. He noted that independent counsel, Mr Peter Davies, would be present at the search together with Mr Barry Mayne from the Law Society in order to

provide legal advice on what might constitute protected material. He concluded "*such material will not be seized*".

22. He advised that files relating to any of the people or companies itemised by DC Jones in the draft Information would not attract privilege as all such material would be tainted by Mr Rudall's criminal involvement and so privilege would be lost under s.10(2) PACE. His Advice was in emphatic terms: "*the prosecution case here is absolutely clear. Phillip Rudall has not been acting as an honest solicitor in relation to any of these people or their transactions… he is suspected of being fully implicated in all criminality right from the start*". When reviewing of the Advice, Mr Sherrington apparently questioned this approach, recording in the margin of the Advice: "*can't say that*" and "*what about honest work done for suspects?*"

23. Mr Taylor QC also grappled with the problem posed by the presence of "special procedure material" under s.14 PACE, that is, material which had been obtained or created by Mr Rudall and which, whilst not privileged, nonetheless was held by him on terms of confidence. Mr Taylor QC's advised that material relating to the individuals or companies itemised by Mr Jones, would, like privileged material, also be tainted by Mr Rudall's criminality and any protection from seizure thus lost. Raising the same query as he did in connection with material covered by legal professional privilege, Mr Sherrington noted in the margin of the Advice: "*what about honest material for suspects?*"

24. Mr Sherrington raised his queries in a "Note on GT's Advice" on 8 May 2002. He questioned whether it could be confidently asserted that there were reasonable grounds to believe that files relating to those listed in the Information did not contain honest work when "*it goes without saying that even criminals have some honest dealings".* He apparently remained concerned to establish whether the correct route was s.8 rather than s.9 PACE and, if so, why. This Note was passed on to Mr Taylor QC and others for further discussion.

25. In preparation for a conference on 17 May 2002, Mr Sherrington prepared a Note which anticipated the contents of a "prompt sheet" which he intended to use during the application before the Magistrates. He showed the Note to Mr Essex Williams on 17 May who approved it. From the Note and the prompt sheet it appears that Mr Sherrington was satisfied by that stage that:

    a. s 8 was "*not only the appropriate route, but the only route"*. He explained his conclusion that s.9 PACE route was not appropriate on the basis of his understanding that s.9 PACE was to be followed if special procedure material was being sought. However, it was not the intention of the search to seize such material and it was highly unlikely that such material might inadvertently be seized given the modus operandi of the search. Also, he recorded that the s.9 route required that other methods of obtaining the material had been attempted or that other methods had not been tried because they would be bound to fail. He did not think that an application under s.8 PACE was bound to fail. For these reasons, he did not consider that a Circuit Judge would be empowered to make an order issuing the warrant.

    b. The prompt sheet appeared to accept the possibility that Mr Rudall may have had some legal dealings with the targets identified on the Information. However, the document emphasised that it was not intended to seize that material and that the "MO" of the search (which included an initial sift by police

officers who would have a deep knowledge of the investigation, a review by independent counsel and the involvement of the Law Society) would render it "*virtually certain*" that such material would not be seized. .

26. The Information drafted by DC Jones was placed before the magistrates on 6 June 2002 together with Mr Taylor QC's Advice. The Information related to Mr Rudall's connection with a number of companies and individuals. The list included OCL, AML, PBC, Mr Evans, Mr Richards, Ms Richards (and others). It included the following statements:

    a. at paragraph 3: "*this Information relates to Phillip Rudall's connection with money laundering and drug trafficking offences, the subject of a National Crime Squad investigation codenamed Operation Darwin*;"

    b. at paragraphs 55 and 59: "*Ms Richards had been named on a 24 count draft indictment in relation to Aurum*".

    c. at paragraph 131: "*there was an investigation ongoing into a bank in Gibraltar where it was believed that substantial evidence is held against, amongst others, Mr Rudall, to support money laundering and theft*".

    d. at paragraph 138: "*a number of arrestable offences have been committed by individuals named in this Information. They include conspiracy to traffic in drugs and money laundering. They also include numerous offences as outlined where substantial financial gain has accrued to the named individuals and serious financial loss has been caused to investing member of the public. Mr Rudall is linked to them all*"

27. Mr Sherrington attended the Magistrates Court with DC Jones on 6 June 2002 and the warrant was issued. The search took place on 7 and 8 June 2002. Mr Sherrington was not present. Independent counsel, Peter Davies, attended to advise upon matters of privilege and special procedure material. Mr Rudall and his solicitor Mr Stephens were present together with Mr Barry Mayne of the Law Society (fraud division).

iv) The First Prosecution: Wolfram II

28. One of the items seized was the file of Richards v Clarke. The Claimant was Natalie Richards, Mr Rudall's partner, for whom Mr Rudall was acting as solicitor. This file formed the basis for what Mr Sherrington subsequently described as a "*spin off*" prosecution. This was the first prosecution. It was code named Wolfram II. The intricate details of the Richards v Clarke action are not relevant to the issues before me. I need note only that it was an action by Natalie Richards for breach of contract in which she claimed the return of a payment on account of £34,000 in respect of landscape gardening work which she alleged she had paid Mr Clarke. Mr Clarke denied having received the money.

29. The police review of the file demonstrated some apparently startling inconsistencies in the accounts given by Ms Richards concerning when and how she had come to pay Mr Clarke the £34,000. In September 2001, an assistant solicitor employed by Mr Rudall had prepared a draft affidavit for Ms Richards, based on her instructions, in which Ms Richards had given a very different version of events to those which she had previously given. This new account was based on an, apparently contemporaneous, diary entry made by Ms Richards. Mr Rudall was suspected by the police of having revised the draft affidavit, deleting those paragraphs which set out the new version of the story and those

which referred to the diary. In September 2001, when a freezing order was sought and obtained from the High Court in respect of Mr Clarke's assets, the diary was not disclosed.

30. Sometime later, on 12th August 2002, Mr Clarke made an application for the action to be stayed relying on, amongst other matters, the execution of the search warrant and the fact that Mr Rudall was the subject of police investigation. Mr Rudall ceased to act for Ms Richards and passed the file to another firm where it was handled by Andrew Stephens. At a hearing on 19 August 2002, the stay application was successfully resisted by Mr Stephens on the basis of his assertion that Mr Rudall was not under police investigation.

31. The initial interest in the file of Richards v Clarke focussed upon Mr Stephens' misleading statement to the Court that Mr Rudall was not the subject of a police investigation. Whilst there was a strong underlying view that the whole claim was a concoction by Ms Richards and Mr Rudall to get money from Mr Clarke, it was thought that there would be "*serious difficulties*" associated with a prosecution of Mr Rudall and Ms Richards for attempting to defraud John Clarke; there were "*too many holes in the story presented*" and a prosecution would have to adopt Clarke's position and "*turn the case on its head and turn his defence into the prosecution case*" In contrast, the "*more one looked at it, the stronger the evidence became against Rudall in respect of misleading the courts. If that were the case, the correct course of action would be a prosecution of perverting the course the justice*."

32. However, this view changed. In June 2004, Mr Sherrington prepared a charging note in which he recorded that the initial view that Mr Clarke was unreliable and eccentric had shifted in the light of the further investigations by the unearthing of material supporting Mr Clarke's version of events: the upshot of the further investigation was that the officers now considered Mr Clarke to be a reliable witness. Mr Sherrington advised that there was a realistic prospect of conviction. On 6th July 2004, Mr Rudall and Ms Richards were therefore charged with conspiracy to defraud Clarke and attempting to pervert the course of justice by concealing or suppressing the diary and the explanatory draft affidavit.

33. In April 2005, the matter came on for trial before HHJ Denyer QC who ruled, as a preliminary issue, upon the defence application to exclude all of the evidence in the Richards v Clarke file on the grounds that the search warrant which had been executed was unlawful. The defence submitted that privileged material was likely to be present in the Claimant's office and so the warrant application should have been made on notice before a Circuit Judge under section 9 PACE, rather than ex parte under section 8 PACE to the Magistrates. Judge Denyer QC ruled that the defence application was founded on "*a fallacy*": the fallacy being that neither the Magistrates nor Circuit Judge had the power to permit seizure of documents covered by LPP. He declined to rule that the search was unlawful, nor that the totality of the search arising from the warrant was unlawful He expressed no concluded view on the lawfulness of the seizure of the file, although he expressed the provisional view that the file "should probably not have been taken." Even if unlawfully obtained though this did not render the material contained in it inadmissible. He declined to exclude the evidence under s.78 PACE on the basis that there was no evidence that its admission would adversely affect the fairness of the proceedings. The trial therefore proceeded. No half-time submission was made on either Mr Rudall or Ms Richards behalf. Both were acquitted by the jury of all charges.

34. I remind myself that Phillips J in his ruling of November 2016 found that there was reasonable and probable cause for the prosecution, a ruling which is both undoubtedly correct and in any event binding on me.

35. Following the acquittal, Mr Sherrington turned his attention back to the investigation into Mr Rudall's involvement in Mr Evans/Mr Richards financial dealings: Wolfram I.

v) The Investigation of Wolfram I

a) The International Letters of Request and the Production of TE/91

36. On 18 February 2003, in the context of the NCS investigation, Operation Darwin (drug trafficking and money laundering by Evans and others), the CPS had sent an International Letter of Request ("ILOR") to the Competent Judicial Authorities in Latvia seeking material held at the Paritate Bank in Latvia. The letter set out a summary background of the investigation into Evans and the inquiries being undertaken to determine the size of his operation and location of any proceeds of his criminal operation. It recorded that investigations had revealed that investors in Lifeclub (purporting to be an internet investment club) deposited their funds in the Paritate Bank in Riga, Latvia and that the accounts of other companies, PBC and GFS, were also held in the Paritate Bank.

37. The Letter of Request sought details of the account held at the Paritate Bank by Evans in respect of Lifeclub; copies of signed bank mandates relating to the account; copies of correspondence between the holders of the account and the bank; copy bank statements for the account for either the whole of its active life or until the date that the bank closed and a similar raft of information in respect of PBC and GFS. The letter also requested details of any other accounts that related to Evans, or any other person or company whose details were disclosed within the ILOR.

38. Between 3 and 8 November 2003, FI Eynon and DC Jones visited Latvia to obtain the documents which had been the subject of the ILOR. There is a single contemporaneous account of the events of those days which is contained in DC Jones' pocket note book. According to this document, there were a number of conversations between the officers and Mr Lochmelis of the Latvian Prosecutor General's office and with others, which bore no fruit. DC Jones had a discussion with "CPS York" on 4 November. On 5 November it was recorded that Mr Lochmelis "*had then had the additional request and stated that he would inform Paritate Bank to produce documents however could take some weeks*." No further detail is included in the notebook concerning the nature of the "additional request" and its contents. On 7 November, Mr Jones recorded that Mr Lochmelis "*handed us docs re accounts of P'vania Inc, Mortgage Tender and Lifeclub. Also CD Rom of accounts*". The CD Rom containing the Latvian banking material was subsequently labelled TE/91 and exhibited by FI Eynon. The material was produced by the Latvians under a covering letter which stated that *"in accordance with your verbal request, I submit the documents in my possession obtained in compliance with the judicial assistance request of the Prosecutor's Office of Great Britain in relation to the proceedings against Martin Wayne Evans.* The letter specified the enclosures as*: (1) Documents on 126 pages and (2) One compact disc (placed in an envelope sealed with control label and the official seal of the JSC Paritate bank*)". The document was receipted by FI Eynon and DC Jones. Save for the account in the pocket note book and two statements made by Eynon and Jones in 2010, no further statements concerning the events in Latvia were available at the time of Mr Rudall being charged with money laundering offences (in 2010).

39. It was argued at the dismissal hearing before Judge Parry and in this civil litigation that the documents recovered by DC Jones and FI Eynon were not recovered in response to the ILOR of 18 February 2003. There was, it was submitted, a further or amended letter of request ("the second ILOR") which triggered the production of the material. The second ILOR had not been disclosed in the criminal prosecution nor indeed in these proceedings. All that exists, which may have a bearing on the point, is a fax cover sheet marked "*for the attention of the guest in room 1512 only*" on the reverse of which is recorded "*Tommy Latvia*" followed by a series of numbers and "*Room 1512*." It was submitted by Mr Spackman that this was the cover sheet for the second ILOR which had been faxed to FI Tommy Eynon in Latvia. To complete the story, a further ILOR dated only "November 2003" was drafted by the CPS. That letter however requested details of any accounts held by the Paritate Bank in the names, not of Evans, but Lydia Matthews, Michael Richards and in respect of a different money enterprise, Internet Syndicate Gaming Inc.

b) Mr Sherrington's Legal Analysis of the Admissibility of TE/91

40. By way of relevant background, in April 2006, Evans had pleaded guilty to fraud in respect of OCL and HHJ Diehl QC had ruled that confiscation proceedings in respect of the OCL fraud were to precede those under the Drugs Trafficking Act 1994 arising from Operation Darwin. I note in passing that, during the confiscation proceedings (in September 2005), Mr Evans, through his Counsel Huw Davies QC, admitted that Lifeclub was a "pyramid style selling scheme."

41. In the summer of 2006 therefore Mr Sherrington turned his attention to how material which had been obtained for the purpose of Operation Darwin could be used in connection with the intended prosecution of Mr Rudall and Ms Richards. In July 2006. he drafted an agenda for a forthcoming meeting with Counsel and the police in Wolfram, raising as a topic for discussion whether there was a need for statements to be obtained to cover all bank accounts and other evidence from foreign jurisdictions. It appears from his conference note that Counsel was to consider the point.

42. Apparently before Counsel could provide that advice, Mr Sherrington himself analysed the position in his file review note of 11 September 2006. This is an important document in this litigation and I set out its contents in some detail.

