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R. v William J Fulton & 3 Others (No.7)

SB

RULING:

MR JUSTICE HART: There are applications before the court that I should stay these proceedings. The main submissions have been made on behalf of Fulton and Gibson and adopted by counsel for Rain Landry and Talutha Landry. In effect the applications have been made by Fulton and Gibson and I received extensive written and oral submissions from Mr Treacy QC on behalf of Fulton and from Mr Macdonald QC on behalf of Gibson. These had a good deal of common ground and I have not considered it necessary to refer to each and every argument advanced by both counsel in this ruling, although I have had regard to them. I propose to deal with the issues raised in this application in a different order to the submissions of counsel, starting with the allegation of improper contact amounting to collusion between a number of the Prosecution witnesses.

Part of the submissions of Mr Treacy and Mr Macdonald related to what was alleged to be a collusive process, whereby a number of witnesses prepared their statements in collaboration with each other on the 2nd or 3rd of November, in circumstances where it was alleged that the statements were not the genuine recollection of each witness. Their evidence was described as "the party line", designed to put forward an agreed version of events relating to the notification to the Chief Constable of the approval of authorisations by the Surveillance Commissioners.

A further criticism relates to contact between several, if not all of these witnesses, during the period between their evidence in chief and how they came to be cross-examined at a later stage.

Before turning to the facts of what occurred, it is necessary to consider what principles apply to the preparation of witness statements and to the manner in which witnesses give their evidence once they have started to give evidence. The fundamental principle is that a witness "should give his or her own evidence so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal discussions". In the words of Lord Justice Judge in R v Momodou and another [2005] 2 All England Reports at page 587. The reasons why this is necessary were explained in the following passage by Lord Justice Judge in the context of witness training or coaching, but they are applicable to all forms of discussion between witnesses:

"There is a dramatic distinction between witness training or coaching and witness familiarisation. Training or coaching witnesses in criminal proceedings, whether for Prosecution or defence, is not permitted. This is the logical consequence of well known principle that discussions between witnesses should not take place and that the statements and proofs of one witness should not be disclosed to any other witness".

See R v Richardson, R v Arif, R v Skinner and R v Shaw.

"The witness should give his or her own evidence, so far as practicable, uninfluenced by what anyone else has said, whether in formal discussions or informal discussions. The rule reduces, indeed hopefully avoids any possibility that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one to one with someone completely removed from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be improved. These witnesses are present in one to one

witness training. Where, however, the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change, memories are contaminated, witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited".

As was recognised in the above passage, it may not always be practicable to insure that a witness is uninfluenced by what anyone else has said, and an obvious and long recognised occasion when this may occur, is when police officers prepare their notebook entries.

As Lord Justice Farquharson observed in R v Skinner 1994 99 Criminal Appeal Reports at
page 216, it has long been permissible for police officers, "to confer together in the making up of their notebooks immediately after the events or interviews in which they have both been participating as an aid to memory".

It is common nowadays for officers to prepare their witness statements soon after the events to which they refer, and there can be no real distinction drawn between the preparation of notebook entries and statements, provided that the statement does represent the genuine recollection of the witness.

However, there are well recognised principles which have to be borne in mind. One is that the statements and proofs of evidence of one witness should not be made available to another witness. As Lord Justice Sachs stated in Richardson at page 251:

"Obviously it would be wrong as several witnesses were handed statements in circumstances which enabled one to compare with another what each had said".

This statement was quoted in Skinner at page 216 where Lord Justice

Farquharson then said:

“In other words, as a general rule, any discussions as to what evidence is going to be given by them should never take place between two or more witnesses. Counsel goes on to say the statements or proofs should not be read to witnesses in each other's presence. That must obviously follow, because it would amount to a discussion between the pair of them as to what evidence is going to be given. One would be enlightened by the evidence that is to be given by the other. As a practice, therefore, the court disapproves of such conferences taking place. It is to be hoped that they will not do so in future. It is particularly important in the case of police officers because, as is well known, they are the only ones who give evidence fortified by the use of notes made at the time. In such a case, as indeed is the case here, witnesses can be attacked for giving evidence on grounds that they are giving not a true account of what occurred, but something which has been affected by the discussions they have had with somebody else".

