

**IN THE CENTRAL CRIMINAL COURT**

**R**

**-v-**

**ASIL NADIR**

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**SKELETON ARGUMENT ON RE-OPENED  
ABUSE OF PROCESS APPLICATION**

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**Introduction**

1. On 5 July 2011 the Defendant successfully applied to re-open the abuse of process application upon which a ruling had been given on 31 March 2011 in order that the court can consider:
  - a. Whether Mrs Harris lied when she told the court in March 2011 that she was not at fault for the error that led to the copying and circulation of documents from bags over which a potential claim of LPP ('the disputed bags') had been made; and if the court should so find,
  - b. How the application for a stay should be determined in light of that new fact.
  
2. The court ruled that a further hearing should take place starting on 18 July 2011 in the expectation that evidence would be given by:
  - a. Lorna Harris
  - b. Michael Hawkins, then Detective Inspector
  - c. Wendy Russell-Rayner, then Detective Sergeant
  - d. Anthony Puddick, the Police Constable
  - e. Andrew Barnes, then Detective Constable
  - f. David Staff, then Detective Superintendent
  - g. Andrew McStravick, then Detective Chief Inspector
  - h. Jim Davies, then Detective Superintendent
  - i. Mr Churchill Coleman, then Commander and Commissioner of the Metropolitan Police.

The hearing is listed to take account of the fact that an appeal against the ruling on 31 March 2011 had been listed for 21 July 2011. The appeal has subsequently been taken out of the list.

3. The argument outlined on behalf of the Defendant to the Court on 5 July appeared to be as follows:
  - a. First, the court should reassess a finding of fact which was part of the ruling on 31 March 2011, namely that Mrs Harris was truthful when she said that the copying and circulation of material from the disputed bags was not her fault but that of the police;
  - b. Secondly, should the court conclude that Mrs Harris had lied about this, the court should reassess its findings on Mrs Harris's credibility, and on her honesty in general;
  - c. Thirdly, the court should re-consider the wider factual findings which are dependent on her evidence and credibility, namely whether Mrs Harris knew about the contents of Mantle 3, whether she failed to disclose the contents of Mantle 1, 2 and 3, whether she failed to provide for proper disclosure, and / or failed to disclose material opinion evidence from KPMG witnesses; and
  - d. Fourthly, then proceed to make a fresh conclusion on the question of whether the case should be stayed as an abuse of the process of the court on the basis of any new factual findings.
4. The Respondent submits that, even taking the Defendant's arguments at their highest, this case should not be stayed:
  - a. The Defendant's trial is not thereby unfair since the real position is now known and he is in possession of Mantle and KPMG material; and
  - b. It would not be unfair to try him since the nature of any misconduct on the part of the prosecution would not constitute the type of behaviour that would lead to charges of this seriousness being stayed. The case of R v Early [2003] 1 Cr App R 19 is not authority for the proposition that lies by a prosecutor, even to a court at a voir dire on the issue of whether there has been an abuse of the process of the court, give rise to a stay on the basis that it is not fair to try the accused: the Court of Appeal would have ordered re-trials but for issues of timing and

length of sentences already served. Even taken at its highest, the behaviour alleged against Mrs Harris is not comparable to what was proven to have occurred in the case of Early.

5. Further, and in addition:

- a. First, the evidence on the question of fault, if taken in the round, *may* show that there was a misunderstanding between Mrs Harris and the police about what should be done to the disputed bags and what was in fact happening. Any such misunderstanding can rationally be described as fault in either party to the misunderstanding. The evidence is also clear that the physical custody and handling of the disputed bags was under the control of the police and that Mrs Harris took no part in it, which would support an interpretation that what occurred was the fault of the police and not of her.
- b. Secondly, while it is acknowledged that one interpretation of the recent material is that Mrs Harris failed to give sufficiently clear instructions about what should be done with the disputed bags and could therefore be said to be at fault for the copying and circulation of documents held in them, there is no evidence that any such failing was anything other than inadvertent or incompetent; there is no suggestion that she deliberately instructed that those bags in particular be opened and the contents copied and circulated; there is no evidence that could suggest that she was acting in bad faith.
- c. Thirdly, should the court find that Mrs Harris was at fault and further find that in saying on oath that she was not, she deliberately lied, it is submitted that this lie was part and parcel of her failure to be truthful about this discrete area of the handling of documents from the disputed bags. The new evidence does not provide any basis for a suggestion that this lapse in good judgment extended beyond those confined matters. As such there is no basis for the court to re-consider the rest of the evidence on Mantle and KPMG to decide whether she lied on those issues.
- d. Fourthly, should the court find that Mrs Harris had lied in this respect, that lie and the others already identified by the court should not result in this case being stayed. They remain lies on a peripheral issue that had no effect on the fairness of the trial then, and will not have that effect now, when Mrs Harris is no longer involved and there has been a through review of the manner in which LPP was handled. There has been and will be no unfairness to the Defendant in

litigating these charges at trial. The conduct of the prosecution has not been such as to require criminal allegations of this importance to be stopped.

- e. The evidence of Brendan Morris suggests that the material which was the subject of the LPP claim was retained by the SFO and reviewed by him in February 2011 [Supplementary Bundle Tabs 20-22]. He concluded that some of the material was not privileged and where the material was privileged, the privilege was that of the Administrator or the Trustee in Bankruptcy. It is submitted that the breach of privilege in 1990/1991 would therefore have had little or no effect on the interests of Mr Nadir and can have none now.

6. The more detailed submissions are set out as follows in sections:

- A. The procedural background page 5;
- B. The factual background page 7;
- C. Mrs Harris's evidence to the court on LPP handling page 17;
- D. The further evidence and its effect on the ruling page 24;
- E. Conclusions on fact page 34;
- F. Conclusions on law page 36.

In the document below, references are made to where material can be found as follows:

- a. References to the prosecution bundles for the abuse of process hearing are shown as I/II, referring to whether they are in the first or second volume, and then p1, showing which page number of that volume;
- b. References to the defence bundles for the abuse of process hearing are shown as 'Defence bundles, div' and then the number of the divider;
- c. Reference to statements contained in the abuse of process bundles served by the prosecution are shown as 'Abuse statements page';
- d. References to material found in the defence response file are shown as 'Defence Response div';
- e. References to the evidence heard are shown as '16 March 2011 page';
- f. References to the ruling by Holroyde J on 31 March 2011 are shown as 'Ruling page'; and

- g. Where any document was added to following the PII hearing, it is assumed that the full document is referred to, although some of these were provided and referred to in the hearing as being in the file provided.
- h. References to the bundle of documents produced by the prosecution for the re-opened application are shown as 'Supplementary bundle, tab'

## **SECTION A - Procedural Background**

7. On 31 March 2011 Holroyde J ruled on an application to stay the case on the grounds of abuse of process. In the closing submissions on behalf of the Defendant it was argued that should the court find that Mrs Harris had lied, that would ground a stay, in reliance on the case of *R v Early*. The ruling on this point was as follows:

*"I have criticised Mrs Harris to the extent that I have found her at fault and I of course do not diminish the importance of my finding that she was untruthful in her evidence to me, but as I have said it is not every lie on oath which presents such an affront to the conscience of the court and of the public that proceedings must be stayed.*

*Nothing that Mrs Harris has done in fact impinges on Mr Nadir's ability to defend himself or causes him any disadvantage. She was a very important member of the prosecution team, but she was not the most important. In fact, as she said in her evidence, she was the lowest ranked of all the SFO lawyers involved in the investigation.*

*I have said that the legal professional privilege issue is the one respect in which I have found she lapsed from what was otherwise the proper performance of her onerous duties, and I have expressed my view that she was correctly disciplined by the internal proceedings.*

*This is not a "but for" case. On the contrary, the only respect in which I have criticised Mrs Harris relates to her failure to disclose the error of others, that error being one which did not disadvantage the defence.*

*There are here serious charges and a body of evidence on each side which should be considered by a jury. There is, in my judgment, a strong public interest in the evidence being so considered. It would be wholly unjust for the proceedings to be stayed on the ground of impropriety by one member of the prosecution team in respects which do not affect the fairness of a trial." (Ruling page 89 line 89 to page 90 page 20)*