43. The file note records Mr Sherrington taking stock of the evidence against Mr Rudall and Ms Richards in anticipation of committal proceedings (which were to be conducted under a new committal regime). The document goes over much old ground, referring for example to the June 2002 search of Mr Rudall's business premises, the spin off case (Wolfram II) which had delayed the investigation into Wolfram I and Mr Sherrington's request of SWP to prepare a summary to include the ILORs. Mr Sherrington noted the issue with which he was grappling: the contents of new Letters of Request (which he was in the process of drafting) in which he was seeking the consent of overseas judicial authorities to use the material which had been obtained in the context of Operation Darwin in connection with the prosecution of Mr Rudall and Ms Richards. The acute question was whether "*we need statements from abroad or whether we can rely upon documents that we have already obtained. If possible, the latter would be preferable.*" He noted that the documents obtained from abroad had only been used by the prosecution in the confiscation proceedings thus far; that they had come from different jurisdictions and in different ways; that some included a statement (eg from a bank manager); some had "*simply been handed to officers whilst they were over in those countries*". I note in

passing that the "documents from abroad" to which he was referring was far more extensive than those which had been obtained by DC Jones and FI Eynon in November 2003 from Latvia as a large number of ILORs had been despatched in Operation Darwin and material obtained in this way from a very large number of jurisdictions.

44. Judging by his note, Mr Sherrington had undertaken some research. He noted that *R v Foxley* [1995] 2 Cr. App. R 523 was "*a relevant case*" concerning an application to admit hearsay documents obtained from abroad. He recorded his understanding that the Court of Appeal had held that inferences could be drawn from such documents regarding their creation to satisfy the requirements of s.24(1) Criminal Justice Act 1988 without the need for "*witnesses of any kind*". He noted that the same principle must apply to the successor provisions s.117(1) and (2) Criminal Justice Act 2003 (concerning the admissibility of hearsay evidence contained in business and other documents) and that the additional requirements of s.117(5) did not apply as the material was obtained under an ILOR.

45. He referred to a textbook which he had consulted from the CPS library which had set out that "*the source of the document must be sufficiently identified*" and which had cited the unreported case of *DPP v Boo* (CO/2538/97) but that the textbook "*had then gone on to quote Foxley in relation to business documents*". He noted that he was trying to track *Boo* down via the library but "*I do not anticipate that this should cause us much of a problem.*"

46. He concluded that "*Foxley would appear to give us permission to rely on documents alone for admissibility, in the sense that we do not need the bank manager or other witness to demonstrate provenance unless, for example, provenance is a real problem in itself. As far as I can see, most of our evidence that is going to relate to Wolfram file is of the business variety and should not be a problem.*" His thinking was that there should be a statement from the officer who obtained the material which "*must describe the process of obtaining them, list and exhibit the documents from abroad and include reference to the appropriate LORSs as well as possibly exhibiting copies of them*".

47. The file review note was sent to Mr Essex Williams on 12 September 2006. In his covering letter Mr Sherrington took the opportunity to correct a mistake in his Note on the interpretation of the statutory provisions concerning the new committal regime noting: "*I was looking at the Stones version of s.5 at the time and, looking at the Archbold version, I see that there is in fact a subsection 3A.*" Then he records that "*Documents are admissible at committal on the basis of s.117 and Foxley and I think they should be exhibited by the officers and the process of obtaining them described in full.* He said that he planned to change the draft letter seeking permission, so as to make provision for statement taking in due course if needed.

48. On 14 September 2006, in a follow up note to Counsel and the police on ILORs Mr Sherrington recorded that there "*are bound to be objections to the banking material (even if only tactical) and despite Foxley, we will face challenges, if we need to go back for a new letter of request then, it will be too late.*"

c) Consent from the Latvian Judicial Authorities to use TE/91

49. On 2 March 2007 Mr Sherrington finally despatched a letter of request to the Latvian Judicial Authorities seeking their permission to use the evidence obtained by way of ILORs in connection with the Wolfram investigations.

50. He recorded in that letter that it might be necessary in due course to submit a further request to enable new statements to be taken and further inquiries to be made in respect of matters that might arise out of the evidence already provided explaining that *"During the course of criminal proceedings when a document is produced in evidence, it is possible to rely on that documentary evidence to prove the facts contained in the document without the need for witnesses to prove the document or speak about its provenance. However, any party (including the court) can raise objections to, or query, the use of documentary evidence, whether from a domestic or international source at any stage of proceedings. Such a query can also be triggered by different issues as they arise… If such further enquiries do become necessary, a supplementary request will be sent*".

51. On 21 March 2007, the Latvian authorities responded to Mr Sherrington's letter by granting permission that "*any evidence that has previously been obtained and provided by means of requests for judicial assistance in connection with Martin Roydon Evans and his associates, may be used in the Wolfram investigation and in the prosecution of any cases against the Wolfram suspects*".

52. On 1 May 2007, Mr Sherrington made a conference note referring to the consensus that Lifeclub and GFS form "*the foundation of any case against the Wolfram suspects*". Also, that the available material whilst sufficient for confiscation purposes for "*not sufficient for evidence*". His view was that "*some further statements need to be taken*." Later that month in a lengthy Advice, Mr Taylor QC recorded that the prosecution was aware that what was admissible in the confiscation proceedings would not be sufficient to establish guilt of any criminal charges laid against Mr Rudall and Ms Richards. He recorded the need for a "*fresh start*" with an eye to what must be proved under the present criminal evidence rules and to the criminal standard of proof.

53. It is convenient to note at this point, albeit taking it out of chronological sequence, that statements were obtained from FI Eynon of 5 February 2010 and from DC Jones on 16 March 2010:

    a. DC Jones' statement (so far as relevant) records that he was present in Latvia on 7 November 2003 when Mr Lochmelis, an official with the Department of Justice, handed FI Eynon a quantity of documentation as requested in the Letter of Request. The documents are produced by FI Eynon marked TE90 to TE 94A. The item marked TE/91 is a CD containing the statement of accounts held by the Paritate bank in Riga in relation to PBC, Lifeclub and GFS.

    b. FI Eynon's statement records that he received (on 7 November 2003) a number of exhibits TE90 (certification of authenticity of business records signed by Mr Lochmelis); TE/91 statements of accounts from the Paritate Bank contained on a CD re PBC. Lifeclub and GFS: TE/92 application mandates to open an account at Paritate bank for PBS signed by Mr Evans: TE/93 application mandates to open account for Lifeclub and certificate of incorporation for Lifeclub. Also, a driving licence with photograph of Mr Evans and a specimen signature card in the name of Michael Richards.

vi) The Charging Decision

54. The Director's Case Management Panel (DCMP) considered the case against Mr Rudall and Ms Richards in a series of meetings starting on 17 December 2008. The membership of the DCMP included at times the Director of Public Prosecutions himself, his principal legal advisor, Ms Levitt QC and Ms Saunders, then head of the Organised Crime Division of the CPS. It was not the function of the DCMP to drill down into the minutiae of the evidence against the Claimant and Ms Richards but to provide strategic oversight consistent with its role of ensuring that expensive and high-profile cases were prosecuted efficiently and effectively. It is clear from the minute of that first meeting that the DCMP were concerned by the "*extraordinarily long investigation that had been hampered by lack of investigative resources and delays in securing evidence from abroad*" and the chance of an application for the prosecution to be stayed on the grounds of delay.

55. On 23 January 2009 Mr Sherrington provided the DCMP with his assessment of evidence and his advice on charging. In the section listing the documentary evidence from foreign banks he noted "*these will be exhibited by Tommy Eynon from SOCA, the officer who originally obtained them. No witness statements were provided when the original material was obtained only the accounts. The best we received were some certificates of authenticity and authorisations*". His pack of material for the DCMP ran to dozens of pages, including a draft master chronology, a schedule of letters of request for Wolfram, a review of Counsel's advices on the possibility of an abuse argument being mounted on the basis of delay. Mr Sherrington advised that there was a realistic prospect of conviction of Mr Rudall and Ms Richards of money laundering and that the case should not be prevented from proceeding for reasons either of delay nor unfairness.

56. The DCMP then considered and scrutinised the case at a number of subsequent meetings:

    a. on its recommendation the indictment was shrunk to 12 counts.

    b. It advised that the AG Guidelines (which had come into force on 9 May 2009) were followed with the object of dealing with the case at an early stage by way of guilty pleas so as to avoid the collation and service of all of the evidence that would be required for a full trial and a letter initiating plea discussions was sent to the defence. Mr Sherrington queried whether there would be a need to serve evidence upon the defence solicitors so that they could understand the full detail of the case and make an assessment of its strength. The Panel concluded that this was not necessary.

    c. On 12 August 2009 Mr Taylor QC and Mr Essex Williams provided an Advice on the approach proposed by the Panel. They were critical of the suggestion that plea negotiations be conducted, describing the plan to be "*fatally flawed*". They observed that "*no solicitor would advise his clients to plead guilty without proof that Aurum and Lifeclub were frauds… We have no idea when Arthur Haverd* (the forensic accountant expert) *(if he has been instructed yet) will complete his task but (i) until he does and (ii) assuming he finds evidence of fraud, the Defence will deny that Lifeclub was anything more than a money game or speculation.."* They observed that the approach suggested by the Panel was short sighted and would be pointless "*without having all of the evidence collated*".

57. In fact, plea negotiations never did get off the ground. On 26 February 2010, Mr Rudall and Ms Richards were charged (by way of summons) in respect of 12 counts of money

laundering contrary to s.93A(1)(a) Criminal Justice Act 1988. Two charges were levelled against Mr Rudall alone, three against Ms Richards alone and seven were brought against them both. The essence of the allegations was that they had both laundered tainted funds generated by the fraudulent money scheme, Lifeclub, which had been created and operated by Evans and Richards.

(vii) Events after Charge

58. A set of Admissions were served on the defence on 20 May 2010. They included the request for the following to be agreed: "*the obtaining, collection, transmission, retention and production of evidence from foreign jurisdictions under Letters of Request in the course of this operation have been properly and lawfully conducted by the prosecution officers and police officers and it is agreed that the said evidence is admissible at trial*." On the same date, the Crown served a hearsay notice (drafted by junior counsel) indicating its intention to rely upon, amongst other pieces of evidence, the material produced by the Latvian authorities to DC Jones and FI Eynon in November 2003.

59. On 17 March 2011, an indication was given by the defence of their intention to launch an application that the prosecution be stayed on the grounds of abuse. Joint submissions supporting the application were then served on 29 June 2012. Neither the application nor the skeleton argument raised any issue concerning the admissibility of TE/91. In October 2012 it became apparent that as a result of the approach being taken by the defence in respect of the abuse argument (which was put on the basis of both delay and bad faith on the part of the Crown) Mr Taylor QC and Mr Sherrington would have to provide witness statements. In his Advice of 2 October 2012, Mr Taylor QC posed the question of whether he could "*operate ethically and effectively from counsels' bench. In all these areas I was involved in the decision making. When the witnesses are giving their evidence about the various strategic or evidential decisions made along the way I will constantly be comparing and testing their evidence against my own recollection with or without my notes, of events they are talking about. I will have first-hand knowledge of a lot of it because I am part of the evidence they are giving. No counsel should be in this position*." At this juncture, Mr Sherrington was replaced by Mr Ian Lee and Mr Taylor QC by Mr Kelly QC.

60. Mr Sherrington provided three statements in connection with the abuse argument: on 19 December 2012, 11 January 2013 and 1 February 2013. Mr Taylor QC also provided a statement dated 27 December 2012.

61. On 21 November 2012, Mr Lee met with Mr Kelly QC, Ms Bex and Dr Djanogly (an expert forensic accountant) in conference. A short conference note, or series of action points post conference, records Mr Kelly QC having questioned how the core material (TE/91) had come to be produced and his advice that a statement from the bank be taken, or at least steps taken to obtain such a statement. The note records the understanding that the Paritate Bank had closed some time ago but that Mr Kelly QC still wished to know "*who had compiled the material on the disc in a statement as 90% of expert's work based on bank material*".

62. On 31 January 2013, Mr Kelly QC was shown "*an original document and its translation exhibiting the Paritate Bank documents and a CD Rom*" (which was presumably the covering letter from the Latvian Authorities of 7 November 2003). He expressed his provisional view that the document was probably sufficient to establish the admissibility of TE/91 but that Ms Bex was to research the current law. It does not appear that she undertook this task or at least, if she did, it did not find its way into a written advice.

63. A dismissal application was served on behalf of both defendants on 8 March 2013 to be heard before the abuse application. After reciting that the prosecution had accepted that it had to prove, as a starting point, that Lifeclub was a fraudulent Ponzi scheme, the application submitted that TE/91 was either not admissible as hearsay evidence under s.117(1) Criminal Justice Act 2003 or that it was of such doubtful reliability that, if admissible, it should be excluded under s.117(6) of the Act. The application included the following arguments:

    a. the sole evidence relied upon to prove that Lifeclub was a fraud was an expert accountant report by Mr Djanogly, expressing opinions on the contents of the CD Rom identified as exhibit TE/91;

    b. that, although the prosecution asserted that TE/91 contained records maintained by the Paritate Bank, there was no evidence to establish that fact. All that was in evidence was that a disc had been given to FI Eynon but there was no evidence as to its provenance, the subsequent chain of custody or how it had been used or interrogated;

    c. the CD Rom was labelled "Viborka" meaning "excerpt" in Latvian.

64. In response to a query by Mr Lee concerning the admissibility of TE/91 Mr Kelly QC advised Mr Lee by email on 11 March 2013 as follows: "*TE/91 and its provenance were discussed in conference on 21 November 2012, it was noted that there was no statement from the P bank nor its administrator explaining or producing the CD or the exhibits.* The advice given was noted as follows *"even though the P bank is closed we still need to prove the provenance of the CD, we need to try to get a statement from the bank and if we fail, to document our efforts to obtain it. On 31 Jan 2013 we were shown the L DOJ document. It was made clear that this was all we were going to get and told that we could get no more. We will argue that the disc and its content are admissible as evidence. We will rely on one of three bases: not hearsay, hearsay but admissible under s.114 or business record admissible via section 117 CJA 2003.*" Mr Kelly QC advised that in the absence of a statement from the bank or from the actual creator of the disc he could not *guarantee its admissibility.*

(viii) The Hearing before HHJ Parry

65. During the hearing itself, problems concerning the logging and auditing of the exhibit TE/91 came to light which meant that, overnight, various elderly police officers had to make statements reconstructing the chain of custody of the exhibit since it had been produced to the officers in 2003.