It must be noted that this prohibition is not an absolute one, because of the qualifications inherent in the reference to "as a general rule". At page 217 Lord Justice Farquharson expressly stated that there cannot be an absolute rule citing the following passage from the transcript of the judgment of Lord Justice Nolan in Arif. The Times June 22nd 1993:

"It follows in our judgment, that the fact that there has been a pre-trial discussion of evidence between potential witnesses, cannot be said to render the evidence of such witnesses at the trial so unsafe that it ought always to be excluded. Each case has to be dealt with on its own facts. In some cases, it may emerge in the course of cross-examination at the trial of the witnesses concerned that such discussions may well have led to fabrication of the evidence in the sense which we have described. In such a case, the Court might properly take the view that it would be unsafe to leave any of the evidence of the witnesses concerned to the jury. There may, however, be other cases where the nature of such pre-trial discussions is such that it would be quite sufficient to draw to the jury's attention in the course of summing up, the implications which such conduct might have for

the reliability of the evidence of the witnesses concerned. In each case, it must be a matter for the trial judge".

These principles are, or should be well known to all police officers, as is evident from instructions which, it appears, are given to them, to judge by the contents of Defence Exhibit F.20. Two extracts are relevant in the circumstances of the present case:

> ***"MAKING UP POCKETBOOKS TOGETHER***
>
> ***if officers have been involved in the same incident they may confer when preparing notes. Where joint notes have been made the officers should endorse their notebooks to that effect.***
>
> ***CONFERRING AT COURT***
>
> ***officers should not confer or coach each other or other witnesses on the evidence they are about to give. If there is a genuine reason why police officers have to discuss something relevant to their evidence, then the Court must be made aware that this has occurred. The same principle applies to allowing civilian witnesses to look at their statements before giving evidence (see the cases of Skinner and Arif listed further down this document in the relevant cases)".***

These principles have been expressed in the context of discussions and contact before witnesses give evidence, where they have already prepared their statements.

Once a witness commences his or her evidence, then the witness must not discuss his or her evidence with anyone until their evidence has been completed. This requirement is frequently emphasized to witnesses when they are allowed to leave the witness box before their evidence is completed, although such a warning should not be necessary for someone such a police officer who is familiar with giving evidence. That is not to say that a witness whose evidence has not been completed may never be spoken to about their evidence, or issues in the case but this should only happen in exceptional circumstances and never without the Judge and all the parties being informed. If at all possible permission should be sought from the Judge beforehand, so that the opposing party can have the opportunity to

make representations about what is intended. If, for some reason, it has not been possible to inform the Judge and the parties beforehand, then the Judge and the parties should be informed of what has occurred at the earliest opportunity. In practice it is very hard to envisage circumstances where it would be proper to approach a witness about his or her evidence without, at least, obtaining the consent of counsel for the opposing party beforehand, if it is not possible to raise the matter with the judge in advance. If it is absolutely unavoidable to have to speak to a witness about their evidence or issues in the case before their evidence is completed, then this should only be done by counsel or, if no counsel is engaged, by the solicitor, or in the case of the PPS, professional officer.

I now turn to consider what happened in the present case at the stage where the witnesses described as the '*managers*' were preparing their witness statements. On the 11th of October 2005 Mr Provoost gave evidence as to when he became aware that Sir John Evans had not been notified, in writing, that the authorizations he had granted had been approved by a Surveillance Commissioner. He gave his evidence-in-chief and was cross-examined and then re-examined. When he completed his evidence he left the witness box and was followed by Mr Bailey. He was not placed under any restriction about discussing his evidence and, so far as I was concerned, he had completed his evidence.
He was, therefore, in the same position as any witness who has completed his evidence, although he has accepted that he realized he would probably be coming back to give more evidence on this issue at some later stage of the trial.
I will return to his status in due course.