8. Following the ruling on the Defendant's application for a stay on 31 March 2011, on 4 April 2011 Bark and Co, the solicitors representing the Defendant, reported Mrs Harris to the City of London police for perjury arising from the evidence she gave at the abuse of process hearing. An investigation began and remains ongoing.
9. On 5 April 2011, an application for leave to appeal was lodged on the Defendant's behalf. The prosecution responded to that appeal and lodged grounds of opposition on 12 April 2011.
10. On 13 April 2011 the Defendant lodged an application to vary the conditions of his bail to remove the electronic monitoring tag.
11. On 15 April 2011 the parties were asked by the Registrar of Criminal Appeals to lodge further submissions on the question of whether the Court of Appeal had jurisdiction to hear the appeal, to be lodged by 21 April 2011 with particular reference to the case of *R v VJA [2010] EWCA Crim 2742*, which further restricts the jurisdiction to hear and discretion to interfere in interlocutory appeals.
12. On 18 April 2011 the court heard the Defendant's application for a variation of his bail conditions and refused it.
13. As to the period 18 April to 10 June 2011, at the 5 July 2011 hearing when the defence obtained leave to re-open their abuse application, the learned judge expressed the desire to have further information as to the timing of further enquiries made by the defence. The SFO attach in a small file marked "Defence Approaches to Police Witnesses" showing the detail of such approaches in the above period.
14. On 10 June 2011 the defence were provided with the statement of Anthony Puddick and his exhibit [Supplementary Bundle Tab 1-2].
15. On 14 June 2011, following liaison between leading counsel, the Court of Appeal was informed that it was possible that there would be an application to re-open the abuse of process application, and ruling.
16. On 23 June 2011 those representing the Defendant wrote to the trial judge to alert him to the fact that they sought to re-open their application for a stay attaching correspondence and other supporting

material which was said to demonstrate that the evidence which Mrs Harris gave at the hearing of the application in March was "*deliberately false and untrue*" and that as a consequence the court was misled as to a "*pivotal aspect*" of its judgment.

17. On 1 July 2011 the defence were provided with the transcribed section 2 interview of Michael Hawkins and two statements from Wendy Russell Rayner.
18. On 5 July 2011 the application to re-open the abuse of process hearing was granted.
19. In relation to evidence from witnesses: statements have been taken from Mr Puddick and Mrs Russell-Rayner; Mr Hawkins has given an interview under section 2; it is hoped that Mr Staff will be able to provide a witness statement on or after 14 July when an appointment has been made to see him; Mr Barnes has been spoken to in France and a draft statement has been prepared, but he is not available to assist in the process of providing evidence in witness statement form until 21 July 2011.
20. Mrs Harris has indicated she is not available to give evidence in the week of 18 July 2011 and has not yet had an opportunity to provide a witness statement.

#### **SECTION B - Factual Background**

21. On behalf of the SFO it is submitted that owing to the passage of time, the detail of what took place from 30 October 1990 to the end of 1991 with regard to material over which Vizards made a potential claim and later an actual claim of LPP, was not clear to Mrs Harris when she began giving her evidence from the witness box on 16 March 2011. For example, she had a distant memory of two bags being breached to give documents to the Administrators, a fact that was apparent from the contemporary correspondence and was summarised in a chronology prepared by Robert Wardle. Cross-examination proceeded on the basis that this claim to poor memory was an excuse, and it was not until re-examination that this was clarified. For that reason, and to assist in clarifying the evidence, the factual background of those events is set out here.
  - a. Following the seizure of documents during the search of PPI's offices on 30 October 1990, by a letter dated 31 October 1990 [I p78], Vizards complained that documents potentially subject to LPP had been seized. Most of the seized documents were taken to the Major Incident Room controlled by the police; some, at least 300, were left in the custody of KPMG. The bags over

which the general claim was made were under police control. They were numbered from 57 to 65, ie there were 9 such bags. Bag 56 contained a briefcase and contents including correspondence and a passport: the passport was returned on 1 November 1990 and the rest on 2 November 1990.

- b. By letter dated 2 November 1990 Mrs Harris stated that she did not propose to look at documents individually but would leave them to the police to prepare an inventory. Thereafter the defence could inspect the documents [I, p80]. In a reply dated the same day Vizards invited the SFO to instruct independent counsel to inspect the material. They did not object to the bags being opened for the purposes of documentary control [I p81].
- c. At a meeting on 5 November 1990 between Mark Tantam of Touche Ross and David Morrison, deputy director of the SFO, and in charge of the accountancy side of the PPI investigation, an agreement was reached that the administrators would be provided with copies of documents seized from PPI [Supplementary Bundle tab 9]. This was copied to Detective Superintendent Staff, DI Hawkins and DS Russell-Rayner.
- d. By letter dated 6 November 1990 Vizards asked that the bags should remain sealed [I p84]. In letters exchanged between Vizards and Mrs Harris between 31 October 1990 and 5 December 1990, Vizards objected to Mrs Harris seeing any of the material over which they had made a potential claim, but made no objection to the police seeing them.
- e. It would appear that representatives from Vizards were at the SFO to inspect SAM documents on 6 November 1990 [see letters dated 2 and 6 November 1990; I p80-81].
- f. In an undated note from Barbara Mills QC she referred to visiting the police room on 7 November 1990 where she discovered that bags had been opened; she told the police to stop opening bags until Mrs Harris returned from Jersey. None of the disputed bags were opened on 7 November 1990. The note ended by stating "*it is important that a note is made as to what did actually happen about the opening of the bags*" [I p87]. In his chronology Robert Wardle added a comment in respect of that part of Barbara Mills QC's note: "*[By way of commentary it is regrettable that no such note appears to have been made.]*" [II p817]. Likewise, in his 1994 Management Report Wardle wrote that no such notes were made and there was no note of what action Mrs. Harris took to instruct the police [Defence response div. 10].

- g. By letter dated 12 November Vizards expressed their "*extreme concern*" about the issue and asked to be present for the opening of the bags in order to determine which documents are privileged. They asked that in the meantime Mrs Harris should undertake not to open the bags, whether what was referred to as a "*formal*" opening or an "*informal*" opening [I, p99].
- h. It appears that it was on 12 and 13 November 1990 that the police opened five bags (nos. 57, 59, 64, 58 and 63) for documentary control purposes. The circumstances were referred to in Robert Wardle's chronology [II p817], his 'Summary of the Facts' [II p826] and George Staple's letter dated 2 December 1993 (which letter post-dated the Police Report) [II p850]. In this letter Staple wrote: "*The investigation that I have caused to be undertaken as a result of your letter has revealed that on 12 or 13 November 1990 when preparing the inventory the police routinely copied documents with a view to circulating them to members of the prosecution team, including counsel. Unfortunately documents from the bags in respect of which you had made a claim for privilege were also copied and on 26<sup>th</sup> November 1990 circulated with a very large number of other documents. It was not appreciated then that the circulation contained documents from the privileged bags.*" Staple continued that the administrators had been entitled to and had required access to the documents belonging to PPI and were provided with copies of some documents from the circulated sets and not from the bags themselves. When referring to these events in 1995 in his later Ruling on the disciplinary proceedings, Staple similarly stated that the documents were "*in error routinely copied and circulated*" [Defence bundles div. 22, pages 2 and 9].
- i. The SFO case secretary, Steve Taylor, kept a note of the circulated pages which shows that the documents copied from the bags over which the claim of privilege had been made were circulated on 26 November 1990, ie before Mrs. Harris' later undertaking dated 5 December 1990 [Supplementary Bundle tab 15]. As Robert Wardle stated in his Summary of the Facts, there was no evidence that Mrs. Harris realised that copying to the case team had taken place [II p831]. Robert Wardle's view, even after the disciplinary proceedings had been instituted, and which he communicated to Krivinskis solicitors, who were representing Elizabeth Forsyth and also represented Asil Nadir at some point, was that the copying and circulation of LPP material had been "*inadvertent*": see letter dated 12 December 1995 [II p930-4].