66. I do not have a transcript of the proceedings before HHJ Parry although the arguments, for both sides, appear to have been reasonably comprehensively recorded in the ruling. For present purposes I concentrate below on the arguments advanced by Mr Kelly QC.

67. Mr Kelly QC acknowledged that there were no statements from the Paritate Bank concerning the CD Rom but submitted that the jury could draw inferences from the surrounding material. He described in some detail that surrounding material which included:

    a. the officers' witness statements of 2010;

    b. DC Jones' pocket notebook;

    c. the ILOR of February 2003 and the covering letter of 7 November 2003;

d. other material which was handed over by the Latvians in the form of correspondence which made reference to the Lifeclub bank account number matched the bank account number on the data on TE/91; correspondence from one of the alleged operators of the fraud requesting an online facility from the Paritate Bank; the reference in that request to the Lifeclub bank account number which corresponded with that on the CD Rom.

68. Mr Kelly QC argued that an examination of TE/91 demonstrated that its contents were what they purported to be, namely, the accounts of Lifeclub. He, like Mr Sherrington, relied on *R v Foxley* and submitted that direct evidence, although desirable, was not an essential precondition for the admitting of the evidence when a proper examination of the data led, sensibly, to the conclusion that the document spoke for itself. In this context, he submitted that the start and end dates shown on the account found in TE/91 corresponded with the dates upon which it was known that Lifeclub was incepted and when it was known to have collapsed. There were multiple references in the account material to Lifeclub. He drew the Court's attention to payments out to Ms Richards from the Lifeclub accounts which matched income entries shown on her personal bank account at the Cooperative Bank and to other instances in which payments out from the Lifeclub account matched income entries in the defendant's bank account.

69. Mr Kelly QC conceded that there had been "*bad practices*" employed by those responsible for the proper handling and auditing of the exhibit following its production to DC Jones and FI Eynon. He conceded that there were differences and inconsistencies in accounts given by DC Jones and FI Eynon over the course of the years concerning the events of November 2003. However, he submitted that none of these problems were fatal and the reliability of the evidence was properly a matter for the jury in due course.

70. On 2 May 2013, HHJ Parry upheld Mr Rudall's and Ms Richards' application. Although long and clear in some respects, it is not apparent from my reading of the ruling whether the judge was ruling the evidence inadmissible on the basis that he was not satisfied that the requirements of s.117(1) and (2) had been met (the admissibility issue) or whether he excluded the evidence under s.117(6) and (7) (the reliability issue). He ruled that the material contained on the CD Rom did not "*speak for itself*" in the *Foxley* sense but did not set out why he reached that conclusion. He expressed his view that exhibit TE/91 was an item which was (inter alia):

a. recovered from a bank that was itself the subject of an investigation by the country's prosecution authorities without any explanation as to the nature of the investigation or the personnel involved – indeed whether they played a role in the creation of what is relied upon as TE/91;

b. obtained, whether at the bank or at the prosecutor's office, without any enquiry being made or examination made as to how it was created, by whom and on what basis;

c. bore the description of being an extract – of what or how extensive there is no evidence;

d. bore no identifying label nor was one given to it and no contemporaneous statement was made as to its transmission and subsequent secure keeping;

e. had been handled and worked upon by various people, most certainly in 2004 and then again following 2005. No contemporaneous note was made; no audit

trail was kept of its use, and what exactly was done. He commented upon the "*lackadaisical, if it not reckless manner in which the evidence has been handled"* resulting in the *"unedifying situation*" of former police officers being asked to make statements during the evenings to rebut arguments.

f. Had been used by one witness instructed by another defendant in quite separate proceedings to generate information that was intended to be supportive of a particular aim which could have included a desire to create the impression that Lifeclub was a fraudulent enterprise.

(ix) The Post Mortem

71. In the aftermath of the dismissal, Mr Kelly QC advised on whether there should be an application for a voluntary bill. He said that he thought that HHJ Parry QC had been wrong to rule the exhibit out. He noted however that the test for a voluntary bill was whether the ruling was "obviously wrong" and that "*it must be accepted that the prosecution argument was made more difficult when it became apparent for the first time that the disc TE/91 had not been preserved in the way in which we would have expected it to have been kept; the defects date back to 2003 and are incapable of rectification now. That being said, we remain of the view that the learned judge ought to have concluded that these issues could be addressed in cross examination and that the evidence of provenance of TE/91 was sufficient to establish a case for the defendants to answer*."

72. He advised that the abuse argument was stronger than the dismissal argument and therefore for tactical reasons there was little value in applying for a voluntary bill. He said that "*whilst confident that the prosecution response to the abuse argument was arguably correct, we have always acknowledged and discussed that, if the trial judge did stop the trial as an abuse of process arising from delay, it would be difficult to challenge that decision because the prosecution would probably be unable to show that it was "Wednesbury" unreasonable".*

73. In her internal review report of 17 May 2013, Ms Jenkins (a Senior Specialist Prosecutor with the CPS) laid the blame for the dismissal fairly and squarely at the door of SWP. She did not hold back in her criticisms. She recorded that the judgment was an "*unattractive laying bare of the way in which TE/91 had been handled by SWP both before and after it arrived in the UK*," and that the judgment "*demonstrates the breath-taking lack of care by officers of SWP around the obtaining and preservation of their key exhibit*". She was concerned that the police had not appreciated that there was a "*ticking time bomb surrounding their handling of TE/91*" and that it was "*unclear whether the failures in this case are indicative of faults in respect of their internal processes or whether it was just an issue in this case*." She said that nothing she had seen in her review of the files demonstrated that Mr Sherrington specifically questioned the provenance of TE/91; nor did it appear that he had ever sought an assurance in respect of the continuity aspect for this exhibit. She explained however that in a long running case, trust and professionalism of all of those involved were implied and it would be impossible for a prosecutor to verify every detail. SWP had not, in any of the numerous conferences, ever flagged the issue with Mr Sherrington and so everyone had gone forward on the assumption that the evidence was available and in proper order. She observed that the Admissions should not have been sought given the "*parlous state*" of the "*integrity issue*" but that the only conclusion to be drawn from the fact that the Admissions had been

sought was because it had not been appreciated that there was a serious underlying problem.

The Claim for Malicious Prosecution

Legal Framework

74. I start with uncontroversial matters of law. In order to succeed in his action for malicious prosecution, the Claimant must prove (a) that he was prosecuted by the Defendant (b) that the prosecution was determined in his favour (c) that the prosecution was without reasonable and probable cause and (d) the prosecution was malicious: see Lord Keith of Kinkel in *Martin v Watson* [1996] 1 AC 74 at 80C (citing Clerk & Lindsell on Torts 16th d (1989) p. 1042, para 19.05).

75. This claim concerns the last two elements only. There is no issue that the prosecution was determined in the Claimant's favour and, having discontinued his action against the South Wales Police, Mr Spackman accepted that the prosecutor, for the purpose of the claim for malicious prosecution, was Mr Sherrington, the CPS lawyer who, having advised throughout the investigation, ultimately made the charging decision.

76. I therefore turn first to the issue of reasonable and probable cause. Again, the basic legal principles underlying the claim are not contentious. I set them out below:

    a. the question of whether there was an absence of reasonable and probable cause has two strands; the objective and the subjective: it involves considering whether the prosecutor had an honest belief in the charge and whether, viewed objectively, there was a reasonable basis for that belief.

    b. An absence of honest belief in the charge by the prosecutor is conclusive of the absence of reasonable and probable cause, even if a reasonable man could have believed in the charge on the basis of the facts known to the prosecutor. See: *Haddrick v Heslop* [1848]12 QB 268 at 274 -5 "*It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause*" per Lord Denman CJ.

    c. It is not necessary for the prosecutor to believe in the guilt of the person accused, he has only to be satisfied that there is a proper case to lay before the court: see *Thacker v Crown Prosecution Service* [1997] EWCA Civ 3000 where Kennedy LJ observed "*Guilt or innocence is for the Tribunal and not for him*" and *Coudrat v Commissioners of Her Majesty's Revenue and Customs* [2005] EWCA Civ 616 where Smith LJ stated "*an officer is entitled to lay a charge if he is satisfied that there is a case fit to be tried. He does not have to believe in the probability of conviction."*

    d. The Court arrives at the answer to the question of whether there was reasonable cause by examining the facts as they were known to, or appeared to, the prosecutor at the time of charge, "*the facts upon which the prosecutor acted should be ascertained.. when the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable and*

probable cause for prosecuting the accused": see *Herniman v Smith* [1938] AC 505 at 316 per Lord Atkin.

e. The absence or otherwise of reasonable and probable cause involves an analysis of the sufficiency of the evidence. As Sharp J expressed the position in *Besnik Qema v News Group Newspapers Limited* [2012] EWHC 1146 (QB) "*whether one considers the objective or subjective element of reasonable and probable cause, the focus is always on the sufficiency of evidence to support the prosecution of the offence in question, and the defendant's knowledge of and honest belief in that.*"

f. In *Coudrat*, Smith LJ framed the assessment of evidential sufficiency as follows: "*when considering whether to charge a suspect, consideration must be given to the elements of the offence with which it is intended to charge him. There must be prima facie admissible evidence of each element of the offence. Although anything plainly inadmissible should be left out of account, we do not think that, at the stage of charging it is necessary or appropriate to consider the possibility that evidence might be excluded at the trial after full legal argument or in the exercise of the judge's discretion. Nor is it necessary to test the full strength of the defence. An officer cannot be expected to investigate the truth of every assertion made by the suspect in interview."* (my emphasis).

g. Absence of reasonable and probable cause must be established, like each of the elements of malicious prosecution, separately. Want of reasonable and probable cause can never be inferred from malice:

i. *"From the most express malice, the want of probable cause cannot be implied. A man from malicious motives may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt and in neither case is he liable to this kind of action*": *Johnstone v Sutton* (1786) 1 Term Reports 510, 545

ii. "*The importance of observing this rule cannot be exaggerated… It behoves the judge to be doubly careful not to leave the question of honest belief to the jury unless there is affirmative evidence of the want of it*" *Glinski v McIver* [1962] AC 726 per Viscount Simonds.

h. The preparedness of counsel to act for the crown is relevant to (and potentially determinative of) the question of reasonable and probable cause. However, each case must be considered on its own facts: see *Abbott v Refuge Assurance Co* [1962] 1 QB 432 "*the variations in the circumstances of cases are almost infinite. Clearly the view of counsel, who was not experienced in work of this kind, would not be of any great value to persons seeking his advice; neither would that advice be of any great value however experienced the counsel, if the whole of the facts were not put before him*."

77. There was no difference between the parties concerning the meaning of "malice". In *Glinski*, Lord Devlin said at 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*." Or "*any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice, is a malicious motive on the part of the person who acts in that way.*" Malice can be inferred from the absence of reasonable and probable cause but not from a finding

of lack of reasonable and probable cause where there is an honest but unreasonable belief: see *Thacker.*

78. I pause at this stage to clear the decks of two points which arise.

79. The first concerns the difference between the evidential stage of the Code for Crown Prosecutors and the assessment of sufficiency of evidence for the purpose of establishing reasonable and probable cause. Mr Spackman's closing submissions elide the two tests. He does so on the basis that when, as in this case, the piece of evidence of (he submits) doubtful admissibility is fundamental to the Crown's case, then my approach to the objective assessment of adequacy should reflect the importance of the evidence to the success of the prosecution. I should not therefore, he argues, limit my examination to whether the evidence is strictly admissible but should adopt a broader approach, consistent with the evidential stage of the Code test, of admissible evidence being nonetheless excluded, for example, on grounds of reliability. Such an approach he submitted to be consistent with that the Court's approach in the Australian case of *A v State of New South Wales* [2007] HCA 10 where it was emphasised that the question of evidential sufficiency was a question of fact which should be assessed in the light of the facts of the particular case.

80. I do not accept that the evidential Code test is the correct test to apply for the purpose of examining whether there is reasonable and probable cause. The exercise undertaken by the prosecutor in that context is to identify whether there is a realistic prospect of conviction which is a different, and higher, threshold than that which I must apply when considering whether there is a case fit to be tried or a proper case to lay before the court. The intensiveness of the scrutiny to be applied to the evidence is correspondingly different and greater than that relevant to the consideration of reasonable and probable cause. The evidential stage of the Code test includes an analysis of not just the admissibility of the evidence but the importance of the evidence, whether the evidence is reliable and credible and the impact of any defence or other information put forward by the suspect. By contrast, my role, in examining whether there is a reasonable basis for an honest belief in the charge by the prosecutor, is to address the question of whether there is prima facie admissible evidence in respect of each element of the offence (see Smith LJ in *Coudrat*), setting aside evidence which is plainly admissible. I accept that there may in some circumstances be a feature (which is, or should be, obvious to the reasonable prosecutor) which raises such a large question mark over whether otherwise admissible evidence could be "used in court" (to adopt the expression used in the Code) that a wider consideration including, for example, of the reliability of the evidence is reasonably justified. But, even in those circumstances, the degree of scrutiny will be at a level consistent with the need to establish whether the evidence could prima facie be used in court and not whether at trial there may be a successful argument mounted by the defence to exclude it.

81. Second, I do not understand it to be a matter of controversy between Mr Spackman and Mr Kinnear that an absence of reasonable and probable cause could be found in circumstances in which the court concludes there to be an honest, but objectively unreasonable, belief: see, for example, *Thacker*. An honest but negligent or uninformed or careless belief may be sufficient to establish subjective absence of reasonable and probable cause which if coupled with a finding of malicious motivation and damage will complete the tort (subject to the other elements). For the reasons which I set out below however, that principle is of no application in this case where the Claimant has

unambiguously pinned his colours to Mr Sherrington having no honest belief in the charge. The point does therefore not arise.

The Claimant's Case

82. The Claimant's pleaded case on the absence of reasonable and probable cause is reasonably clearly stated in the Re-Amended Particulars of Claim. Although the pleadings entwine topics relevant to malice with those relevant to reasonable and probable cause, the line of attack is easy to see. The case on reasonable and probable cause relates solely to the admissibility of exhibit TE/91 which purported to contain the bank account of Lifeclub.