Sir John Evans was called to give evidence on this issue and was cross-examined at some length on Saturday the 29th of October 2005, and a transcript of his cross-examination was directed. As there were issues of disclosure which the Defence wished to explore, the remainder of the cross-examination of Sir John was deferred until a later date. The trial was then adjourned, as the next week was the midterm recess. Mr Provoost explained that six witnesses, who have collectively been described as '*the managers*' had to be contacted and arrangements

made for them to come to Northern Ireland to examine the authorizations and prepare their written statements, as it had not been anticipated that they would be required to give evidence, so they had not previously made witness statements.

He arranged for these witnesses to be provided with transcripts of the evidence of himself, Mr Bailey and
Sir John Evans, together with some disclosure letters encapsulating what difficulties there were with what he described as the 'flawed authorities' as a reference bundle. He briefed them as to what they were expected to cover in their statements, such as their experience when they came to 'Operation George', their duties, who they worked with, what their processes were in terms of prior approval notices, their contact with the Chief Constable, and why they had failed to provide the Chief Constable (as the authorizing officer) with written notice of the Surveillance Commissioner's approval. He denied that the purpose of the meeting was to establish that the failure to notify the Chief Constable was inadvertent, that no-one had realized that there had been a failure to comply with this requirement until September 2005, and that the explanation was that the written notice requirement was not specified in the Code of Practice.

When cross-examined on the 16th of January 2006 about why he had briefed the managers, Mr Provoost denied that he intended to coach witnesses or to distort their statements; saying that only he had experience of 'Operation George' and that the procedure he adopted was what he termed:

> "*A reasonable and pragmatic way of getting statements from five to six busy managers, from four different Police Forces, who could only spare me two days*".

I have already referred to Mr Provoost having completed his evidence on the 11th of October, and on 16th January he said that at this time in November he did not consider himself to be under oath, although he did realize that he would probably be giving further evidence on the issue of the authorizations at some stage. So far as Mr Provoost's action in briefing the managers is concerned, I do not consider that he was prohibited from speaking to other witnesses at this stage. He had completed his evidence and had not been made subject to any restriction

as to who he should speak to, or about what, particularly those who have responsibility for the conduct of the case to give evidence on discreet issues at various points in the trial. Usually they are cross-examined and re-examined on one issue and complete their evidence. Whilst they may have to give evidence about other issues later, their evidence is complete on that issue. Frequently, if not invariably, as the officer in charge of the case, they will be required to instruct prosecution counsel about other issues in the case, and at least in my experience, it has never been suggested that they cannot discuss issues in the case, even though they may be required to give evidence again, and I see no reason why they should not. To prevent them from doing so could well cause serious and unnecessary complications in the presentation of the evidence, with evidence being held back from being given at the logical point, to avoid the risk of the witness becoming subject to an embargo, because he or she gives evidence on a discreet issue. Therefore, in my opinion, there was nothing improper or untoward in Mr Provoost speaking to the managers to inform them what were the issues that they were to address in their statements.

On the 10th of November Mr Provoost briefly gave further evidence about the criteria adopted by the police when the applications were made for surveillance; whether under the Home Office guidelines, under what has been referred to as CLET and then under RIPA. He also touched on the preparation of the redacted abstracts. His cross-examination was then deferred until the end of the cross-examination of the surveillance managers.