- j. In further correspondence Vizards objected to Mrs Harris seeing any of the material over which they had made a potential claim. In responding to them in a letter dated 14 November 1990, Mrs Harris made clear that the procedure adopted *"I regret that the procedure set out in my letter to you of 6 November 1990 was not sufficiently clear. As I have indicated to you (my letter of 2 November refers) the first priority for the police is to prepare an inventory of the documents seized. This is an essential step following the execution of a warrant. This procedure is currently being undertaken and involves the police opening bags and preparing precise inventories of all documents seized. I am not party to any of this work. When I am informed that the inventories are complete and that therefore the police are satisfied as to the contents of the bags then you will be invited to inspect such documents as appear to be the property of your client"* [I p102-3].
- k. The correspondence centred around a debate as to how the claim would be decided, Vizards objecting to what Mrs Harris stated was *"the practice which has been operated hitherto"*, namely 'formal' opening and consideration of the documents in question by herself or an SFO lawyer and a representative of Vizards.
- l. On 21 November 1990 Mrs Harris wrote to Vizards indicating that the *"police documentation"* of the seized material had been almost completed and inviting Vizards to inspect the documents to resolve the question of privilege [I p108].
- m. On 23 November 1990 a case conference took place attended by Mrs Harris, counsel David Calvert-Smith and Simon Browne-Wilkinson, Chief Superintendent McStravick, Superintendent Staff, DI Hawkins, DS Russell-Rayner, DC Barnes and others. McStravick asked Mrs Harris to reconsider her decision in respect of returning documents which were LPP and she instructed the police that such documents had to be returned and invited counsel to indicate if there was any disagreement with her decisions [Supplementary Bundle tab 48, p.12-13].
- n. On 5 December 1990 Vizards inspected the bags and placed yellow tags on documents over which a claim was made. Mrs Harris gave them an undertaking that she would not examine them. Wendy Russell-Rayner was present at this examination. The nature of what was agreed was addressed in several letters and documents that followed the inspection:

- i. On 5 December 1990 Mrs Harris wrote to Vizards after their visit stating that *"I cannot agree to a claim on behalf of your client unless I have the opportunity of inspecting the document first. At this stage, however, I undertake not to examine the documents retained at the Serious Fraud Office and identified by Mr Knight as subject of a potential claim"* [I p109].
- ii. In his letter of 7 December 1990 Mr. Knight made it clear that the inspection had merely been a preliminary inspection. Referring to the documents that had been marked up, he wrote *"we agree with you that it was left that members of your office would not peruse these documents"* [I p112].
- iii. In her letter dated 13 December 1990 Mrs. Harris wrote *"I confirm that the documents that were marked will be left in sealed bags and not perused for the time being"* [Defence bundle div. 44].
- iv. In her later letter dated 14 March 1991, Mrs. Harris stated that the undertaking had been that those investigating in the SFO would not examine *the contents of the bags* in respect of which a claim of privilege might arise [Supplementary Bundle Tab 33].
- v. Likewise, in a note to the Attorney General ('AG') dated 26 September 1991 Mrs. Harris stated that her undertaking had been that *the bags* would not be further examined until the matter had been resolved [I p346-7].
- o. By 21 January 1991 Mrs. Harris had learnt of the circulation of documents having included potentially privileged documents and she referred to this in her note to counsel of that date and sent a fax to Coopers asking them to remove pages from their papers [I pp151A and 152]. In addition she indicated that to her counsel that: *"Practically what has happened is that the documents have been retained in the sealed bags into which they were put at the time of the raid. They have been removed from the bags for the purpose of document control filing, and some in fact have found their way into the document control system .... It seems to me that some of these may well be privileged. I have not read them in any detail. I only noted in passing that they exist. I am quite happy to be able to maintain my stance with Vizards that I do not know the contents of these documents and that they have not affected me at all in my assessment of the evidence in this case"* [Supplementary Bundle tab 32].

- p. However 2 of the disputed bags, listed in paragraph h above, were opened after 5 December 1990.
- i. On 30 January 1991 one bag (Bag 59) was opened by the police to provide copy documents to Coopers and Lybrand at PPI. Wendy Russell-Rayner was present on this occasion.
  - ii. On 1 February 1991 two bags (Bags 57 and 59) were opened: 57 was opened by the police for examination by the administrators and 59 was opened by the administrators for examination (F.M.Scott) (see Wardle's documents [II pp 819, 832]). Mr Barnes was present on this occasion as was Wendy Russell-Rayner [Book 104].
- q. In a letter dated 20 February 1991 Mrs. Harris wrote to Vizards indicating that she was now prepared to brief independent counsel [I p157].
- r. In a note dated 26 February 1991 Mrs Harris wrote to Detective Superintendent Staff stating *"You know that I have been involved in prolonged correspondence with Vizards in respect of this issue"* [I p158].
- s. On 28 February 1991 Peter Knight attended to conduct a further examination, accompanied by a colleague Chris Ryan. Wendy Russell-Rayner was present [Supplementary Bundle tab 8 p.14, entries 191-192]. Puddick was present. Vizards became aware of the bags having been opened [Supplementary Bundle tab 2].
- t. On 7 March 1991 Chris Ryan of Vizards made a further visit to the police store at the SFO to examine documents [Supplementary Bundle tab 8, p. 15, entry 193, entries 195-198].
- u. The police Property Store Book 104 contains entries in red ink against the disputed bags by DI Hawkins saying 'not to be opened without the authority of Mrs Harris'. They appear to post-date inspections by Vizards on 28 February and 7 March 1991 [Supplementary Bundle tab 8 p.19-21, entries 358-366].
- v. In her letter dated 14 March 1991 Mrs. Harris wrote about the alleged breach of the undertaking. She stated that her undertaking had been that those investigating in the SFO

would not examine the contents of the bags in respect of which a claim of privilege might arise. She stated that she had showed Vizards the police log in order to demonstrate that the undertaking had been complied with [Supplementary Bundle tab 33].

- w. In their reply dated 21 March 1991 Vizards responded that nobody else besides the police should be allowed access [Supplementary Bundle tab 38].
- x. In her letter to Vizards dated 12 April 1991 Mrs. Harris indicated that she had discovered that two bags had had their seals broken, bags 57 and 59, other than in Vizards' presence. She wrote that Bag 59 was not identified by Mr. Knight as containing anything which might be privileged (it contained a receipt book only) and accordingly the police did not realise that that was covered by the undertaking which had been given. Bag 57, which did contain material marked with yellow stickers, also contained a financial report from Impexbank and the administrators requested and were given a copy of this document. She wrote that this report was not a document which was the subject of a claim of privilege by Vizards. Nevertheless, she wrote that the seal should not have been broken and she regretted this [I p165].
- y. In her letter of 30 April 1991 Mrs. Harris wrote that she had "*all along held the view that all documents were seized from the administrators and not from your client*". She stated that many of the documents seized from Asil Nadir's desk were not truly the property of Nadir "*but belonged to the company and hence to the administrators*" [I, p173].
- z. In her briefing note to the Attorney General dated 26 September 1991 Mrs. Harris wrote that the opening of the two bags for the administrators had been due to "*a breakdown in communication between the police officers involved in securing the documents*" and she reiterated her view that the administrators had been entitled to the documents passed to them from those two bags [I p346-7].
- aa. Mrs. Harris later referred to the circulation in her 'Note re Privilege' dated 9 December 1991 [I p476-7] (also found quoted in Staple's Ruling [Defence bundle div 22 p8]. In that note she asked team members to remove pages, stating that before the claim to privilege was made (presumably during the inspection on 5 December 1990) there had been "*a preliminary sift*" and "*accordingly*" there were copies of documents in circulation.