83. The Claimant's starting point is that the admissibility of that material was fundamental to the prosecution and was the foundation for the expert opinion that the scheme bore all the hallmarks of a dishonest pyramid selling scheme. Adopting many of the elements of HHJ Parry's ruling on the dismissal application, the Claimant's case is that the exhibit was "plainly inadmissible" because:

    i) in the absence of any statement from the person at the Latvian bank who had selected the data or who had downloaded the data onto the CD Rom there was no evidence upon which the Court could properly infer that the data related to the Lifeclub bank accounts. At the trial before me, this issue was broadly described as the "provenance issue",

    ii) there was no evidence of the handling of the CD following its production to FI Eynon and DC Jones by Mr Lochmelis in November 2003. There was no proper audit or record of its being copied, manipulated, interrogated, moved, stored and ultimately ascribed the exhibit reference TE/91 in 2010. In the absence of the transmission record, no Court could be satisfied that the CD relied upon by the Prosecution was "one and the same" as that produced to the officers in November 2003. This, before me, was described as the "continuity issue".

    iii) There was no consent obtained from the Latvian authorities to use the material contained on the CD Rom. No particular elaboration of this assertion is provided in the Re-Amended Particulars of Claim.

    iv) The CD was endorsed with the phrase "Viborka for Prok" which means "extract". The inference of the endorsement being that the content of the Latvian CD Rom was only part of the Lifeclub bank account or only part of the material or information held by the bank about Lifeclub.

84. In his closing submissions, Mr Spackman raises as a separate (unpleaded) "defect." the existence of the "second ILOR" which (a) was sent to FI Eynon when he was in Latvia in November 2003 (b) has never been disclosed and (c) generated the production of the CD Rom and other material. On this basis he submits that the CD Rom was not recovered lawfully. Mr Spackman spent time at trial exploring this issue with witnesses. Although not pleaded, I am prepared to allow him to pursue the point and to resolve it not least because it seems to fall very broadly within his case on provenance.

85. The Claimant's pleaded case was that Mr Sherrington knew of the defects in his case and that he knew that TE/91 was inadmissible. For example, it is pleaded:

a. in paragraph 18(vii) of the Re-Amended Particulars of Claim that the Defendants knew of "*such defects in their case*";

b. in paragraph 18(x) that the prosecutors relied on financial evidence about Lifeclub that they "*knew to be corrupted, incomplete, lacking integrity and which was inadmissible in evidence*";

c. in paragraph 18(xi) that the prosecutors "*knew that the intended prosecution of the Claimant was wrongful*".

86. At times, Mr Spackman appeared reluctant to put the full force of his case on honest belief to Mr Sherrington in cross examination, but to the extent that he did, he followed the pleaded case. He put to Mr Sherrington that his reliance on the case of *Foxley* as the basis for the admission of the evidence under s.117 Criminal Justice Act was wrong and known by him at the time to be wrong; that Mr Sherrington was "*hanging his hat on Foxley*" because he knew of the deficiencies in his evidence; that Mr Sherrington deliberately withheld from the DCMP highly relevant information concerning the problems concerning the admissibility of TE/91; that Mr Sherrington had deliberately concealed a second ILOR because he knew that it would reveal that TE/91 had been unlawfully obtained and that he had no consent to use the material in Wolfram I; that the service of a set of Admissions had been manufactured as a way of getting him out of the problems the case posed.

87. The Claimant's case as framed in closing submissions veered away from his pleaded case, and the case which he put in cross examination. Mr Spackman refers in his written closing submissions to Mr Sherrington not having given the admissibility of TE/91 "*proper consideration*;" he refers elsewhere to Mr Sherrington having "*deliberately ignored any issue about whether it was admissible*". In his oral closing he embarked on a submission that "*whether Mr Sherrington appreciated it or not, he ought to have come to the conclusion that it* (ie TE/91) *was neither admissible or else likely to be excluded*." I queried Mr Spackman's approach with him during closing argument and understood him to accept that his case against Mr Sherrington was based on his actual knowledge of the defects in the exhibit, not on constructive knowledge. In case I am wrong in my understanding, I make it clear that the case that I address in this judgment is that which is pleaded and as framed at trial. This is not a case in which it was suggested that Mr Sherrington negligently failed to investigate the admissibility of TE/91 or that he formed a view of its admissibility on the basis of an honest but flawed interpretation of the law or that for some reason he had an honest but objectively wrong view concerning TE/91. The case against him is that he knew of the defects but proceeded to charge Mr Rudall notwithstanding. This is the case which I deal with below.

88. The Claimant's case on malice is also addressed clearly in his pleadings. It is pleaded that Mr Sherrington was motivated not by a desire to bring Mr Rudall to justice on the basis of the charges but because of the ulterior and improper motivation of stopping him practising as a solicitor coupled with general ill-will and spite. Mr Sherrington was part of a close-knit team all of whom were motivated by spite and ill-will towards Mr Rudall. The team comprised Mr Sherrington, Mr Taylor QC, Mr Essex Williams and the police officers. The team acted in concert. Each member was, as it was put to Mr Sherrington and Mr Taylor QC, "*out to get*" Mr Rudall. Mr Spackman submits that I should be prepared to infer malice or improper motive on Mr Sherrington's part from statements made by others in the team. They worked closely together over a long period of time. This submission attracted the label (from Mr Kinnear) of "malice by osmosis." However,

I do not understand Mr Spackman to be shrinking away from his need to prove his case against Mr Sherrington; he is however asking me to infer an animus which is common to those working closely together in a group over a prolonged period of time. I interpret the submission in that way and address it accordingly.

89. I am also asked to infer malice from the following specific matters set out in Mr Spackman's closing submissions:

    a. The deliberate inclusion in the Information presented to the magistrates in support of the application for a search warrant of prejudicial details which associated Mr Rudall with drug trafficking.

    b. The use of the s.8 PACE route to make the application for the warrant when the only lawful and proper route was via section 9. The object of selecting the s.8 route was to deny the Claimant the protection afforded by a hearing before a Circuit Judge on notice.

    c. The seizure of the Richards v Clarke file and decision to prosecute Wolfram II which was "*manufactured and motivated by matters unconnected with the proper pursuit of justice*."

    d. The delay in charging Mr Rudall which was "*indicative of an unnatural determination on the part of the Prosecution team to pursue the Claimant at all costs*" (paragraph 18(xviii). Mr Spackman submits that the delay speaks for itself and demonstrates the dogged intention of Mr Sherrington to pursue Mr Rudall at all costs.

90. It was also suggested by Mr Spackman in his written closing submissions that there had been a failure to disclose the document in these, civil, proceedings ("*either no copy of the document was retained or it has been deliberately withheld from disclosure in these proceedings*"), an argument which Mr Spackman sought to dilute in his oral submissions but which, for obvious and good reason, caused Mr Kinnear a degree of professional concern. The allegation has no foundation. It should not have been made. However, I put it to one side given that it irrelevant to the findings which I need to make.

The Defendant's Case

91. The Defendant's case is that Mr Sherrington is a straightforward and honest witness. Mr Kinnear submits that I should accept his evidence that he had an honest belief in the case against Mr Rudall and raises, rhetorically, the question of why a prosecutor of 30 or more years' track record with the CPS should embark upon such a dishonest project against a person whom he did not know and had never come across before in his professional or personal life.

92. Mr Kinnear accepted that the main focus of the case (on both the subjective and objective strands of the test) was TE/91 but reminded me of other evidence available to Mr Sherrington which pointed clearly in the direction of criminal involvement between the Claimant and Evans. There was, for example, a considerable email traffic between Evans (signing himself off as ghost or spook or "Don Evanso") and the Claimant when Evans was on the run in Spain; that email traffic was not consistent with a professional relationship between client and solicitor but was matey and familiar in tone (the Claimant signing himself off as "Lonely of Swansea" or "Desperate of Swansea" or "P x"); the

email traffic related to Evans' business dealings and property purchases; there was a witness statement from Mr Rudall's estranged wife which spoke of the Claimant's close involvement with Evans; the Claimant had been interviewed by the police and asked questions concerning Lifeclub which he had refused to answer. There was, Mr Kinnear submitted, a considerable circumstantial case against the Claimant which painted a compelling picture of Mr Rudall's involvement in crime.

93. Further Mr Kinnear submitted that TE/91 was not plainly inadmissible and that a reasonable prosecutor could legitimately form the view that the exhibit would be admitted as hearsay evidence of a business nature under s.117(1) Criminal Justice Act 2003. Mr Kinnear accepted that the evidence was fundamentally important in establishing that Lifeclub was a fraudulent enterprise and that there were no statements from those involved in the creation of the disc. His point was that, whilst there were arguments which could be made concerning the origin of the disc before the jury, the factors upon which the Claimant relied were not determinative of its admissibility or otherwise. He submitted that there was ample material bearing upon the circumstances of the CD Rom being produced which supported the Crown's case that it contained the Lifeclub accounts. This material included the Letter of Request of February 2003 and the letter enclosing the material in November 2003; the correlation between what was requested in the February ILOR and what was produced in November 2003. The data contained on TE/91 showed a list of transactions with an opening balance of zero and a closing balance close to zero. Although the Paritate Bank had closed in dubious circumstances there was no plausible reason why the bank itself should have wished to manipulate the data. Mr Kinnear accepted that there were problems with the documentation of the handling of the exhibit but those problems only became known at the time of the dismissal hearing in April 2013 and in any event were not the fault of the CPS (or of Counsel). He submits that the abject failure by SWP to maintain the integrity of the audit trail could not have been predicted. Both the reasonable prosecutor and Mr Sherrington had been entitled to assume that the exhibit had been handled in accordance with good practice.

94. Mr Kinnear submitted that the evidence of Mr Kelly QC was of crucial importance to my objective assessment of evidential adequacy. No critical allegations were made against Mr Kelly QC, whether of bad faith, negligence or breach of the Code. Mr Kelly QC was aware of all of the material factors impinging upon the admissibility of TE/91, save for the problems associated with continuity (of which he was not aware until the dismissal hearing). He was aware of the importance of the evidence to the case. Nonetheless his view was that the Code test was met, that being a test higher than the test that I should apply to establish the presence or absence of reasonable and probable cause. Mr Kinnear's submission was that Mr Kelly QC's evidence was the killer blow to the Claimant's case that there was no reasonable and probable cause.

95. As to the Claimant's case on malice, Mr Kinnear submits that I address the case on the basis that nothing short of evidence directly impinging upon Mr Sherrington's state of mind will suffice and that "malice by osmosis" is not sufficient. There is, he argues, no such direct evidence. As to those particular matters which Mr Spackman relies upon as suggestive of malice on Mr Sherrington's part, he submits that none stand up to close scrutiny.

Discussion: Reasonable and Probable Cause

96. The distillation of the case leaves me with three issues to determine: whether Mr Sherrington had an honest belief that exhibit TE/91 was prima facie admissible or (putting the same point in a slightly different way) whether Mr Sherrington knew that TE/91 was not plainly inadmissible. If I find that Mr Sherrington did not have an honest belief that TE/91 was prima facie admissible then that is an end of the issue of reasonable and probable cause. If I do find he had an honest belief then I must go on to consider whether in the light of the pleaded case, that belief was reasonable. If not, then I need consider whether Mr Sherrington was motivated by malice in charging Mr Rudall.

97. I remind myself that I must consider and analyse each of these elements separately, although inevitably there is overlap in the evidence and there are obvious points of contact between the three elements.

98. I consider first therefore the merits of the Claimant's case that Mr Sherrington did not honestly believe in the charge. That is, in the context of this case, that he did not honestly believe that exhibit TE/91 was prima facie admissible or that he knew that TE/91 was plainly inadmissible.

i) Limb One: Mr Sherrington's Honest Belief.

Mr Sherrington: general impression

99. It is obvious that, at the heart of this element of the case, is Mr Sherrington's honesty and integrity. I have found it helpful to stand back from the Claimant's case and draw together some of the threads of Mr Spackman's cross examination and see where they lead. In this context, I make the following observations:

    a. It is the Claimant's case that Mr Sherrington knew that he was likely to encounter a major problem at trial in relying on TE/91 and that he was "*hanging his hat on Foxley*" even though he knew that it would not "*get him out of these problems*". It must follow from this assertion that Mr Sherrington's internal file note of 11 September 2006 (in which he documented his research and his analysis of the application of *Foxley)* is a false document in which Mr Sherrington recorded an analysis of the evidential status of the banking material which he knew to be wrong. This was not expressly put to Mr Sherrington, although Mr Sherrington picked up the implication of Mr Spackman's suggestions to him ("*So what you're saying…I have looked at the material and maintained, created a note which I knew to be completely wrong and which I disagreed with, but put forward anyway… No it was my genuine view*").

    b. It must also follow that the file note was created by Mr Sherrington in order to put someone off the scent in the event of a review into his conduct of the prosecution at some point in the future. On the Claimant's case, this is the only sensible explanation for the file note: I can see no other point to the note.

    c. Although the main document in this category of self-serving documents is the file note of 11 September 2006, it also includes Mr Sherrington's Note to Counsel of 14 September 2006 (in which he refers to the application of *Foxley*) and his letter seeking the consent of the Latvian authorities of 2 March 2007 in which he recorded that "*during criminal proceedings it is possible to rely upon documentary evidence to prove the facts contained in the document without the*

need for witnesses to prove the document". Although as a matter of generality that statement is true, on the Claimant's case, Mr Sherrington knew that the general principle was of no application.

d. It is also part of the Claimant's case that Mr Sherrington deliberately misled the DCMP, throughout the course of its involvement in the case, most particularly in his charging decision papers on 23 January 2009 by not flagging up to the Panel the risks associated with the admissibility of TE/91.

e. Perhaps most serious of all is the allegation that Mr Sherrington was aware of the existence of a "second ILOR" which had led to the production of the material on 7 November 2003 in Latvia. It was put to Mr Sherrington that he knew that there was such a document and that he had either personally concealed it or been a party to its being concealed as he knew that the document would not provide him with the authority needed to use the evidence against Mr Rudall.