On the 14th of November evidence-in-chief was given by five of the six managers. These were Mr Mawer, Mr Leitch,
Mr Craig, Miss McMurdie and Mr Toyne. In each case their cross-examination was deferred, pending the outcome of applications before the Disclosure Judge. In the event the disclosure hearings took several weeks, and it was not until the 19th of December that evidence in the trial really resumed, when the cross-examination of Detective Chief Superintendent Mawer started with cross-examination by
Mr Treacy on behalf of Fulton. Mr Mawer was due to continue his evidence on the

20th of December, but the trial had to be adjourned because Fulton was ill, and because of this and the Christmas vacation it did not resume until the 9th of January, when Mr Mawer's cross-examination resumed and it continued on the 10th of January. Re-examination was deferred until Mr Mawer returned at later date, having been asked by the Defence to check various matters raised with him during cross-examination. On the 10th of January Detective Chief Inspector Leitch was cross-examined and re-examined, thus completing his evidence subject to Mr Macdonald (for Muriel Gibson) having reserved his position on further cross-examination depending upon the outcome of a disclosure application relating to spread sheets. On the 11th of January Sir John Evans was recalled, cross-examined and his evidence was completed. On the same day detective Chief Inspector McMurdie was cross-examined and her evidence was completed. On the 12th of January Detective Inspector Toyne was cross-examined and his evidence was completed. Detective Inspector Craig was recalled and tendered for cross-examination, but this was declined by counsel for all defendants. The remaining manager was Detective Inspector Fernandez, who had not yet given his evidence-in-chief. He gave his evidence, but was not cross-examined on behalf of any of the defendants.

On the 16th of January Mr Provoost was recalled, to resume his evidence from the 10th of November 2005.

He was not cross-examined by Mr Treacy (for Fulton) nor by

Mr Lyttle for Rain Landry, nor by Mr McCollum for

Talutha Landry. He was cross-examined by Mr Macdonald for Muriel Gibson, about the preparation of the managers' statements on the 2nd or 3rd of November 2005, and I have earlier summarized his evidence on this.

Disclosure hearings before the Disclosure Judge meant that the trial did not resume until the 30th of January, and on that date Mr Mawer was recalled for further cross-examination. During his cross-examination it emerged that he and Mr Provoost had been in contact in circumstances that are alleged to be improper and it is, therefore, necessary to examine, in some detail, what his evidence was

about what occurred between himself and Mr Provoost. Mr Mawer's evidence about this is contained in pages 37 to 50 of the transcript of his evidence on the 30th of January. Initially he was asked had he spoken to any of the managers since the 14th of November and he said that whilst he had spoken to some about other matters, or about innocuous administrative matters, he had not spoken to any of them "about any of the issues connected with this case", as Mr Treacy put it at page 39. He went on to say that he did not "brief them" about collateral intrusion, about circumventing PACE, about payments to the defendants, or about intruding on legal professional privilege.

Mr Treacy then put to him the following entry from Mr Provoost's journal of the 24th of November 2005:

"AM - spoke Nigel Mawer. NM must take responsibility, as will all the George managers, for reviewing their journals. Question mark. Do you intend to rely on your journal when giving evidence if A yes. Identify the excerpts and serve them on defence. If PII non-relevant material appears in that journal excerpt redact".

Mr Mawer stated that his recollection of this was that "this was all the work that was being done to pull together the journal entries in relation to the evidence".

He explained that he was asked to review the managers' journals "because there is some evidence that would not - should not or would not have been disclosed in relation to this case". Because there was what he described as "a mountain of material basically". He was then asked what the entry meant when it referred to intending to rely on journals and there occurred the following exchange at page 43, and I quote from the transcript:

"Question: And did you speak to the, speak to the officers concerned about getting their journals from them? Answer: Yes, I did, my Lord, yes. Question: This was at a time when they hadn't completed their evidence. Answer: That is correct, my Lord, yes. Question: So you had discussions about disclosure with those officers and about their journals? Answer: I did, my Lord, yes. Question: And

what did that, what does that mean there when it said: Do you intend to rely on your journal when giving evidence if answer yes? Well, you can read it for yourself. What was that all about? Answer: Sorry, could you just refer me to. Question: Yes, that's the entry for the 24th of November 2005. Answer: Yeah. It was an issue around disclosure because if there was any part, the journals had already been copied and were part of the disclosure material. But if anybody was seeking to rely on any particular entry from their journal when giving evidence, then that's, would then become a disclosure issue as to whether or not that journal entry should be disclosed. Question: And if they weren't relying on their journal? Answer: Well, that was, it was more to point to the relevant parts of the journal that may be used in evidence which then may become, be a disclosure issue. Whereas if they were not seeking to rely on their journals, then it was unlikely that it would be a disclosure issue".