- bb. In June 1993 Michael Mates MP resigned and in his resignation speech to the House he made allegations that the SFO had improperly handled the LPP material in the SFO investigation into the Defendant [Supplementary Bundle tab 42, pages 1-4].
- cc. On 30 June 1993 the Attorney General responded and stated that only 2 of the disputed bags had been opened. In handwritten amendments to the AG's draft statement in 1993 apparently made by Mrs. Harris, she wrote "*As soon as the mistake was realised the bags were resealed and not again opened until the determination of the claim of privilege by independent counsel*" [Defence Bundle div 50].
- dd. On 1 July 1993 DC Barnes drafted a note detailing his efforts to investigate the allegation that the police had erred in opening the disputed bags. He commented that it was extremely difficult and that the office manager, Wendy Russell-Rayner was on annual leave. However, he reported that the bags were examined by KPMG or the administrators and that in allowing access to Touche Ross disputed bags had been opened by the police. "*At a subsequent examination of the bags by solicitors from Vizards who were then acting on behalf of Nadir the error was identified. An immediate admission of what had taken place was made together with an apology and steps were taken to ensure that such an error could not take place again. The facts were reported to Mrs Harris the case controller and the matter was the subject of correspondence between her and Vizards. ... I believe that any explanations made by the SFO were made with the knowledge of the police officer in charge of disclosure. Similarly I believe that explanations made to the Attorney General's Office in relation to this particular matter were made with the knowledge of the police officer concerned.*" [Supplementary Bundle tab 26]
- ee. On 2 July 1993 Vizards wrote a letter of complaint to the SFO in which they asserted that 5 bags and not only 2 bags had been opened as had been maintained [Supplementary Bundle tab 41].
- ff. Robert Wardle conducted an internal SFO investigation into what had occurred. In his Summary of the Facts he referred to the undertaking given on 5 December 1990. He wrote "*That [undertaking] was notified to the police and the logs marked accordingly.*" [II p830]. This document was dated 22 November 1993, three days before the date of the Police Report.

As part of this enquiry, John Knox sought the views of the police in a memo dated 23 November 1993 [Supplementary Bundle tab 29 (para. 1)].

- gg. On 24 November 1993 there was a meeting at the Attorney General's office at which John Knox informed those present including Staple and Wardle, that the police had not been informed until 7 March 1991 that five bags could not be opened without Mrs Harris' consent [Supplementary Bundle tab 30].
- hh. The police also conducted an internal investigation, prompted in part by the statement of the Attorney General that the police were at fault for the error in copying and circulating, and also by a memo dated 23 November 1993 from John Knox, sent as part of the SFO internal investigation. The report that was drafted as a result of it was by Detective Superintendent Davies, who had played no part in the SFO investigation at the material time. It was dated 25 November 1993. It reported that the police had done nothing other than what they had been told to do and that they were not at fault; the only indication of a claim to LPP over the papers was a letter dated 2 November 1990 and one dated 26 February 1991 both of which had been found on the police file; there had been no written instructions from Mrs Harris and no one could recall oral instructions either to do anything other than what they did; there was no copy of Barbara Mills QC's memo on the police file and no one recalled that visit. It would appear that this report was sent to the SFO under cover of a letter from Commander Churchill-Coleman dated 3 December 1993 which set out the views set out therein to the Director, George Staple [Supplementary Bundle tab 29].
- ii. On 3 December 1993 the Attorney General made a further statement to the House in which he corrected the error that only 2 bags had been opened. In this statement the Attorney again referred to an 'error' but did not ascribe it to any person or body [Defence Bundles div 42].
- jj. Wardle was provided with a copy of the report in its incomplete form by George Staple on 14 December 1993. Staple informed Wardle at that time that in his view it "*does not appear to differ in any way from the facts that you [ie Wardle] found*" [Supplementary Bundle tab 28]. It appears that Wardle may have subsequently read the Police Report and taken account of its contents, because in his 1994 Management Report he wrote "*The undertaking which she gave to the defence on 5 December 1990 does not appear to have been copied to the police or them given written instructions*" [Defence Response div.10].

22. In ruling on the disciplinary charges 'at first instance', George Staple explained that the opinions of the police had been canvassed and taken into account: "*Mrs Harris has alleged that there were a number of procedural defects in the conduct of the disciplinary proceedings. In particular, there was insufficient investigation of the police and counsel. I do not accept this. Between July and December 1993 the SFO conducted a thorough investigation of the facts. There was an enquiry by Miss Rowe and her two colleagues into the role of Mrs Harris and, lastly, I have considered all the relevant material. At each stage the role of the police and counsel was carefully examined and Mrs Harris has had full opportunity of providing evidence and explaining her conduct. It is not, of course, possible to compel the assistance of police and counsel, although they have volunteered information and their role has been clear*" [Defence bundle div 22, page 14].
23. In 1995, during the argument before Staple, it was argued that the statement made by the Attorney General to the House on 30 June 1993 could not have come from Mrs. Harris' briefing on 26 September 1991, either at all or at least in part. One of the reasons was that she had not said that the police had erred. Staple who was involved in that June briefing process, stated that the phrase 'owing to a breakdown in communication' used by Mrs Harris was translated by the Attorney General into the words "*were opened in error by some police officers*" [Supplementary Bundle tab 27, page 13].
24. At the appeal hearing before Sir Peter Graham in 1996, it was agreed by both Mrs Harris and the SFO, represented by Robert Wardle who had conducted the SFO internal enquiry, that she had had no idea that the bags had been physically interfered with [Defence Bundle div 7, page 15].
25. Both George Staple and Sir Peter Graham had the benefit of letters written by counsel instructed at the time. In his letter dated 25 May 1995, Simon Browne-Wilkinson gave his view, stating that, "*the position between December 1990 and August 1991 was that Vizards had identified a group of documents in respect of which Vizards "might" (the word used by Vizards in their letter dated 22 March 1991 [see Supplementary Bundle tab 38]) claim privilege but no specific claim had been asserted. ... A claim for privilege does not appear to have been positively asserted until March 1991*" [Supplementary Bundle tab 31, p. 2].

## SECTION C - Evidence of Mrs Harris

26. Mrs Harris provided two statements for the abuse of process hearing, one dated 19 February 2011 and one dated 16 March 2011. The material parts are found at paragraphs 69 to 94 of the statement dated 19 February 2011 and page 2, paras 1-2 of the statement dated 16 March 2011 [Supplementary Bundle tab 25, p2].

### Statement dated 19 February 2011

- a. Para. 69: *"There were disciplinary proceedings against me in relation to certain matters arising out of the handling of the papers that came from the bags that had been breached in error by the police, and may have contained potentially privileged documents."*;
- b. Para. 71: confirms her evidence is to be the *"best of her recollection"*;
- c. Para. 72: *"A search of PPI premises took place in October 1990. A general claim for legal professional privilege in respect of documents taken from around the desk of Mr Nadir was made by Vizards acting on behalf of Mr Nadir. In accordance with what was then normal practice, items in relation to which privilege was claimed were bagged and sealed and removed to the SFO premises by police, pending resolution of the claim. The police remained the custodians of the exhibits throughout. In November 1990, some of the sealed bags were opened by the police for the purpose of document control. Some documents were copied and circulated (as part of a circulation of many hundreds of pages) to various members of the case team, including myself, counsel and accountancy experts. I was not aware of this breach at the time."*
- d. Para. 73: Having given the undertaking in a letter on 5 December 1990 that the bags containing the documents in respect of which privilege had been claimed would not be dealt with, *"I made the police, who had control of the documents, aware of my undertaking"*;
- e. Para. 92: in relation to the AG's correction statement, *"I commented that a particular sentence appeared to blame me specifically for the errors which had occurred in the case, although, as is clear, any error in fact originated with the police. (I should add that I understand that the police were not consulted at all in connection with the preparation of the draft statement.)"*;

- f. Para. 94: she adopted what she and Ms P Howse said at the disciplinary hearing (before George Staple) on 11 May 1995.