100. Knitting the elements together, on the Claimant's case, Mr Sherrington acted dishonestly over many years; he was deceitful (prepared to mislead the DCMP, the Court and the Latvian authorities) and cunning (creating a paper trail to cover his tracks in the event of questions being asked concerning his decision-making at some point I the future). It is conduct which, as Mr Rudall put it in his pleadings (albeit in the context of malice), demonstrates the utmost bad faith. Mr Sherrington was correct in interpreting the allegations (as he did) as ones which, if true, risked his livelihood, career and, possibly, his liberty. There is also a contradiction at the heart of the Claimant's case. If Mr Sherrington knew the key evidence against Mr Rudall to be inadmissible then the chances of a conviction were slim. He would have had to been either naïvely optimistic or grossly arrogant to believe that the point would not be raised by the defence and argued out at court. If, as Mr Spackman suggested, the hope was that Mr Rudall and Ms Richards would agree a set of Admissions so that the problem would disappear, Mr Sherrington was certainly taking a big risk.

101. Mr Kinnear submits that the case against Mr Sherrington is inherently improbable. I accept this point. At the time when the investigation into Mr Rudall's connection with Evans and Richards commenced, Mr Sherrington had been employed by the CPS for over 30 years, for much of that time with the fraud branch. There is no suggestion that Mr Sherrington knew Mr Rudall or knew of Mr Rudall before his name began to crop up during the investigation into AML and OCL and before he became linked with Ms Richards after her husband's death in 2000. It is intrinsically unlikely that Mr Sherrington should gamble everything (his career, his reputation and livelihood) by embarking upon a prolonged course of dishonesty and deceit when, as I have noted above, the chance of it resulting in a conviction (on the Claimant's case) must have been so slim and the personal and professional risk to himself so great. It makes little sense.

102. That said, I bear in mind that people do sometimes behave irrationally. They can become obsessed and behave completely out of character. I have therefore examined the evidence to see whether it points in the direction of an otherwise honest man behaving irrationally.

103. I set out my review of the evidence and my conclusions below.

104. I formed a preliminary impression of Mr Sherrington's general approach to his work from the large number of documents within the trial bundles which had been drafted by

him. Those documents included file review notes, conference notes (including a duplicate note if a note has been prepared by an assistant) and briefing documents. The documents are lengthy, detailed, methodical and at times repetitive. Even his file notes and briefing documents frequently start with a short scene-setting and reminder of the point in question. He would correct himself if he thought that he had made an error. Mr Sherrington described himself in his evidence as a "worrier," a description which is borne out by my reading of the documents in the trial bundle; for example, he took the opportunity to correct what he regarded as a mistake in his file note of 11 September 2006 (based on his reading of Stones, rather than Archbold) when he sent the note on to Counsel. Whether considering the correct route to follow in making the application for a search warrant, or his consideration of the expert evidence in Wolfram 1, it seems from the documents that if he was concerned by a point, he would return to it again and again. Although Mr Spackman submits that this quality was singularly lacking when it came to Mr Sherrington's examination of the admissibility of TE/91, there is another equally plausible explanation for this, which is that Mr Sherrington was satisfied with his analysis so there was nothing for him to worry about.

105. I found the three statements that Mr Sherrington prepared for the purpose of the application for a stay on the grounds of abuse to be potentially revealing. They each ran to over 40 pages and must have taken Mr Sherrington a very substantial time to prepare. The documents slavishly (and relentlessly) set out the chronology of the prosecution. I found them to be striking for two reasons.

    a. First, on their face, they were particularly conscientiously produced. They are long, not to say, indigestible and turgid. I accept that for the purpose of their production, Mr Sherrington consciously tried not to look at material that post-dated his departure from the case. The statement of 11 January 2013 acknowledges the delay in its production and provides the explanation that there had been a "*constant need to re-read and cross reference documents as each topic is dealt with and the need to look at the same document more than once from a different perspective*".

    b. Second, the documents are not particularly defensive. They contain the detail of the prosecution and the decision making. Although Mr Sherrington makes the point that there was no time-period when nothing was happening, there is very little in any of the statements which could be characterised as overtly defensive. Taken together, the statements amount to a matter of fact history of the case. When others might have taken the opportunity to mount a more vigorous defence of the prosecution, the case preparation and to justify the time spent in getting the case on for trial. Mr Sherrington did not do so. This is all the more surprising given that the application for a stay on the grounds of abuse was founded not just on delay but also on bad faith and manipulation of the process by the prosecution. Although the police were the main target for criticism, so too was Mr Sherrington.

106. Whilst it would be wrong to say that I formed the impression from the statements that Mr Sherrington was taking the application for the stay in his stride, there is a workmanlike quality to the statements which is not consistent with the Claimant's portrayal of him as someone personally and emotionally committed to the prosecution; nor of someone who, on the Claimant's case, may be on the brink of exposure as a dishonest prosecutor who had ridden roughshod over the Code.

107. This methodical and rather pedestrian approach which I detected from the 3 witness statements was reflected in his evidence to me. Mr Sherrington pointed out on several occasions what he had read and what he had not read to explain his difficulty in answering certain questions. He reminded me that, even for the purpose of the hearing before me, he had tried not to read too much of the material which had post-dated his leaving the case in August 2010. He came back to the topic of the further ILOR after a short adjournment to clarify his evidence on the point, having taken the opportunity to read some further material. He frequently went back to his original chronologies to orientate himself in the context of the topic under question. My impression was that he gave evidence in a business-like, slightly fussy, way.

108. I do not recognise Mr Spackman's characterisation of Mr Sherrington's evidence as "overly defensive and argumentative". He made appropriate concessions: for example, he never denied that TE/91 was fundamental to the success of the prosecution; he did not deny that he may have seen the words Viborka for Prok on the CD Rom (he just could not remember); he accepted that although he took into account advice from Counsel, ultimately, the decision to prosecute was his and his alone: when it was put to him that he was part of a team that was out to get Mr Rudall, he responded "*I can only answer for me. I was not out to get him."*

109. Nor do I share Mr Spackman's submission that Mr Sherrington's evidence was the "*exercise in self-justification*" which Mr Spackman submits it to have been. Over the course of the day and a half or so of his cross examination, he gave me every impression of being an honest and straightforward witness. He was quick to appreciate the truly serious nature of the allegations which were being made and their implications for him personally and professionally. It was put to him that he hoped to sidestep the problem of the admissibility of TE/91 by serving admissions which he hoped that the defence would agree, even though no evidence had been served upon which the defence could make those admissions. He responded "*Absolutely not. I am not suicidal*". When it was put to him that he had misled the DCMP by failing to highlight the difficulties posed by TE/91 because otherwise there would have been "huge damage to the reputation of the CPS" he responded "*Absolutely not.. So now in addition to all of the other things which I would have risked, I lie and try and prosecute somebody in order to protect the reputation of the service? No.*" When it was put to him that he knew that he did not have the evidence but had nonetheless gone on to prosecute Mr Rudall regardless and in so doing was acting dishonestly and maliciously, he responded "*Absolutely not. I had the evidence. I had put everybody to thousands of hours of work. You're suggesting to me that I would risk not only my job, my career, my liberty and my family's welfare for the sake of one defendant in one case? Rubbish*."

110. My general impression of Mr Sherrington is therefore completely at odds with the picture painted by the Claimant's case. There is nothing which I draw from my review of the documents or the manner in which he gave his evidence at trial which points me in the direction of him being anything other than an honest and sincere, if slightly perplexed, man.

The Provenance Issue

111. Mr Sherrington acknowledged to me that TE/91 was fundamental to a successful prosecution: he accepted that, if TE/91 were to be ruled out, the Crown would have no

case. Mr Sherrington was not cross examined closely on his legal analysis, but Mr Spackman put to him in cross examination that the mass of data contained on TE/91 was "*a million miles away*" from the sort of documentation that the Court held in *Foxley* would speak for itself. He stood by his analysis as recorded in his file note of 11 September 2006. He told me that it represented his genuine and honest opinion both at the time when it was created, and thereafter, otherwise he would not have written it. He said that when he prepared the note, he had read the case of *Foxley* and he had genuinely considered it to be on the point. Mr Sherrington said that he only very rarely was given the sort of material that Mr Spackman was suggesting to him he should have received: sometimes he was given letters from foreign jurisdictions substantiating the data which was produced but more often than not he only got a certificate. He told me that he was surprised and shocked to learn of the outcome of the dismissal application.

112. The file note bears many similarities with other documents which Mr Sherrington produced. It starts with scene setting and moves on to set out his research and then his conclusion. The note is not a formal document; it has something of the flavour of an aide memoire, prepared by Mr Sherrington to capture his thoughts at that time. There is nothing in the form or content of the document which suggests it to be a false document, contrived for the purpose of putting someone tasked with reviewing the file in the future off the scent. It might be said, that if that had been its purpose, Mr Sherrington might have done a rather more comprehensive and authoritative job (not, for example, musing on the significance of the case of *Boo* and recording his intention of tracking it down via the CPS library). I also find it revealing that Mr Sherrington sent the note on to Counsel. Even if I were to take into account the Claimant's case (which I reject, see below) that Mr Sherrington was only part of a team effort to prevent Mr Rudall from returning to practise as a solicitor and that Counsel were part of that team, it still strikes me as illogical and inconsistent with the Claimant's case that the document was false, that Mr Sherrington should send to Counsel a record of his analysis of the law which he knew to be wrong. At very least, there was a risk that the note might have sparked a response that his analysis was wrong or doubtful. Although Mr Taylor QC admitted in his evidence to me that before the topic was raised with him by Mr Sherrington he had not been familiar with the case of *Foxley*, I can see no reason why Mr Sherrington would have known this. If the note had been drafted for the self-serving purpose of track covering, then there would be no need to send it to Counsel: Mr Sherrington could have simply drafted it and put it in the file to be uncovered in years to come by whoever was tasked with reviewing the file.

113. I find nothing inconsistent between the analysis in the file note that TE/91 was admissible and the contents of other documents in the trial bundles. For example, Mr Sherrington's conference note of 14 September 2006 (in which he recorded that there were bound to be objections to the banking material, if only tactical) is not inconsistent with his view that the material was admissible. Viewed in context, that section of the conference note is referring to the need to make sure that the further letters of request seeking permission to rely upon the Darwin material covered off the possibility that further statements may be needed in due course. Nor is the file note inconsistent with Mr Sherrington's comment in the conference note of 1 May 2007 that there would be "*a need for some further statements*". When asked about those further statements in evidence, Mr Sherrington accepted that it was not referring to statements from the Paritate Bank and it seems clear to me that the statements he was referring to were from police officers, exhibiting the letters of request and material produced, similar to those obtained from DC Jones and FI Eynon in 2010. Mr Sherrington was asked about the reference to "*starting from scratch*"

in the conference of 1 and 2 July 2007 but again viewed in the context of the conference note as a whole, he is referring to the need for expert forensic accountancy evidence geared towards the prosecution of Mr Rudall and Ms Richards, rather than relying upon the expert evidence which had been obtained for the confiscation proceedings.

114. Finally on this point, Mr Sherrington made it clear to the DCMP in his charging note that the evidence which had been assembled consisted of "*a huge amount of material not in the usual format of banking records which took a long time to analyse*" and that "*no witness statements were provided when the original material was obtained, only accounts..the best we received were some certificates of authenticity and authorisations*." I do not see how Mr Sherrington could have laid out in more unambiguous terms what he had by way of provenance evidence and what he did not have: his charging note is absolutely clear. Mr Spackman's only answer to this point is to speculate that the DCMP membership may not have read the material given to it by Mr Sherrington. This is a bad point. Mr Sherrington could not have known one way or the other whether the DCMP would have skipped over his charging note or read it in detail. Mr Spackman put to him that he should have spelt out the implications of the limits of the evidence and the likely range of objections – even tactical objections - which the prosecution would confront. Mr Sherrington's response was "*we are talking about the DPP, Jenny Goode, the chief crown prosecutor and the principal legal advisor. That was the destination for this material*" and "*I didn't think that I had to – needed to – explain the law of hearsay to them*". This response is compelling.

115. Taking all of these points into account, I do not find that there is any cogent evidence, or even a tell-tale sign, that Mr Sherrington's belief that the exhibit TE/91 was admissible hearsay evidence was dishonest.

Second Letter of Request

116. Mr Sherrington was not in Riga at the time when the Latvian Authorities produced TE/91, nor was he aware of the additional information contained in DC Jones further statement of 12 March 2013 which went into further detail concerning the events in Riga. All that Mr Sherrington had, around the time of charging was the exhibits, including the Latvian covering letter, DC Jones and FI Eynon's statements and DC Jones' pocket book.

117. This is a topic in which Mr Spackman's closing submissions again veer off track. Having pinned his colours to Mr Sherrington not only knowing of the existence of a further ILOR but also having taken steps to suppress the document, Mr Spackman's closing submissions assert that "*there were further fundamental procedural defects in the method by which TE/91 was obtained which Mr Sherrington should have been aware of but of which he was apparently unaware*" and "*the potential defect in the evidence gathering process was apparently never considere*d." I make the point again that I deal with the issues raised in this case on the basis of the pleaded case as fleshed out at trial.