He was then asked about the following extract from Mr Provoost's journal for the 5th of December 2005:

"Spoke Nigel Mawer. Ensured he was briefing all George managers re issues to date including collateral intrusion, circumventing PACE, expenditure on targets, intruding on legal privilege".

Whilst he couldn't recollect the date, he accepted that Mr Provoost had spoken to him around that time and that he had told Mr Provoost that he was "briefing" all the George managers.

The transcript then continues at page 45:

"Answer: Yeah, that's correct, yes, in terms of a lot of the officers had moved on and engaged in other business, so it would provide them the opportunity to refresh their memories around. Question: No, no, just. So Mr Provoost made contact with you on the 5th of December 2005 and one of the objects of that conversation was for him to satisfy himself that you were briefing all the George managers, isn't that right? Answer: Em, yes, around certain issues, yes. Question: Yes. And you told him that you, you told him that you were briefing all the George managers on the issues that had arisen to date? Answer:

Yes, that's correct, yes. Question: And that included those that are listed in that note? Answer: Ah, yes, I will accept that, my Lord, yes. Question: So that means that the, you were briefing all of the George managers at a point in time when they were, hadn't completed their evidence, isn't that right? Answer: Ah, that is correct, my Lord, yes. Question: And after you had known that you and Mr Provoost had known that there was an order from the Court that these witnesses should actually give their evidence while the others were excluded? Answer: Yeah, that's correct, my Lord, but the issues involved in this were sort of general issues to get people up to speed around what the position is in how you deal with intrusive surveillance".

Throughout pages 46 to 48 he was asked on a number of occasions had he "briefed" various individuals, or himself used the term "briefed". At page 49 he sought to explain what he meant by briefing:

"Question: So you have no notes or records in relation to your briefing of the managers whom you did brief? Answer: No, and I think briefing is too strong a word. It sounds like a formal event. Question: Well -- Answer: Was to ask -- MR KERR: Well, with respect, if he can finish, my Lord. THE WITNESS: Sorry, I think briefing is actually too strong a word. What it is, it's looking, getting officers to be familiar with the particular material areas of the law, not to brief them in terms of what it was".

Before considering the implications of these discussions between Mr Provoost and Mr Mawer, there are some related matters that I now turn to. Detective Chief Inspector Leitch was recalled on the 2nd of February and further cross-examined. He conceded that he had been approached by Mr Provoost, or one of the officers working with him, and asked to look at his journals. Mr Mawer had said at page 48 that he had spoken to him, but Mr Leitch denied that Mr Mawer had spoken to him about any of these issues. Mr Mawer agreed that he spoke to Miss McMurdy, but she gave evidence on the 11th of January before this issue emerged, and I have not heard from her on it. Mr Mawer said that he did not speak to Mr Fernandez who gave evidence on the 12th of January. I have not

heard from him on this issue. Mr Mawer said that he had not spoken to Mr Toyne. Mr Toyne was recalled on the 2nd of February, but was not cross-examined on behalf of Fulton and was not asked whether he had spoken to Mr Mawer since he gave evidence on the 14th of November. Mr Provoost was recalled on the 2nd of February. He was not questioned on behalf of Fulton, but was by Mr Macdonald. In the course of Mr Macdonald's cross-examination, he touched on the significance of his journal entries of the 24th of November and the 5th of December.