Statement dated 16 March 2011

- g. In relation to the note from Barbara Mills QC, she had no recollection of seeing it at the time but it was inconceivable that it was not brought to her attention. *"I am also satisfied that I would have made sure that the contents of the note were made known to the police immediately."*
27. Mrs Harris gave evidence to the court at the abuse of process hearing on 17 and 18 March 2011 and stated:

17 March 2011

- a. Page 13, lines 12-15: she agreed that the police would operate under her direction;
- b. Page 13, line 21 to page 14 line 8: the SFO had no power to direct the police, *"police conduct of the investigation was a matter for them. I was not responsible for the day-to-day running of the police enquiry. That was a police internal matter"*;
- c. Page 14, lines 15-20: there were a number of discussions where the police were unhappy with advice from her and counsel;
- d. Page 24, lines 22-24: when asked whether she had told deliberate lies about the LPP issue she said *"Not as far as I know"*;
- e. Page 28, lines 8-9: she described the claim first made on 31 October 1990 as *"a general claim attached to unspecified documents"*;
- f. Page 29, lines 16-24: *"I can tell you, generally, that it appears that the police opened bags in November 1990 for what I had understood were document control purposes, and I thought that two bags had been opened for that purpose. I only found out that that happened in, I think,*

January 1991, and I understood that the opening of those two bags was for document control purposes only, that is to say to log what we've got rather than to examine the documents”;

- g. Page 30, line 12 to page 31, line 11: “I... repeatedly told the police about Vizards' claims [that] in fact it was not two bags that had been breached but five....and I remember making a complete nuisance of myself with the police going back to them again and again because, of course, I had no control of the exhibits... ”; She said she did not learn that it was five bags until late July 1993;
- h. Page 31, lines 12-19: Defence counsel (inaccurately) asserted that Mrs Harris had mentioned constantly reminding the police of their obligations. In response Mrs Harris said there probably would not have been any notes of this, but added “*but I don't think any of the police would have been in any doubt – if they were here today they would say that I was a nuisance over the subject.*”;
- i. Page 31, lines 22-24: she described a small office and an open door policy, with the police in her room 10 times a day and her in theirs, 10 times a day;
- j. Page 32, lines 3-7: “*it appears that copies had been made of documents and, therefore, the opening wasn't just for document control purposes*”;
- k. Page 33, lines 2-10: with regards to the Barbara Mills QC note, she agreed that in November 1990 she knew bags covered by the claim were being opened (the question was put on a misunderstanding that the bags opened on 7 November were the disputed bags). She continued “*I became aware that there must have been more than document control in January 1991*”;
- l. Page 34, line 14 to page 35, line 7: Holroyde J asked for the meaning of ‘documentary control.’ Mrs Harris stated that when the bag was seized the document control system would record somewhere that the bag contained eg the contents of the top left hand drawer of a desk. She confirmed that by “*document control*” she meant the next step in the procedure which required someone to “*open the bag, take out the individual documents and make some kind of log*”; For example, “*papers relating to ...*”

- m. Page 44, lines 16-24: she said that when she gave the undertaking on 5 December 1990 she did not know whether documents from the disputed bags had been circulated by then; she agreed they were in her papers by the middle of January;
- n. Pages 45 line 7 to page 46, line 21: with regard to the Wardle chronology suggesting the documents were circulated on 26 November 1990, she said she accepted that it might be accurate; she explained that the circulation was large and contained SAM and banks' documents as well as PPI documents. *"The potentially privileged documents would not have been flagged up in red as being potentially privileged; they would have been part of a huge circulation of many thousands of papers, and I think that if one looks at the volume of papers generated in this case you can see that there were huge numbers of documents and the fact that the potentially privileged documents formed part of a very large circulation on 26 November would not have been known to me on 5 December"*.
- o. Page 47, lines 1-10: she said that by 5 December she knew two bags had been opened for documentary control as that was apparent from Barbara Mills QC's note, but the mass circulation would not have led her to conclude that it contained documents from bags *"which I had instructed were not to be breached"*;
- p. Page 47, lines 16- page 48 line 11 and page 49, line 22 to page 50, line 3: she said she did not feel any need to check with the police before giving the undertaking on 5 December because she had given instructions to the police which ensured it was meaningful in advance; those instructions were not in writing;
- q. Page 53, lines 23-25: *"the undertaking had effect to the extent that I made clear that the bags were not to be further interfered with"*;
- r. Page 68, lines 12-17: in answer to the assertion that she deliberately covered up an error, she said *"the failing that originated in this case was not one of mine but of the police's. I had nothing to cover up because I was given inaccurate information and activities took place in a department for which I had no responsibility. I had nothing to hide"*;

- s. Page 68, lines 20-24: at the beginning of 1991 she was told by the police that 2 bags had been breached for documentary control and by the end of January she knew the breach had been for other than documentary control;
- t. Page 69, lines 3-6: *"I had nothing of my own to cover up, Mr Clegg. I'm sorry. This was something that I had not done in the first place, nor did I have anything to cover up."*
- u. Page 69, lines 13-18: *"it can profit me or the team nothing to circulate documents which might be subject to a claim of privilege, since no improper advantage could be made of them";*
- v. Page 87, lines 9-16: she re-iterated that it was not her, but the police, who had made a mistake.
- w. Page 104, lines 12-19: she restated that she did not attempt to cover up the activities of other people;
- x. Page 128, line 18 to page 129, line 10: (in relation to the 2 bags / 5 bags issue): she stated that *"the police are the custodian of the bags"* and she checked with the police, asking them to go into their documentary control system; at first they would show her the logs to prove there had been no breaches, *"I can't even begin to think how many times I nagged the police about this";*
- y. Page 129, line 11 to page 130, line 22: she said she wrote that she checked the entire logbook and agreed that that must be right, although she was not sure what she was looking for and found it all bewildering. She relied on the police who were the custodians. There would be no note of these checks but everyone, all the police and her colleagues would recall how much she went on about it;
- z. Page 156, line 21 to page 157 line 114: she accepted that there was a lack of file notes but said *"I don't think, in any of those cases, it's seriously disputed that what I say happened happened in relation to, for example, to the instructions to the police, because the communication lines were so apparent, one could so easily communicate with them ... it was perhaps a system failing at that stage"*. She agreed that Wardle found a lack of instructions to the police;
- aa. Page 159, line 6 to page 160, line 21: she accepted Wardle's comments to the effect that, after Barbara Mills QC found the police opening bags, no notes were kept of what happened

opening the bags. Nor were there any notes of what action Mrs Harris took to instruct the police. Also, the 5 December undertaking did not appear to have been copied to the police or them given written instructions. She added that case conference minutes would assist, which discussed the matter of privilege and bag opening and *"in the context of the case conference the importance of the issue of privilege was emphasised to the police"*;

18 March 2011

- bb. Page 133, line 2 to page 134, line 7: Holroyde J asked for clarification as to whether the documents copied to the administrators in January and February 1991 were adjudged privileged by Walker and Mrs Harris said: they *"were not those which had been made the subject of a claim for privilege"*, however she said that ultimately she could not be sure because of the way in which the Walker adjudication and the removal of the documents happened;
- cc. Page 136, line 10 to page 137, line 2: she referred to the letter dated 12 April 1991, saying that the Impex cash book was not subject to PII;
- dd. Page 141, lines 2-18: Mrs Harris referred to the 2 bags opened for the administrators and said that only two bags had been opened other than document control purposes. She said *"That's right, and the reason I say that is that I knew that material had been copied, ie it was more than document control, because I knew it had found its way into the circulation and was told that it emanated from two bags."*
- ee. Page 145, lines 1-16: she referred to a note to Detective Superintendent Staff and said there was daily communication (ie with the police). She said that *"the chains of communication in the office were exceedingly short."* She said he would have known that she had been in prolonged correspondence with Vizards in respect of LPP and that it would have been communicated in *"any number of ways"*, and it was raised in conferences, informal meetings and over a cup of coffee.
- ff. Page 148, lines 1-7: At the end of her evidence she said to the Judge that she did not know when she learnt of the opening of the bags for document control purposes. She said she certainly knew about those dealt with by Barbara Mills and she saw that note.

gg. Page 148, line 21 to page 149, line 20: she said that she gave her undertaking of 5 December in good faith and when she gave it she was aware bags had been opened for document control purposes but was unaware that documents had been copied and circulated. Later in January she found out that in fact documents had been copied and circulated from the bags which she had undertaken not to examine.