118. Mr Sherrington told me that he believed that TE/91 and the surrounding material had been produced in response to the ILOR dated 18 February 2003. It was not clear to me from his evidence whether he had, at the time, paid close attention to the reference in DC Jones' notebook to the "further letter" as he wondered, on reflection, whether that further letter was the undated November ILOR. He consistently told me that, when he had reviewed the ILORs for the purpose of obtaining consent from the Latvian authority to use the Darwin material, he had been aware of only three ILORs: those of 18 February

2003, November 2003 and another written in 2005. It was put to him that he had not sought consent to use material obtained by an additional ILOR: "*my answer is simple, those are the letters of request which I looked at with respect to the material obtained and set out in FI Eynon's statement"* and "*as far as I am aware those are the only letters of request*". It was put to him that the second ILOR had not been produced by him because he was aware that the document did not provide him with the authority he needed to use the evidence against Mr Rudell. Mr Sherrington's response was again compelling: "*all the effort, all the hours, is based on fact that we've hidden the letter of request, knowing that that was completely wrong. Utter rubbish.*"

119. I accept Mr Sherrington's evidence that he did not know of the existence of a further relevant letter of request. I accept his evidence that he has not, during the course of the prosecution, concealed or destroyed evidence. Setting aside my general impression of him as an honest witness, I can see no logical reason why, if he had been aware of the existence of a further letter of request, he would not have disclosed it. It was put to Mr Sherrington that his reason for concealing the letter was because it would have established that the Latvian material had been obtained unlawfully or (as it was put in Mr Spackman's closing submissions) that "*the process by which the Latvian CD was obtained was flawed to such an extent that its admissibility was at best extremely uncertain*". However, no coherent case has been advanced by Mr Spackman, either in his cross examination of Mr Sherrington or in his closing submissions, explaining why the production would have been unlawful in those circumstances. Mr Spackman appeared in cross examination to be setting out a case that the material would have been unlawfully produced on the basis that (at the time) letters of request would have had to have been despatched via the UK Central Authority but there is no evidence that a second ILOR, if one existed, was not sent to the UKCA as well as to the Latvian authorities. More importantly, if Mr Sherrington had been aware that there was a procedural flaw in the obtaining of the material, it would have been consistent with his methodical practice to have addressed the point and taken steps to remedy the defect by asking for the material again via an appropriate and lawful route. There was no evidence before me that material obtained unlawfully in the context of one investigation (Operation Darwin), could not have been obtained again and lawfully as part of a separate investigation (Operation Wolfram). Although in his closing submissions, Mr Spackman submits that the Bank had closed and so any steps taken to rectify the problems would have been impossible, this makes no sense: the Bank had already closed by November 2003 and yet was still "in existence" at least to the extent that it had a General Manager (Mr Olegs Chernyshen – whom DC Jones, in his pocket notebook recorded meeting) and premises. In any event, the letters of request and consent are directed, not to the Bank itself, but to the Latvian Judicial Authorities.

120. For the reasons I set out above, I reject the Claimant's case that Mr Sherrington knew of the existence of a second or further ILOR which he then concealed or otherwise suppressed.

The Continuity Issue

121. HHJ Parry's conclusions concerning the failings by the police in its handling of TE/91 are strongly worded. It was these failings which had led to the "*unedifying spectacle*" of retired police officers scuttling around during the course of the dismissal hearing

attempting to document their handling of the exhibit. The police handling of the exhibit was described by HHJ Parry to have been "*lackadaisical and reckless*".

122. Mr Sherrington was asked few questions concerning his knowledge of these defects. To the extent that he was asked questions on the topic, he denied being aware of the problem. I accept his evidence. From his first grappling with the issue of the mechanics of getting TE/91 before the jury, he contemplated statements being provided by DC Jones and FI Eynon exhibiting the CD Rom and other material. He returned to the point on a number of occasions, including his charging note to the DCMP. Had he been aware that there had been irregularities in the handling and audit of the exhibit, it would have been consistent with his practice to have addressed them. As Mr Beer put the point in his opening and as adopted by Mr Kinnear, the best evidence that no one (including Mr Sherrington) knew of the defects in the logging of the handling of the exhibit was the depressing backdrop to the dismissal hearing of officers attempting to reconstruct the audit trail on the hoof.

Viborka for Prok

123. Mr Sherrington did not deny that he had seen the words Viborka for Prok which appear on the computer screen when the CD Rom was opened. Interpreting his evidence as a whole on the point, he was, in 2018, simply unable to say one way or another whether at the time when he was working on the case he had seen it but that if he had seen it, he did not know what it meant.

124. I accept his evidence. Indeed Mr Spackman, in his closing submissions appears to accept the evidence also, expressing only surprise that he was not made aware of it (although by whom, Mr Spackman does not mention). Again, if Mr Sherrington had been aware of the possibility that the Lifeclub banking accounts were not complete, I see no reason why he would not have made a further request of the Latvian authorities for the full set of accounts.

Lack of Consent

125. It has been a consistent theme of the Claimant's case that Mr Sherrington never had the necessary consent from the Latvian authorities to use the material which had been obtained in November 2003. Although not spelt out in the pleading, I had always understood his case on this point to be part and parcel of his case on the alleged second ILOR and based on Mr Sherrington's failure to list in his letter seeking consent (2 March 2007) the "second ILOR." See for example, the following exchange between Mr Spackman and Mr Sherrington (referring to the contents of the 2 March 2007 letter): "*you're not seeking permission in relation to any material that you might have received from Latvia from some other source*" to which Mr Sherrington's response was that "*my answer is simple. Those are the letters of request which I looked at and those are the only letters of request to Latvia that I was aware of*". Given that I have already found that Mr Sherrington did not know of the existence of a second ILOR, the case on consent on this basis also falls away.

126. In his written closing submissions however, Mr Spackman raises a separate point, never put to Mr Sherrington, that the letter from the Latvian authorities giving consent "*carries no stamp or signature and it does not bear the coat of arms of the Latvian judicial*

authority." I do not know where this takes the Claimant or how, if at all, it ties in which his case on consent as put at trial. In any event though, as it is a new point, not pleaded, I do not address it.

Conclusion on Honest Belief

127. This deals with the relevant matters concerning Mr Sherrington's honest belief. I conclude without hesitation that Mr Sherrington had an honest belief in the charge. I find nothing in the evidence which points in another direction. I therefore move on to consider whether his honest belief was reasonable by the standards of the reasonable and conscientious prosecutor.

ii) Limb Two: Objective Sufficiency.

128. Section 117 Criminal Justice Act 2003 ("CJA 2003") provides an exception to the hearsay rule in respect of "business and other" documents. Sub-section (1) sets out the exception and sub-section (2) the qualifying requirements that the document was created or received by a person in the course of trade, business, profession or other occupation; that the person who supplied the information had personal knowledge of the matters dealt with and that each other person (if any) in the transmission chain from the supplier of the information to the creator of the document had also been acting in the course of a trade or business. Sub-sections (6) and (7) provide that otherwise admissible hearsay evidence may be excluded at the court's direction on grounds of doubtful reliability as to contents, the source of the information contained in the statement, the circumstances in which the information was supplied, or received, or the statement created or received.

129. Mr Kinnear submits that in addressing the question of objective sufficiency of evidence for the purpose of determining whether Mr Sherrington's honest belief in the charge was reasonable, I should limit my examination to those issues which have a bearing upon the admissibility of TE/91 under s.117(1) CJA 2003. Broadly speaking those issues are the "provenance issues". He submits that there is no need for me to consider wider issues relevant to the reliability of the exhibit under s.117(6) which, whilst potentially relevant to the Code evidential limb, are not relevant to the narrower question of the prima facie admissibility of the exhibit. I agree with him. For the reasons which I set out below, I do not consider that the reasonable prosecutor (in whose shoes I stand) would have sufficient doubt over the reliability of the exhibit to engage in the exercise and analysis that I refer to in paragraph 80 above. Out of deference to Mr Spackman's arguments, and in case I am wrong on the point, I address Mr Spackman's full argument in any event.

130. I deal first therefore with the question of whether the exhibit was admissible under s.117(1).

131. In *Foxley*, the Court of Appeal considered the effect of the absence of evidence from those persons who had created the documents: in that case the documents were credit notes, invoices and credit invoices purporting to emanate from foreign suppliers of ordinance. The only evidence adduced by the Crown in that case, like the present, was from police officers who had obtained the material from the appropriate foreign authority who had in turn seized it from the companies in question. There was no evidence bearing upon the qualifying criteria in sub-section (2). The Court concluded that, although it might be desirable to have evidence bearing upon the different limbs of s.117(2) the Court was entitled to draw inferences from the documents themselves, and from the

method or route by which the documents had been produced, in the absence of evidence detailing the circumstances of the production and obtaining of the material. It did so on the basis that Parliament had anticipated that the courts would draw inferences as to the personal knowledge of the person supplying the information of the matters dealt with.

132. Mr Spackman's submission on *Foxley* drills down into two main points. First, the CD Rom contained spreadsheets detailing a mass of transactional data which bore little resemblance to bank accounts. Therefore, he argues, in the absence of a statement from the person who downloaded the material the spreadsheets did not speak for themselves. Given the way in which the transactions were laid out, he submits that it was not even clear that the material contained on the disc was a bank account record, let alone the bank account relating to Lifeclub. Second, he submits that it was known that the Paritate Bank had closed down in dubious circumstances and so the source of the information was unknown and doubtful.

133. I reject Mr Spackman's submission. Assessed by reference to the standard of the reasonable prosecutor at the time of charge, I do not find that the exhibit was "plainly inadmissible" under s.117(1) CJA 2003. I reach this view for the following reasons.

134. I have looked at the material contained on the CD Rom (as it appears when opened on the computer). It contains three files of transactions, one bookmarked Lifeclub, the other GFS and the third PBS. The accounts record a series of credits and debits from the account. Many of the transactions relate to Evans. The transactions include transactions by the 13 "sample" people who were known to be victims of the Lifeclub fraud. Many of the payments are made by way of Lifeclub Maestro cards which was known to be one of the means by which payments were made. My conclusion, based on the data contained on the disc alone, is that it is a bank account record. This is not just one of a reasonable range of conclusions, it is the obvious conclusion (and no plausible alternative was advanced by Mr Spackman). I also find that the reasonable prosecutor would be satisfied to the required standard that the bank account was the Lifeclub bank account. Mr Kinnear did not address me upon all of those matters which Mr Kelly QC raised in his argument before HHJ Parry and which found their way into the ruling (the matching bank account numbers, the request for the online banking facility) but I find that, just on the basis of the transactions recorded, the bank account was likely to relate to Lifeclub.

135. I also accept Mr Kinnear's submission that it is reasonable to consider the nature of the data on the CD Rom and to assess it in conjunction with relevant surrounding material: the Court of Appeal in *Foxley* stated that it was legitimate to view the material and the method or route by which the material had been obtained. There is a volume of other supporting information bearing on the nature of the data. DC Jones recorded in his pocketbook receiving the Lifeclub accounts and, although it is possible that he simply made that assumption, it is equally possible that that was what he was told. I also accept Mr Kinnear's point that the material recovered in November 2003 by DC Jones and FI Eynon, and later exhibited by FI Eynon, matches broadly that which was requested in February 2003 ILOR. The bank accounts for PCB and GFS were provided. The other material exhibited by FI Eynon was consistent with what the February ILOR requested.

136. I do not accept that the fact that the data emanated from a bank which had closed down in "*dubious circumstances*" has a relevant bearing on the admissibility of the data. As Mr Kinnear has submitted, even if the Bank had been closed down by the Latvian regulators because it had become the banking house of choice for criminals such as Evans and Richards, without wild speculation, I see no plausible reason why the Bank itself

should supply material other than that which had been requested. I deal with Mr Spackman's other argument in this context that, as an internet banking facility, Evans or Richards may have been able to conceal the true nature of the transactions. Mr Spackman relies here upon a comment made by Dr Djanogly (the forensic accountant expert who reported for the Crown in December 2012) which suggests that the entries were open to manipulation by Evans. I do not see how this argument advances Mr Spackman's case: even taking into account that possibility, Dr Djanogly still considered that the bank accounts demonstrated the hallmarks of a Ponzi scheme. But even if there is substance in Mr Spackman's argument, it does not interfere with my finding that the reasonable prosecutor would be entitled to conclude that the data was prima facie admissible under s.117(1) on the basis that "*it spoke for itself*" in a *Foxley* sense.

137. I now deal with Mr Spackman's arguments which go to the reliability of the exhibit and its potential exclusion under s.117(6). I do not address each point which was made in cross examination but focus upon the issues relied upon in Mr Spackman's closing submissions.

138. I have already considered the allegation that Mr Sherrington was aware of, and concealed, a second ILOR but the topic arises again in connection with my assessment of the sufficiency of evidence under the objective strand of the test for reasonable and probable cause. I bear in mind that, at the time of charge, the reasonable prosecutor would not have the benefit of those statements from DC Jones and FI Eynon of 2013 in which they add some flesh to their accounts of what took place in Latvia in 2003.

139. Mr Kinnear described the issue of the second ILOR as being little more than a distraction. He urged me to bring a "real world" sense to the topic. His point is that, that which was requested by the February 2003 ILOR was what was obtained by the men in November 2003. Mr Spackman argues, and invites me to find, that there was a second letter and that it led to the production of the material. He relies upon DC Jones pocket book reference to "an additional request" and the statements of the two officers in 2010 which referred to an additional request. I find that the reasonable prosecutor addressing the circumstances of the production of the material in November 2003 would conclude that the material had been produced in response to the ILOR of February 2003. I reach this view for the very simple reason that Mr Kinnear submits: what was received was what had been requested in that letter. If the reasonable prosecutor had, at the time of charge or running up to charge, focussed upon the reference to an additional or second letter in DC Jones' pocket notebook, the natural inference would be that the second letter was the undated "November 2003" letter which had been despatched to Latvia at the time when the men were there in the hope that, whilst in Latvia, that material (relating to another person and another bank account) could be collected at the same time.

140. There were considerable irregularities in the handling and audit trail of the exhibit following its production to DC Jones and FI Eynon in November 2003. Those irregularities are described in detail in the Parry ruling. However, just as I have found that Mr Sherrington was not aware of those deficiencies, nor do I find that a reasonable prosecutor would have been aware of them. The reasonable prosecutor was entitled to assume that the police would do their job properly by labelling the exhibit, by maintaining a log of its use, keeping an audit trail of its being copied and ensuring that its integrity was not compromised. Ms Jenkins noted on 17 May 2013 that "*in a case of the size and history of Op Wolfram there is a very close working with the investigation team and a degree of trust and professionalism is implied."* It was not part of the Claimant's case that Mr Sherrington (and by implication, the reasonable prosecutor) was

under a duty to check that the police were doing their job in accordance with good practice and this was not put to him in cross examination. Although an application was made to amend the pleadings on the last day of trial to raise the allegation, the allegation was directed at Mr Taylor QC who it was submitted was under a duty to check that the police were handling the exhibit in accordance with good practice. As it was, I refused that application on the basis that by that stage (on the last day of trial) it would be unfair to the defence. In any event, even had I allowed the application, it would not have assisted Mr Spackman's case against Mr Sherrington.

141. The CD Rom bore the words Viborka for Prok meaning "excerpt" from this, it is said, the reasonable prosecutor would appreciate that the disc did not contain the entirety of the Lifeclub bank account. There is nothing in this point. Even if an interested prosecutor had taken the trouble of finding out what the words meant, the date span of the Lifeclub material on the disc (which coincided with the "life" of the company) and the size of the opening and closing balances would remove any concern that the full records had not been produced.