In a lengthy exchange at pages 2 to 5 of the transcript, Mr Provoost explained his purpose in asking the witnesses whether they were going to rely on their journals:

"In that document there is an entry for the 24th of November 2005. Answer: Yes, Sir. Question 6. And you spoke to Mr Mawer and you told him that he must take responsibility, as will all the George managers, for reviewing their journals. Answer: Yes. Question 7: Do you intend to rely on your journal when giving evidence, read excerpts redacted? Answer: Ah ha. Question 8: It appears that you were indicating to Mr Mawer that he, and indeed all the other managers should go through their journals and then disclose whatever they intended to rely on, is that fair? Answer: It is fair in respect of that particular passage, my Lord, yes. What I should say is that there were also other conversations in respect of, for example, specific disclosure issues which I was talking to the individual managers about as and when they arose and asking them to check their individual journals vis a vis those specific issues. Question 9: That gives the impression that, first of all, they hadn't reviewed their journals before then. Perhaps I should take it in stages. It gives the impression that they hadn't reviewed or produced their journals beforehand. Answer: Their journals had been reviewed, my Lord, as part of the disclosure exercise by Superintendent Bailey, and that was part and parcel of that whole disclosure exercise into the covert side of the operation. Question 10: Why would it have been necessary to go through this exercise in November 2005 to identify the excerpts that they may be intending to rely on? Answer: This was a continuing process. From the time at which the problem with the flawed

authorities was discovered, I was pretty much in regular contact with these managers and one of the things that I asked them to do was to go through their journals and to try and determine whether there was anything that might inform that process. As I say, following on from that, as and when specific disclosure issues arose, I was having an ongoing dialogue with the managers to get them to check their individual journals for specific issues. Question 11: But it seems the test that they were told to apply was whether or not they intended to rely on them. Answer: No. I think in fairness there was a whole issue around how we were going to approach the journals because, of course, practically everybody who worked on George, including myself, our journals contained highly sensitive material, on occasions secret material, so there was a whole disclosure issue, a whole issue about those journals and about them being produced, as it were, in court. It wasn't really like a police officer's notebook, where one could bring it along and refer to that in evidence, and use it as one was giving evidence. Obviously once the journal was produced there was a potential there for further disclosure. So there is something of a dilemma about what our approach to the journals should be and the way in which we saw as a means of getting through that dilemma was. You now know that you are going to be called to court as a witness. Is there anything in those journals that you would want to rely upon to inform your evidence or to use as an aide memoire when giving evidence? And if there is, please identify that so we can then have a look at that entry, make sure that we are not breaching anything that is secret or sensitive and then disclose those entries. Question 12: Yes, but it appears from what you wrote in your note that the test as to whether or not you should serve this material on the defence was whether or not the officers in question intended to rely on the journals. Answer: No, I don't think so. Yes, in respect of that particular issue. This is a discrete issue. It's an issue of when you appear at court as a witness what entries in that journal would you intend to rely upon when giving your evidence. But, as I say, there were other issues going on. There were other disclosure issues that I was talking to the managers about, and they were directing me to their journals

and from their journals we did disclose further entries that touched upon disclosure issues".

At page 46 and 47 Mr Macdonald briefly touched on the significance of Mr Provoost's journal entry of the 5th of December 2005 in the following passage:

"QUESTION 95. If I could ask you to move

to your entry for the 5th of December?

ANSWER. Yes.

QUESTION 96. You spoke to Mr Mawer then and ensured he was briefing all the 'George' managers in relation to the issues to date, including collateral intrusion, circumventing PACE, expenditure on targets and intruding on legal privilege?

ANSWER. Yes.

QUESTION 97. Why did you do that?

ANSWER. Because these were disclosure issues that were cropping up during the course of the trial. It seemed to me that the managers could inform that process and Nigel had volunteered to be the conduit between myself and all the other managers from 'George'.

MR MACDONALD. What was he briefing?

What were you trying to ensure that he briefed them to understand?