28. In her witness statement dated 18 February 2011 Barbara Mills QC referred to the file note of 7 November 1990 [Abuse statements page 165]. In her live evidence she said that when she attended the incident room "*it seemed to me that the police were under the impression that they should be opening the bags so that they could log the documents in them, but obviously there seems to have been a misunderstanding.*" In evidence she said she would have expected that her file note would have been given to Mrs Harris on her return from Jersey [16 March 2011 page 125].
29. In his witness statement dated 21 February 2011 Robert Wardle referred to the huge number of documents seized during the search at PPI [Abuse statements page 266ff]. He stated that investigators would identify relevant documents which would be circulated to the whole team. He confirmed that when asked to examine the complaints made by Vizards in 1993 he conducted an extensive review and prepared the chronology and summary of facts. He stated that his view then and now was that the breach of the bags and the circulation of the privileged documents was not deliberate. In his live evidence he was asked about his 1994 Management report [Defence response file div 10] and the absence of file notes and instructions to the police. He stated "*there must have been some decisions made of which there didn't appear to be a note, there must have been instructions given, again of which there does not appear to be a note, possibly also telephone calls*" [16 March page 105]. He stated that after the search of PPI and the claim for privilege there did "*not appear to be any record of the police being informed of that .... Whether they had or whether there simply wasn't a record of it, I don't know. I would have expected to see it*" [16 March page 106]. He stated that he did not know whether they had been informed or whether there simply was no record. He said there ought to have been a note if it had happened, or a copy of the letter sent to the police. He also addressed other issues in his evidence, including the failure to notify the defence of the circulation.

## SECTION D - Further Evidence and its Effect on the Ruling

### Further Evidence

30. Further evidence provided to date has come from Anthony Puddick, Wendy Russell-Rayner and Michael Hawkins. In addition there has been waiver over case conference minutes and a letter from counsel instructed at the time. Further relevant material has been disclosed.
31. The prosecution have received no application from the defence to rely on the hearsay evidence in the statement of Christopher Lehman. For the avoidance of doubt, it is not accepted that the hearsay is admissible.
32. First, evidence has been obtained from Anthony Puddick who was a police constable at the time [Supplementary Bundle tab 1].
  - a. He described being put on the enquiry at a point after the search which he would appear to date to mid to late 1990, although he was present at the search of PPI as further hands; he does not recall opening any bags himself and therefore suggests that he may have not arrived until after the initial sift had been done.
  - b. He recalled that Wendy Russell-Rayner was the officer manager of the Major Incident Room and was under the supervision of Detective Inspector Hawkins; Andrew Barnes also worked in the team. He cannot recall any now but thinks there would have been team meetings within the police team.
  - c. Although he was not himself involved in the day to day management of the property seized, which he thought would have been the responsibility of Wendy Russell-Rayner, he recalls being aware of an issue about LPP and claims over material in bags which had been opened.
  - d. He stated the normal police procedure was adopted which entailed the bags being booked out by an officer who would assess whether it contained anything of relevance to the investigation. If the bag did not contain any such material it would be re-sealed and the bag number would remain the same. If it did, that material would be copied and bagged separately and the new bag number noted. He stated that: *"I cannot image that any specific instructions would have been given in relation to the opening of the bags as this was the normal process followed. .... If*

*someone had told us that LPP had been claimed then we would not have touched the bags in question*". At no time did he do anything other than what he was told to do.

33. Puddick produced a note recording his presence at a visit by Vizards on 28 February 1991 [Supplementary Bundle tab 2].
34. Wendy Russell-Rayner's evidence is contained in three statements; two statements dated 1 July 2011 and a further statement dated 11 July 2011 [Supplementary Bundle tabs 3, 4 and 5 respectively]. The material parts of that evidence are as follows;
  - a. She was part of the PPI investigation from 1990 to 1993 or 1994 as a Detective Sergeant. She was supervised by DI Hawkins, with DS Fred Bergin, DCs Andrew Barnes, Tony Puddick, Jim Moloney and Jim Ward. She also recalled that officers David Ward, Gerry Panter, David Worrall and Trevor Rawlinson were involved.
  - b. Her role was as office manager and her core responsibilities included the logging, cataloguing and day to day management of the property in the enquiry. This was a large undertaking.
  - c. The property seized at PPI was subject to a tried and tested procedure contained in an MPS directive and ensured continuity: the material was logged in a Book 1515, called a Documentary Control Book; it was placed in plastic bags and sealed; on return to the SFO the bags were logged and given an unique number; thereafter the contents were assessed and anything relevant was copied, then placed back in the bag which was re-sealed; the documents were also individually described on paper forms given to inputters to put them onto the SFO computer system; the copied documents were kept in binders, one copy retained in the police room and another given to the SFO law clerks so that they could be copied and circulated.
  - d. DI Hawkins decided early on to use a police document control system alongside the SFO system since there was scepticism about the SFO computer system. This involved the use of a Book 104, a Property Store Book, that recorded each opening of a bag.
  - e. The "*copying and circulating was an integral part of the system*". It was police officers who decided whether something was of use to the investigation and should be copied for circulation.

- f. While she herself had overall review she did not read any document and had no time to do so. *"I would compare it to being part of a huge production line with each person having their own area of responsibility"*.
- g. Mrs Harris played no part in the copying and circulating. She does not recall Mrs Harris giving any instructions about the copying and circulating, although, she said she could have done.
- h. *"With regard to the circulation of documents, it would appear that documents copied from the sealed bags were unwittingly circulated and it would appear that Lorna Harris would not have been aware of everything that was circulated in the binders."* Officers made the decisions about copying and circulating and there was no guidance from the lawyers.(statement page number)
- i. The police team were given briefings, and sometimes she would attend case conferences. She took her directions from DI Hawkins. She had a reasonable amount of contact with Mrs Harris particularly about property.
- j. She described Mrs Harris as *"a friendly, personable and quite a nice person. My impression was that she had been thrown in at the deep end and was being pulled this way and that to answer questions. She was generally harassed."*
- k. She did not consider LPP as an issue at the search and does not know when police were first made aware of it. She was certainly aware of an LPP claim by 5 December 1990 when Peter Knight inspected bags 57, 58, 59, 60, 61, 62, 63, 64. She may have been aware of it earlier but cannot now be certain. She was told of an LPP claim in relation to material from the Defendant's office, but does not recall anything in writing.
- l. Once the claim was made the bags would have been set aside, sealed. All bags would have treated the same, although a bag that over which an LPP claim had been made would be marked as such on the label and would not be opened without Mrs Harris' authority.
- m. She recalls Peter Knight visiting on 5 December 1990 and inspecting the bags, and that it was in relation to LPP.

- n. She provided copies of documents to the administrators but always did so on instructions. It was likely that such instructions would have come from David Morrison.
  - o. She does not recall the visit by Barbara Mills QC on 7 November 1990 or any instruction from her; she does not recall seeing the memo.
  - p. In her view the police and Mrs Harris had a different view about what was meant by 'Document Control'. *"I feel there was a difference in understanding as to what was meant by document control. It may be that Lorna Harris understood it as the contents being logged and numbered. The police would have seen it as a process of opening, assessing, copying and circulating having obtained a computer generated number for relevant documents. I think this difference in understanding led to a subsequent breakdown in communication. Why would Lorna Harris lie about such a thing? I feel she may not have asked the right questions and did not realise what we meant by document control, just as it appears the police did not understand what she meant by it"* (at page 18).
  - q. She does not recall conversations with Mrs Harris about breached bags or LPP. While she does not recall saying to her words along the lines of 'you're not going to like this, Lorna, but 5 bags were opened', it is familiar in its turn of phrase.
  - r. She recalls a case conference on 23 November 1990 where there was a discussion about material from a briefcase of the Defendant's.
35. The evidence of Michael Hawkins is contained in a section 2 interview transcript dated 29 June 2011. It would appear from that that his evidence is as follows:
- a. He was a Detective Inspector at the time and responsible for the police administrative side of the enquiry into the Defendant and police operation decisions; he was answerable to David Staff who was a Detective Superintendent (pages 7-8).
  - b. The police team were part of the SFO investigation and police action undertaken had to be approved by the Case Controller which, to the best of his knowledge, he ensured was complied

with (pages 9-10). There were case conferences and openness among the police and SFO team (page 12).