Successor Counsel

142. I deal finally under this topic with what Mr Kinnear submits is the fatal blow to the Claimant's case on reasonable and probable cause. He argues that the fact that Mr Kelly QC and Ms Bex (against whom there are no allegations of bad faith, negligence or failure to adhere to the Code) concluded that the evidence against Mr Rudall and Ms Richards satisfied the Code test is determinative of my ruling on this issue.

143. Broken down, his argument is as follows:

a. that Mr Kelly QC, as a specialist criminal silk with experience in handling complex financial charges, was more than adequately qualified to advise Mr Lee on the merits of the case against Mr Rudall and Ms Richards.

b. Although Mr Kelly QC came into the case late in the day (in October/November 2012) he was aware of the absence of provenance statements and was asked to advise upon this aspect of the case by Mr Lee in the light of the then shared understanding that no provenance statements would be obtained from Latvia ("*it was made clear that this was all we were going to get and told that we could get no more*").

c. He advised that, in the absence of provenance statements he could not guarantee TE/91 being admitted in evidence but set out the basis upon which he would argue that it was admissible (either not hearsay, hearsay but admissible under s.114 CJA 2003, or admissible via s.117). He then argued the point before HHJ Parry in a more than token fashion (as I judge it from the ruling).

d. Mr Kelly QC told me that he considered that the evidence was admissible: that the application of *Foxley*, in practice, involved not simply looking at the documents produced to see if they "spoke for themselves" but also surrounding material. In his opinion, the absence of provenance statements, so far as he was concerned, did not mean that there was "*no case or even a weak case*."

e. His view was that the Code test was met. It was put to him that he was under pressure, having come into what had been an expensive case late and had *"no*

choice but to plough on in difficult circumstances". Mr Kelly QC (correctly) interpreted the question as a challenge that he had not observed and applied the Code test, a challenge which he rejected. He said that the Code was adhered to, "*in my view TE/91 was admissible*".

f. Mr Kelly QC told me that he was not aware of the problem with continuity which only raised its head during the course of the dismissal hearing. He was not self-critical in this regard. He told me that he had assumed that the chain of handling had been undertaken in accordance with good practice and that he considered that he had been entitled to take that view. He did not consider that it was part of his job to check that the police were doing their job properly. I accept his evidence on the point, not least as it is consistent with the terms of the Advice which he wrote on the subject of a possible voluntary bill.

144. Mr Spackman has no real answer to the difficulties which Mr Kelly QC's evidence poses to his case. He notes the difference in approach to TE/91 by Mr Kelly QC (who raises the issue at his first conference) compared with that of Mr Sherrington who appears to have addressed it briefly in 2006 and never re-visited the analysis. He makes the observation that a comment made by Mr Kelly QC in one of the conferences that the Crown was going to have "*a crack at it*" (a crack at prosecuting Mr Rudall and Ms Richards) hardly amounted to a ringing endorsement of the merits of the prosecution; nor was his statement that he could not guarantee the admissibility of the disc. On the first point, however, Mr Kelly QC explained (and I accept) that the context of the conference was his frustration at the threat that funding would not be available to permit DC Grey (who had been the officer in the case) from continuing his role in the case post-retirement. As to his second point, he said that, as Counsel, he was never in the habit of guaranteeing anything. I accept this explanation. It has more than the ring of truth about it.

145. Mr Spackman's only refuge from the full force of Mr Kelly QC's evidence was to suggest to me in closing that Mr Kelly QC was in reality "*impaled on the horns of a dilemma*" For Mr Kelly QC to have "*pulled the plug*" (as he described it) on the case and discontinued the prosecution would have led to "*wide ranging repercussions given the nature and history of the case*". Mr Spackman concludes in this way: " *to the extent necessary therefore it is alleged that Mr Kelly QC and Ms Bex were in breach of the Prosecutor's Code but in reality they were put in an invidious position in the first place… although it is submitted he was in breach of the Code, such a breach was absurdly minor compared to the breach committed prior to the issue of proceedings*".

146. I set aside for one moment that Mr Kelly QC denied that he had breached the Code and pursued a case in which he did not have the necessary degree of confidence. Mr Spackman's other problem here is that no breach of the Code is pleaded in the Re-Amended Particulars of Claim. At the pre-trial review, I had sought clarity from Mr Spackman on his case against Mr Kelly QC and he confirmed in clear terms (as reflected in the Order which I made) that he did not assert bad faith on the part of Mr Kelly QC (or Ms Bex). I accept Mr Kinnear's contention that an allegation against Crown Counsel that he (or she) breached the Code amounts to an allegation of bad faith. Further, although there is a reference in the Re-Amended Particulars of Claim to "*the prosecution continuing in breach of the Code*" this was clarified by the Claimant's Further and Better Particulars to be referring to "the prosecutor" that is (at least until August 2012) Mr Sherrington and not Mr Kelly QC. His case in closing is therefore not only not pleaded

but at variance with his case as confirmed to me at the PTR. It is no answer to the issue to suggest, as Mr Spackman does, that although it was a breach of the Code, it was only a very small one given the mitigating circumstances. As Mr Kelly QC observed: a breach is a breach.

147. It is against this background therefore that I address Mr Kinnear's point that the Kelly evidence is the coup de grace to this element of the claim. I observe that Mr Kelly QC was not called as an expert (nor could he be, given his involvement in the case) but I find I am able treat his evidence as coming from someone against whom there is no suggestion that he was not doing his job properly. As such it has considerable value. I am satisfied that he considered the relevant problems concerning TE/91. I accept that he genuinely believed that it was admissible (indeed sufficient to meet the higher Code test) as opposed to plainly inadmissible. I do not accept that Mr Kelly QC would have felt pressured to "*plough on*" given his late arrival to an expensive long-running case. Mr Kelly QC was no shrinking violet. He struck me as a robust lawyer who would not have had a scrap of difficulty in telling Mr Lee that he thought the case was going nowhere, had that been his view. I do not go so far as to express the view that Mr Kelly QC's evidence is determinative of the issue of the objective sufficiency of evidence. I have undertaken my own assessment of the issue. But having done so, Mr Kelly QC's evidence provides compelling support.

Conclusion on Objective Sufficiency of Evidence

148. I am against Mr Spackman. I find that Mr Sherrington's honest belief was reasonable. I am conscious that my conclusion may differ from that of HHJ Parry but remind myself that the test for a dismissal application under s.6 Criminal Justice Act 1987 is not the existence of a prima facie case, but whether the evidence is sufficient for the jury to convict the defendant. The test is thus different and higher than that which I must apply. HHJ Parry ruling is not, I add, binding on me,

149. Having made the findings of fact above, it follows that I am against Mr Spackman on the absence of reasonable and probable cause. As such, there is no need for me to consider malice. I do so in any event, not only in case I am wrong in my analysis of reasonable and probable cause, but in order to see whether there may be anything thrown up by my examination of the topic which causes me to review critically my judgment on Mr Sherrington's honesty and integrity.

Discussion: Malice

150. The case naturally falls to be considered under 4 headings which I draw from Mr Spackman's closing submissions. First, the extent to which I can infer malice on the part of Mr Sherrington from comments made by Mr Taylor QC and Mr Essex Williams. Second, the circumstances surrounding the obtaining of the search warrant in 2002. Third, the decision to prosecute Wolfram II. Fourth, the continuation of the prosecution of Wolfram I and the delay in bringing that case to charge. I deal with the points in turn.

Statements Made by Mr Taylor QC and Mr Essex Williams

151. I start by making two general observations concerning the relevance of the statements made by Mr Taylor QC and Mr Essex Williams upon which the Claimant relies.

152. First, the case against Counsel is only relevant to the extent that it may shed light on Mr Sherrington's motivation. Even if I were to take the Claimant's case at its highest and find that Mr Taylor QC and Mr Essex Williams were motivated by spite, ill will and/or a desire to prevent the Claimant from practising, this would be irrelevant unless I were to also conclude that there was evidence that Mr Sherrington was infected by that malicious intention or shared that malicious intention.

153. I am against Mr Spackman on this point for the following reasons:

    a. there is no evidence before me, either in the documents or in the oral evidence, which points clearly (or at all) in the direction of Mr Sherrington having been improperly influenced by Counsel. The extent of Mr Spackman's submission is that I should infer that Mr Sherrington was influenced by Mr Taylor QC and Mr Essex Williams. He invites me to keep my eyes open to the "*reality of the situation that Counsel was heavily involved in all aspects of the case from the start*" and urges me not to ignore the "*plain and obvious reality of this case*" that Mr Sherrington was part of a team who was influenced, possibly even sub-consciously, by those around him. His closing submission however points to nothing in the evidence that that indicates that Mr Sherrington was, in fact, improperly influenced.

    b. The Claimant's case relies heavily upon the statement made by Mr Taylor QC in his last Advice (October 2012) when, in the context of his withdrawal from the case, he explained that he was involved in all the decision-making. However, I find there is nothing unusual, let alone sinister, in this. Counsel are frequently involved in decision-making: debating issues with solicitors which arise in the context of difficult decision-making. Mr Taylor QC explained that his reason for withdrawing from the case was because bad faith was being alleged and because he foresaw that he, and Mr Sherrington, might have to give evidence on decision-making "*along the way*". As he put it: "*Decisions, as will be appreciated in large cases are taken after lots of discussion between counsel and solicitors and so on … And that's how it worked*." Mr Taylor QC was here saying no more than he was involved in the decision-making: not that he was the one making the decisions. I do not find, as submitted by Mr Spackman, that I can infer from Mr Taylor QC's statement that the usual demarcation between Counsel and solicitor was lost or that, in some way Mr Sherrington's motivation for bringing the prosecution had been subverted (consciously or sub-consciously) or that I can infer that Mr Sherrington was influenced by Mr Taylor QC's thoughts and views, other than in a professional way.

    c. I accept Mr Spackman's point that this was a long-running investigation in which Counsel played a significant role. There were a number of long conferences in Clydach lasting over a period of days (largely though Mr Sherrington said because he was based in York and it made sense for him to deal with the issues in the case in a solid block of time). However, those features of the investigation do not without more suggest that Mr Sherrington should be imputed with the same set of feelings, opinions and motivations as other members of the so-called "prosecution team." When it was put to him that the

effect of the intensity of contact with Counsel was such that his decisions were "*heavily influenced by others*", Mr Sherrington responded "*My decision was my decision. I took on board everybody's views. That included officers and counsel*." I accept his evidence. It would have been easier for him in some ways to have tried to share the blame for a prosecution which (whatever my findings in this litigation) came to a crashing halt in April 2013. He did not do so, instead taking responsibility for the decisions made, including the decision to prosecute. This is, I find, another marker of his honesty and integrity.

154. The second observation is that I am not satisfied that a wish to prevent a person practising as a solicitor is necessarily an improper motive for bringing a prosecution. As Mr Kinnear submitted to me, viewed in proper context and taking the Claimant's case at its highest, all that Counsel appeared to be saying was that in their view Mr Rudall was dishonest and therefore should not be occupying that position of trust which a solicitor enjoys. It seems to me that only if I were to find that their predominant motive was to prevent Mr Rudall from practising (for reasons other than an underlying belief in his dishonesty) could I conclude that the motivation was malicious and improper.

155. I set out my views on Mr Taylor QC and Mr Essex Williams below. Criticisms can be made of both. Mr Taylor QC was long-winded and lacking in focus. Mr Essex Williams unreconstructed and inappropriate in the views which he expressed of Ms Richards and his comments concerning Mr Rudall. However, I can deal with the case against them relatively briefly given my finding that, whatever their motives, there is no evidence that Mr Sherrington shared their feelings or was infected by their malice and spite.

156. Mr Spackman submits that there is abundant evidence of the true motivation behind the prosecution from the various statements of Counsel. In fact, he relies upon a few statements by Counsel in which they express the view that the Claimant should not be practising as a solicitor. Mr Essex Williams on 22 March 2003 wrote in an Advice "*as has been said on many occasions, he must be stopped practising*;" that of Mr Taylor QC who explained to Mr Barry Maine of the Law Society on 13 May 2003 "*what concerns us is that PR is still in practice*"; that of Mr Taylor QC on 4 February 2004 who recorded in an Advice "*the police are in possession of information concerning the behaviour of a man in private practice as a solicitor. Members of the public routinely ask him to deal with their money*"; and finally, Mr Taylor QC's statement of 7 August 2006 in his case management plan "*I have no doubt that PR is a bent solicitor who should not be in practice.*"

157. I address Mr Spackman's headline points only. I pause to note that the tiny handful of statements above pale into insignificance in comparison with the large volume of material generated by Mr Taylor QC and Mr Essex Williams. On this basis alone, it would be hard to draw any useful conclusions from the statements. The statements should also be placed in their relevant context. For example, the meeting of the 3 May 2003, attended by Mr Mayne of the Law Society fraud team, focussed upon what, if anything, the Law Society could do in connection with a solicitor who was the subject of a criminal investigation and who was still practising. There was a discussion about what material could be shared with the Law Society and what steps it could take without prejudicing the criminal investigation. I find nothing objectionable or even particularly surprising about such an interest. Mr Taylor QC explained that the impetus for his Advice of 4 February 2004 was his knowledge of Mr Rudall's connection with Evans whilst a fugitive, the possibility that the Claimant may have been considering moving to Spain (to be with Evans) and the suggestion of an element of financial dependence by Rudall

on Evans. There is no doubt that Mr Taylor QC considered Mr Rudall to be dishonest. His reference to Mr Rudall being "bent" was inappropriate. However, I find nothing in these statements or in the others upon which Mr Spackman places reliance which suggest to me that the motivation for the prosecution was a desire to stop Mr Rudall from continuing to practice as a solicitor or that for some reason Mr Taylor QC was motivated by general ill-will and spite. It seems to me to be plain that Mr Taylor QC's interest in the prosecution was because, on the basis of the information available to him, he considered the prosecution to be justified.

158. I need to refer to two further documents from Mr Taylor QC which assumed an importance which they did not justify at trial:

a. the first was the subject of a successful application to amend the pleadings at the PTR and relates to an email of July 2012 from Mr Taylor QC (to his junior, Mr Heath Edwards) in which he referred to the need to "*re-phrase the gist of advices"* with care "*to be consistent*". It was put to Mr Taylor QC that this was evidence of Mr Taylor QC's intention and willingness to falsify material which was to be disclosed in the context of the abuse argument. I can deal with the point shortly. There is nothing in it. Mr Taylor QC made clear that he was referring to early Advices which had been written by Mr Essex Williams (not his own Advices which had already been disclosed to the defence) but in any event his reference to re-phrasing the gist was a reference to him wanting to ensure that the gists were consistent with the contents of the Advices or as he put it "*true to the Advices*". His explanation is entirely logical and plausible and I accept it. I bear in mind that Mr Taylor QC was, at the time that the email was sent, Head of Chambers, and that the junior to whom the email was sent was also a member (as was the junior's wife). Although unnecessary, Mr Taylor QC spelt out to me the effect of a suggestion to his junior that he should falsify an advice. He said it would have gone around Chambers like wildfire to which, I add, not just Chambers, but the Cardiff Bar and judiciary also. It is simply inconceivable that a person such as Mr Taylor QC would put in writing such a suggestion.

b. The other document upon which Mr Spackman relies is an email from Mr Taylor QC of 20 March 2012 in which he recorded that (referring to a hearing the previous week) "*The Judge commented that he was concerned about the lack of progress with Admissions and the linked question of witness requirements. I am concerned this is the elephant in the living room so far as the prosecution is concerned."* It was Mr Spackman's case that his reference to the "*elephant in the living room*" was a reference to what all members of the prosecution team were aware, namely, that barring an admission being made, the Crown could not prove its case as it was known that TE/91 was not admissible. As against this rather strained interpretation, Mr Taylor QC's explanation for the wording of the email was straightforward and simple. He explained that he was referring to the fact that Admissions process had been ongoing for some time, there had been a special hearing to consider the point, the matter had been discussed with the defence, with the CPS and yet still no progress had been made concerning witness requirements. I accept his explanation.

159. I mention only briefly the inappropriate and pejorative comments made by Mr Essex Williams. He referred to Ms Richards as appearing to be "*a pampered bimbo*" who was

"*not as stupid as she looks*." Her referred to the pronunciation of Rudall "*as in poodle*." Such comments do not reflect well on Mr Essex Williams but I do not draw an inference from them, or from other statements which he made, that he was motivated by ill-will and spite. The only inference which I can safely draw from his statements is that he was completely out of touch with contemporary mores.

The Information

160. Having dealt with the Claimant's case concerning the "prosecution team", I now consider those topics from which Mr Spackman invites me to infer malice. The first is the Information which was laid before the Magistrates at the application for the search warrant which it is said contained wrong and/or misleading statements intended to colour the attitude of the Magistrates.

161. The Information was not drafted by Mr Sherrington but he accepted that so far as he was aware and could remember, there had never been a suggestion that Mr Rudall was involved in drug trafficking and that to the extent that paragraph 3 of the Information or paragraph 138 of the Information suggested that he was suspected of drug trafficking then those references were wrong.

162. Mr Sherrington also told me that the extent of Mr Rudall's suspected involvement in criminal activity was limited to these facts set out in the Information in terms of Darwin. In this context, the Information is worthy of closer scrutiny. It is again a long and quite involved document. The first point I make is that, although there are references to Operation Darwin relating to drug trafficking as well as laundering, the detailed content of the Information relates only to Evans' money-making schemes and nothing which relates to the drug trafficking element of the investigation. So far as the Information addresses Mr Rudall personally, it records:

    a. Mr Rudall's involvement with PBC, a company run by Evans but which traded as "Phillip Rudall Solicitor, Caer Street, Swansea;"

    b. that Mr Rudall had been closely concerned with Evans and PBC in the acquisition and disposal of various properties in breach of Court Orders;

    c. in the sub-section relating to Mr Rudall and Operation Darwin, the Information refers to his association with Ms Richards ("not a defendant in the Darwin case") who was suspected to have been meeting Evans or being involved in money exchanges and had received a large sum of money through her account (£588,000 over 6 years) and large the deposits into her personal bank account.

163. Taking the Information as a whole the "connection" was between Mr Rudall and that element of Operation Darwin which concerned money laundering. A sensible reading of the Information would not lead the reasonable reader to conclude that Mr Rudall was suspected of involvement in drug trafficking. If anyone had been initially misled by the statements in paragraph 3 or paragraph 138, a review of the document would make the position clear. I therefore reject the Claimant's case that the Information taken as a whole was misleading. It was not. Nor do I find that the inclusion of those statements upon which the Claimant relies is evidence from which I can infer malice on the part of Mr Sherrington, or indeed on the part of anyone else involved in the investigation. He did not write it and, as he told me, the extent of Mr Rudall's involvement in Darwin was as set out in the body of the Information.

The Procedural Route:

164. Mr Spackman invites me to find that the application for the warrant should have been made under s.9 PACE rather than s.8 of the Act. It is not necessary for me to resolve the issue of the lawfulness of the s.9 as opposed to the s.8 route and I decline to do so. My only interest in the topic is whether the choice of route is evidence of malice on the part of Mr Sherrington.

165. Mr Spackman faces additional problems in any event. As Mr Kinnear correctly states in his closing submissions, the basis for Mr Spackman's assertion that s.9 was the correct route was never made clear to Mr Sherrington. The pleaded case on the point (paragraph 11 (iv) of his statement of case) set out the objection on the basis that the Claimant's office would inevitably contain privileged material and this was the case which was put to Mr Sherrington. When I raised the issue with Mr Spackman during his cross examination of Mr Sherrington he confirmed this to be his case on the point. As Mr Spackman's case evolved however and eventually settled in his final questioning of Mr Taylor QC and in his closing submissions, the objection was made on the basis that it was the presence of special procedure material which required the use of the s.9 procedure. Whatever the position, this case was never put to Mr Sherrington.

166. I do not accept that the purpose of pursuing the application for a warrant by an application to the Magistrates under section 8 is evidence of, or even suggestive of, an intention by Mr Sherrington to deprive Mr Rudall of procedural protections and enable the police to "raid" (as Mr Spackman put it) the premises and unlawfully seize privileged material. The evidence suggests that Mr Sherrington's prime concern was to avoid the seizure of privileged material:

    a. on 4th April 2002, Mr Sherrington wrote to Peter Critchley concerning allocation of resources for the investigation into the Claimant and raised at that early stage the need to retain the services of a solicitor or barrister independent of the prosecution process on hand to advise on matters of legal privilege that arose out of the search.

    b. The comments made in the margins of Mr Taylor QC's Advice question the accuracy of the assertion that all of Mr Rudall's professional involvement with those persons or companies identified on the Information would be tainted by criminality ("*what about honest work done for suspects*?"). Whether Mr Sherrington shared that view or, as he told me, he was playing "devil's advocate" to test the position in the event of questions from the Magistrates, the marginalia indicates his wish to avoid seizing material which was privileged.

    c. His prompt sheet for the hearing before the Magistrates demonstrates his emphasis on the "*modus operandi*" for the search which would render it "*virtually certain*" that privileged material would not be taken.

167. Finally, I observe that, if the submission that Mr Sherrington was deliberately manipulating the process to gain a procedural advantage, was correct, then it would follow that Mr Sherrington's prompt sheet (and its predecessor note which was shown to Mr Essex Williams) were false documents (recording a view which Mr Sherrington knew to be wrong). This was never put to Mr Sherrington. But, in any event, I reject the point for the same reason that I reject that Mr Sherrington concocted the *Foxley* file note.

Seizure of the Richards v Clarke File

168. Mr Spackman invites me to find that the seizure of the file was unlawful. Again, I do not determine this point. It is not necessary for me to do so. Mr Sherrington was not present at the search. Indeed, Mr Spackman asked no questions of Mr Sherrington on the topic precisely because he was not present. Whether the file should or should not have been is not relevant to the case against Mr Sherrington.

The Decision to Prosecute Wolfram II

169. The Claimant submits that the real motivation for prosecuting Wolfram II was because it provided Mr Sherrington with "*a quicker and easier*" route to putting the Claimant out of business. Otherwise, it was submitted, there could be no logical reason for prosecuting such a small and unimportant case at the expense of the Wolfram I investigation which was, during the currency of Wolfram II, put on the back burner. I reject this submission.

170. Mr Sherrington explained to me that the prosecution of Wolfram II was neither quick nor easy. He told me that "*quite frankly, the last thing I needed at that stage .. was another file. And it certainly wasn't quick and it certainly wasn't easy… this was a civil law case.. it was the last thing we needed.*" He told me: "*the purpose of the case was simply because we found ourselves in a cleft stick.. that had to take precedence over Wolfram I. It was not to get him out of practice, it was to prosecute the case*." He said that he considered that the evidential limb of the Code test had been met. In those circumstances, he told me that, in his opinion, it would have been "*completely untenable*" for him to have gone on to advise that the public interest did not justify a prosecution. Mr Rudall was a solicitor who, on the facts before him, had perverted the course of justice during the course of civil proceedings. He said that although in money terms the case was not considerable, in terms of the actual administration of justice the case "*loomed very large*." He said that to have made the decision not to prosecute the case on the basis of having "*bigger fish to fry*" would not in his view have been a reasonable exercise of the public interest aspect of the Code test. He did not consider that he could leave it in the hands of the Law Society who appeared to be awaiting the outcome of the criminal prosecution. He also had to consider the fact that Mr Clarke who, unreliable as he in the end turned out to be, at the time of charging had been the victim of an alleged conspiracy/deception.

171. I accept Mr Sherrington's evidence. His explanation that the charge was serious, (although in money terms the case small in comparison with Mr Rudall's suspected involvement in money laundering) was undoubtedly correct. I accept that, as Mr Sherrington told me, the easy way out would have been to have "*washed his hands*" of the case and given the package of material to the Law Society and that for him a case which arose from civil proceedings (of which he had no experience) was an unwelcome intrusion. The fact that Mr Sherrington did not take the easy way out, because to have done so would have been to act in a way inconsistent with the public interest element of the Code is, I find, another marker of his integrity.

172. I address two further points raised by Mr Spackman in his closing submissions on this topic. First, he refers to the dearth of evidence explaining the "sea-change" in the view of the merits of the prosecution of Mr Rudall in connection with his handling of the Richards v Clarke case. I do not accept this. The reason for the change in view was

explained by Mr Sherrington in his charging note: the further investigations had unearthed material which supported Mr Clarke's version of events. Second, he asserts that there is no reasonable and probable cause for the first (Wolfram II) prosecution (although he does not invite me to make a finding on the issue). I do however make a finding. There was reasonable and probable cause: Phillips J was undoubtedly correct in deciding that issue (not least on the basis that there was no half time submission) and, in any event, as I have already said, his decision is binding upon me.

The Return to Wolfram I and the Delay in Charging:

173. Although in his closing submissions, Mr Spackman separates the return to Wolfram I and the delay in the charging, in reality they merge. Mr Spackman makes a number of points (the scattergun approach to potential charging, the large number of charges which were originally contemplated, the lack of focus on Lifeclub as evidenced by the few questions posed of Mr Rudall during his police interview and the lack of regard to Mr Rudall's having a criminal prosecution hanging over his head) but they all add up to the submission that the decision in 2005 to revive the investigation of Wolfram I and the length of the investigation is evidence of Mr Sherrington's dogged determination to prosecute Mr Rudall at all costs.

174. This judgment is not the place to go into the twists and turns of the investigation over the course of the years, not least as I have not been given the full suite of underlying papers. It may be that criticisms could be levelled at both Mr Sherrington and Mr Taylor QC for lack of focus and a difficulty in seeing the wood for the trees. However, I do not find that the prolonged investigation and the fact that charges were brought 8 years after the commencement of the investigation is evidence of malice or that the decision to revive the investigation after the failure of Wolfram II was (as it was put to Mr Sherrington) because he was "*to be sure you finished him off"*. Mr Sherrington's three witness statements for the abuse hearing detail

175. the steps which were taken. They highlight the delays caused by problems with expert evidence and obtaining material from abroad (to take just two examples). There was no time when nothing was happening. The history, as revealed, may show something of a plodding investigation without much strategic overview but there is nothing to suggest that it was a prosecution without foundation or that it was motivated by malice or ill-will. So, I reject this argument also.

Conclusion on Malice

176. I reject the Claimant's case that the prosecution was motivated by malice for the reasons I have given above. I add that I find nothing in my examination of the points raised by Mr Spackman which undermine my view on Mr Sherrington's honesty and integrity in paragraphs 99 to 127 above. Just the opposite. The evidence which I have reviewed underscores and reinforces my conclusion that Mr Sherrington had an honest belief in the charge.

Conclusions

177. This claim for malicious prosecution fails and I dismiss it. Having done so it follows that I dismiss the claims for misfeasance in public office and the action for damages for

breach of s.6 Human Rights Act 1998. The action for misfeasance requires as a foundation a finding that Mr Sherrington acted in excess of his powers in instituting proceedings without the necessary evidential support to do so. I have made no such finding. The action under s.6 is parasitical upon a finding of malicious prosecution and thus fails for that reason.

178. I finish with a comment upon Mr Rudall himself. He gave evidence before me and, on occasions, exercised his right not to answer questions. It is important that I record that I have not drawn any adverse inference from his exercise of this right; nor have my conclusions above been influenced by a view that he is, or may be, guilty of the offences with which he was charged in 2010. I have given no thought one way or another to that issue. Mr Rudall's own evidence has not featured in my analysis of any of the topics in this judgment for the simple reason that he had no relevant admissible evidence to give on any of the points raised by his claim. His witness statements, which originally ran to many hundreds of paragraphs, were reduced by agreement to only a few pages of relevant admissible evidence. As I said at the outset of this judgment, the focus of this case and of this judgment has been Mr Sherrington and not Mr Rudall. Having said this, it would be remiss not to record my understanding, and acknowledgement, of the fact that Mr Rudall lived under a cloud of suspicion for many years and that this has affected his life profoundly.

179. I invite the parties to draw up the appropriate Order to give effect to my conclusions.