- c. Normal police procedure would have included the consideration of material seized for relevance, and the copying of material that was thought to be so. In some cases this would be at the time of logging (pages 4-7). It was the police decision to do this as part of that procedure (page 5 2<sup>nd</sup> tape).
- d. He does not recall any precise instructions from the SFO, or Mrs Harris, about where or how property from PPI should be stored (page 24).
- e. He cannot recall when he first learned of an LPP claim (pages 26-27).
- f. He cannot recall the visit by Barbara Mills QC (pages 27-28) or her memo (page 30). He stated that it was not his signature in respect of entries on document control book showing bags were booked out by him on 7 November 1990 and the entries were not in his handwriting (page 29). He does not recall there being any effect or major stoppages (page 30).
- g. He accepted that it was his signature on entries in the document control book of 12 November 1990 but not his handwriting. He was unable to clarify whether he or someone else had in fact booked out the bags the entries related to or what the purpose for that was (pages 31-33).
- h. He agreed that the entries in the Property Store Book 104 in respect of the disputed bags showed that they were dealt with together as a batch on 16 November 1990 when they were booked in (page 39).
- i. He agreed that the entries in red marking the disputed bags as not to be opened without Mrs Harris' authority were in his writing and would have been made at the earliest on 7 March 1991 and that he was acting on her or D Supt Staff's direction (page 40-42).
- j. *"I am – obviously was aware that there was a claim, which was being dealt with by Lorna Harris, but there was never any instructions that we should stop looking at any particular property bag, and the matter was purely being dealt by Lorna Harris and the solicitors. The police had no involvement at all other – and again you may need to speak to the people that were dealing with that – would have perhaps been on the instructions of Lorna Harris that these could be opened by another party"* (pages 42-3).

- k. He did not think he had access to SFO correspondence as he viewed it as a legal matter but had there been an instruction not to open bags it would have been complied with (page 43, 45).
  - l. The police and Mrs Harris had a good relationship, she was a frequent visitor to them and had a open door policy (page 46).
  - m. He was not aware of any instructions from Mrs Harris specifically to do with the copying and circulation of documents. *“My understanding was the documents went into the system and everyone connected with the Polly Peck enquiry who were permitted had access to those documents. ... It was the police role under the SFO to act in that way of examining the documents, sorting what we considered to be relevant .. for the inquiry and then put it into the system. ... Normal procedure that you would go through. ... I cant say whether she gave a specific – I cant say that, you, now, that it wasn’t explained, but, as you know, as far as – I feel she was fully aware of what we were doing to keep her informed”* (pages 52-3).
  - n. If administrators were allowed to see documents then that would have been with Mrs Harris’ authority (page 63).
  - o. He does not recall the meeting or the note of 5 November 1990 (page 64).
  - p. He clarified that in respect of instructions, he acted on the instructions of D Supt Staff which he *“took to come from the case controller”* (pages 66-7)
  - q. He does not rule out the possibility that Mrs Harris or the lawyers spoke to his superiors, most particularly David Staff.
36. Notes of parts of case conferences in which the procedures adopted in relation to seized material and the question of LPP were discussed have been disclosed under the terms of a limited waiver. The relevant passages include:
- a. On 26 September 1990: the discussion refers to the fact that documents from SAM were entered onto the SFO document control system [Supplementary Bundle tab 43];
  - b. On 10 October 1990: the notes refer to the recording of documents and *“evidential value”* [Supplementary Bundle tab 44];

- c. On 18 October 1990: the police and Mrs Harris expressed competing interests where the documents seized from SAM were concerned in that DI Hawkins was noted as concerned not to rush the process of sifting the material to ensure nothing that could lead to vital evidence was missed and Mrs Harris was anxious to speed to process up since she was embarrassed about stalling the defence solicitors who wanted access to them [Supplementary Bundle tab 45];
- d. On 23 November 1990: there was a more detailed discussion in which DI Hawkins informed the team that the police had completed sorting the bags of documents from PPI and that all the SAM documents were now on the computer, referring to the “*case tracking system*” and he also mentioned that a Turkish translator who had been given copies of documents, was assessing each, and reporting back to the team who then made decisions as to further action. In addition DCI McStravick raised certain matters and Mrs Harris gave advice about LPP which was noted as follows: “*Privilege documents ie the contents of the brief case. TM said he would be very reluctant to return these documents and subsequently have to state they were no longer in police case. He asked LH to reconsider any decision to return. LH replied that she had no discretion in the matter. If the client does not waive the right then we have no rights. LH said there were many documents that came into lawyers possession that are not privileged. However if a decision is made then they are privileged we then have no claim. Mrs Harris referred to one document that came in to police possession during the search of PPI which was an envelope from SJ Berwin to Nadir. This appeared to relate to an instruction the previous day in relation to ownership of Nadir's investments stating words to the effect of “you indicate you are the owner of the beneficial interest of that company”. LH said she had to return that document. Her instructions to the Metropolitan Police were that in these circumstances the information must be removed from the computer. TM queried disclosure – namely how we stood if we gave it back and when there was more than one defendant. DCS said we would have to disclose subject to legal privilege. LH said Vizards were attending in one weeks time and that any claim they made which was sustained will result in the documents being returned. LH asked counsel who had any doubts as to her rulings to inform her before Friday the 30<sup>th</sup> including her ruling to the Metropolitan Police. DCS said he would speak to RO since he agreed that it would be disastrous to get an adverse ruling even before commencement of court proceedings. Certainly we had no right to seize unilaterally.*” [Supplementary Bundle tab 48]

37. The note by DC Barnes is instructive and provides evidence that:

- a. The police felt at the time that they were at fault for the '2 bag breach' which arose when access was given to the administrators; and
  - b. That the markings on or after 7 March 1991 were to ensure that such an error was not repeated, rather than evidence of the earliest time when the police were aware of the LPP claim.
38. It would appear from the letter of Simon Browne-Wilkinson that the approach of Vizards was that the assertion of LPP was not in absolute terms for the relevant period.
39. It is submitted that the effect of the evidence of Brendan Morris on the ruling is to place in context the technical nature of the breach of LPP and demonstrate how little or no effect it would have had and will have on a trial of Mr Nadir [Supplementary Bundle tab 20].

#### Analysis of the Ruling

40. The factual findings that formed part of the ruling by Holroyde J included [Supplementary Bundle tab 49]:
- a. He accepted the evidence of Mrs Harris to the effect that she gave the undertaking of 5 December 1990 in good faith and in ignorance of the fact that some documents had been copied and circulated (Ruling p.21);
  - b. He noted the evidence of Mrs Harris that the failing was that of the police rather than that of her (Ruling p33). He noted the defence submission that Mrs Harris was covering up "*the activities of other people*" (Ruling p38). He found that Mrs Harris must have known that Vizards would have wanted to be told of the circulation and retention of copies. He found that she did not tell Vizards because she was very unwilling to report that an error had been made, "*even though she personally could not be criticised for that error*" (Ruling p41). She knew she should have told Vizards and made a deliberate decision not to volunteer the information (Ruling p42). She avoided telling any direct lie and chose her words very carefully. Likewise, to the Attorney General she did not tell any lies but did not volunteer the information she knew she should have given (Ruling p42-43). He found that she probably persuaded herself that

because she had not been at fault in the initial error, had taken advice and recovered the documents, the matter was resolved and there was no need to tell the defence (Ruling p43);

- c. He did not find any dishonesty in the sense of seeking to obtain a dishonest advantage, however, her conduct amounted to misleading by omission and was to that extent dishonest. It was on any view a very serious matter (Ruling p44).
  - d. He determined that in her evidence to the Court Mrs Harris gave untruthful evidence in that it was plainly a lie to say that she did not know whether Vizards would have been interested to learn the full facts. In her general account she did not tell the whole truth because she did not admit that she knew she should have told Vizards and the Attorney General exactly what had happened. This was not a series of separate lies, however she consistently put forward an account which she knew was not the whole truth (Ruling p44). On any view that was a very serious matter.
  - e. In his conclusions refusing the stay, the Judge stated that the LPP issue was the one respect in which he found Mrs Harris to have lapsed. He had criticised her failure to disclose the error of others, an error which did not disadvantage the defence (Ruling p90).
41. However Holroyde J rejected any assertion of dishonesty or bad faith on the part of Mrs Harris in relation to the other grounds of abuse, namely the alleged non-disclosure of the contents of the Mantle documents and the Bennet 'dossier E' and the allegation that she took advantage of a procedure by which KPMG did not record disclosable expert opinions. None of the material now being considered relates to any of those issues.

#### Effect of the New Material

42. The new material relates to a small part of the LPP handling matter, namely who was at fault for the error that led to the copying and circulation of material from bags over which a potential claim of LPP had been made. It goes no further than this, since it was only in this regard that Mrs Harris sought to blame the police and about which she is now challenged.
43. In particular it clearly shows that:

- a. The police followed police procedures and were not confident in the SFO's procedures in handling seized material.
- b. There was a measure of confusion about whether and when an actual claim of LPP was made.
- c. According to the Davies report, the police had possession of a letter dated as early as 2 November 1990 which referred to the LPP issue.
- d. The Director of the SFO gave the police oral instructions concerning the LPP issue on 7 November 1990.
- e. The instructions given to the police by Barbara Mills on 7 November (as recorded in her file note) tend to suggest that the police must have then received further oral instructions, presumably by Lorna Harris, before they resumed opening bags after 7 November 1990.
- f. Mrs Harris was not the only member of the SFO who was giving instructions about the material seized from PPI.
- g. The collective police recollection is inadequate to recall the visit by the then Director of the SFO, Barbara Mills QC, and an instruction by her to stop opening bags. Since it is unlikely that this did not take place, in view of the contemporaneous record, it is submitted that the police memory of the detail of handling the disputed bags should be given limited weight.
- h. In particular, it is submitted that the fact that police officers have forgotten that they were given oral instructions by the Director herself, suggests that they are equally likely to have forgotten that they were also given oral instructions by the case controller.
- i. The police were made aware of the LPP issue at the conference on 23 November 1990. Those officers who then read the minutes will also have been made aware of the issue.
- j. The police were aware of the LPP issue from their dealings with the defence, and from the events of the Vizards inspection of 5 December and the application of yellow tags to the documents.

- k. There was a misunderstanding between the SFO and the police about what was meant by 'document control'.

#### **SECTION E - Conclusions as to Fact**

44. The submissions on behalf of the SFO are that the question of who was at fault is not an easy one to answer, because the new evidence appears to be that there was a measure of confusion about: first, what was meant by 'document control'; secondly, whether a claim had in fact been made prior to March 1991, and thirdly, about where an error had occurred.
45. Vizards had agreed that the disputed bags should be subject to 'document control', clearly understood by Mrs Harris to be a logging or cataloguing process. By contrast the police, as explained by Mrs Russell-Rayner, using tried and tested police procedures, understood it to include the assessing and copying of relevant material for onward dissemination.
46. Although the minutes of the case conferences record no guidance from Mrs Harris about how to deal with the disputed bags, this should be seen in the context of the following facts:
  - a. The police appear to have been aware of an LPP issue from 2 November 1990, the date of the letter on their file.
  - b. Lorna Harris has asserted that she had regular contact with the police (which does not appear to be disputed) and has said that she gave oral instructions.
  - c. In addition, there is no reason to suppose that Barbara Mills QC did not visit the police room and give the instructions she contemporaneously noted on 7 November 1990, even if the police do not recall such a visit or any instructions.
  - d. The police were obviously aware of the issue by the date of the conference of 23 November 1990.
  - e. The police were present on 5 December 1990 when they supervised the inspection by Peter Knight for LPP purposes.

- f. There was a measure of confusion between the SFO and the police, who had control and custody of the disputed bags.
  - g. Furthermore, this was a fast moving and onerous investigation for all involved, but most particularly Mrs Harris.
47. In considering whether Mrs Harris was lying when she said that not she but the police were at fault, the SFO submit that the court should take into account the following in finding that this was not a deliberate lie on her part:
- a. The police were in 1993 and are still unable to recall the unusual occurrence of the SFO Director visiting and giving instructions, and in those circumstances it is likely that they would have forgotten instructions to treat the disputed bags in a certain way had they been given, as Mrs Harris fairly accepted, orally;
  - b. The documents were not in her control but that of the police;
  - c. A clear inference can be drawn from the new material that there was a level of scepticism by the police about the SFO procedures;
  - d. There appears to have been an outstanding issue as to when the lawyers, most particularly Mrs Harris, were of the view that an LPP claim had been made which would have added to the confusion in complying with any such instructions.
48. Further, when deciding whether this lie was a separate and distinct lie by Mrs Harris, as opposed to part of a series of untruths that had one and the same source, the SFO submits that the only reason this issue arose was because Mrs Harris was defending herself against the allegation that she had deliberately lied when she said she had no malicious intent in not telling Vizards about the copying and circulation. It is part of her evidence on this confined topic, evidence which the court has already found to be untruthful.
49. On behalf of the SFO, therefore, it is submitted that:
- a. First, the court should not find that Mrs Harris was to blame for the copying and circulation.

- b. The Court should accept the evidence of Mrs Harris that she gave oral instructions to the police, instructions which, it appears, officers perhaps cannot now recall due to the passage of time.
- c. If, in the alternative, the court finds that some blame should attach to Mrs Harris as well as the police for the copying and circulation of documents from the disputed bags, it is submitted that it should go no further than a failure to give any or sufficiently clear instructions.
- d. Secondly, in either case, the court should not find that Mrs Harris told a further deliberate lie in order to mislead the court. If any such untruth was told by her, it was a natural exoneration of her position and a corollary of the lie by which she sought to excuse her conduct in failing to inform Vizards of what had occurred.
- e. Thirdly, even if the court finds that the lie was a deliberate deception by Mrs Harris, and in any event, such a finding would not effect the evidence given and the facts found in respect of the Mantle and KPMG issues, since it is confined to the discrete and preliminary issue of the manner in which LPP was handled.

#### **SECTION F - Conclusions on Law**

- 50. The SFO submits that whether the court finds Mrs Harris told a further lie, and whatever construction the court places on such a lie, the case should still not be stayed as an abuse of its processes.
- 51. As previously identified and agreed, the manner in which LPP was handled in the 1990s does not affect the fairness of the trial, or the ability of the Defendant to defend himself on the charges he faces.
- 52. Such lies, and the conduct of Mrs Harris, as prosecutor in the 1990s, without more, it is submitted, could not lead to the conclusion that it is now unfair to try the Defendant who has willingly returned to the United Kingdom to be tried.

53. While the case law has been rehearsed at some length, and is not repeated here, some further examination of the case of *R v Early* is informative. In that case, unlike this one, the lies went to the heart of the appellants' defence on the substantive trial and the prosecuting authorities knowingly conducted the voir dire and would have conducted the trial on a false basis, misleading the court. The deception was not uncovered during the course of the proceedings; it was discovered after the appellants had entered pleas of guilty and been convicted. More significantly, once this deception was uncovered in the Court of Appeal, consideration was given to whether there should be re-trials. None were ordered, although the Court of Appeal stated that they would have made those orders in the ordinary way, but did not do so for a variety of reasons: because of the fact that the appellants had served their sentences, the offences were committed some time ago, or there was no such application by the Crown (paras. 19, 29, 77-78).
54. Furthermore, the Court will be mindful of the Protocol issued by the Lord Chief Justice on 22 March 2005 on the Control and Management of Heavy Fraud and other Complex Criminal Cases where guidance is given in respect of applications for stays on the grounds of abuse of process at paragraph 5, in particular 5(ii) which states "*It should be noted that abuse of process is not there to discipline the prosecution or the police*" [Supplementary Bundle tab 50]. (See too the recent decision of the Privy Council in *Warren v Attorney General of Jersey* [2011] UKPC 10.)
55. In other words, *Early* is not authority for the proposition that lies to a court by someone conducting the prosecution, even about a matter central to the trial, necessarily gives rise to a situation where it would be unfair to try the appellants. Since the appellants in that case had all entered guilty pleas, the Court had no other remedy than to quash the convictions. In this case, the abuse of process hearing and the ruling itself has served the same purpose in that lies have been revealed at this pre-trial stage.
56. The SFO submits that the ruling on this topic by the court on 31 March 2011 should remain the same, even if it is found that Mrs Harris told further lies in relation to who was to blame for the copying and circulation: the error, irrespective of whose fault it was, remains one "*which did not result in any real harm to the defence case, and did not impinge on the trial process.*"

Philip Shears QC

15 July 2011

Gareth Patterson

Esther Schutzer-Weissmann