ANSWER. Well it was a case of really, you still hold your journals, please go back into your journals and have a look into your journals, so as to whether there are any entries that relate to any of these disclosure issues, and if there are let us have those entries so that we can consider them.

QUESTION. Can I have the note back from

Mr Leitch?

ANSWER. Yes.

QUESTION. Why was it necessary to do that in circumstances where there had apparently been a disclosure process undertaken by Mr Bailey?

ANSWER. Well that was primary disclosure. I mean, there are issues that arose that really during the course of... were outside the... well not outside the scope of

the primary disclosure, but were specific issues that had arisen during the course of the trial that we needed to review and look at again. I mean, in essence, this was part and parcel of our duty to keep disclosure under review and we were responding to disclosure requests, either coming through in letters and Section 8 statements.

QUESTION. Did you not think that circumventing PACE and intrusion on legal privilege could be regarded as material or issues that would be disclosable on primary disclosure?

ANSWER. Well perhaps".

When considering the evidence of Mr Provoost, Mr Mawer and the other officers who have been referred to as '*the managers*' it has to be borne in mind that a significant proportion of their cross-examination by Mr Treacy (for Fulton) and Mr Macdonald (for Muriel Gibson) was devoted to establishing whether each witness was correct when they claimed to have been unaware in 2000 of the requirement to notify the Chief Constable, in writing, of the approval by a Surveillance Commissioner of an authorization granted by the Chief Constable. One of the matters to which counsel referred was that the witness statement of a number of the managers contained identically worded paragraphs. These are to be found in Detective Chief Superintendent Mawer's statement of the 3rd of November 2005. The first at page 2 begins:

"*At that time I was unaware etc...*".

The same passage is to be found in the statement of additional evidence of Detective Chief Inspector Leitch.

The second paragraph follows that paragraph in Mr Mawer's statement and begins:

"*The operation was sensitive etc...*".

The same passage is to be found in the statements of Detective Inspector Toyne, Detective Chief Inspector Leitch and Detective Chief Inspector McMurdie. The Defence also placed considerable emphasis upon journal entries made by

Mr Mawer on or about the 30th of July 2000 and the 8th of August 2000 which, it

was alleged, indicated that a decision had been made whereby Mr Mawer, Mr Leitch and Detective Chief Inspector Sobie had been nominated to receive notifications from the office of the Surveillance Commissioners on behalf of Sir John Evans. Entries of the 6th of June 2000 in Mr Leitch's journal were relevant in this context, as were entries in Mr Provoost's journal of the 19th and 20th of October 2005 which, on one reading, suggested that the statements by Mr Mawer and Mr Leitch as to their state of mind in 2000 were incorrect.

Both Mr Treacy and Mr Macdonald submitted that the proceedings should be stayed because of the manner in which the witness statements were prepared, and because of the contact between the witnesses whilst they were in the process of giving evidence; albeit that their evidence had been interrupted by their cross-examination being deferred. Mr Treacy's submissions on this were summarized in paragraph 131 of his written submissions and I quote:

"In summary, the abuse of the process here is:

(I) collusion in the preparation of witness statements

(ii) the contempt of the Court Order regarding exclusion

(iii) the contempt of the Court Order imposing constraints on witnesses under oath

(iv) the risk of tailoring or fabrication in relation to the notification issue

(v) the risk of tailoring or fabrication in relation to the management of the covert operations such as:

- ***collateral intrusion;***
- ***circumventing PACE;***
- ***payments to targets;***
- ***direct questioning etc".***

Mr Macdonald submitted that there had been misuse and manipulation of the trial process in respect of the conduct of the statement taking process, as can be seen from paragraphs 60 and 61 of his written submissions:

"60. It is further contended that the conduct of the statement taking process has been a misuse and manipulation of the trial process, with the object of ensuring that the evidence presented to the Court on this issue favours the Prosecution.

61. The defendant has been deprived of the protection provided by the law, both in respect of his entitlement to disclosure, to which he was deprived by the failure to document the process by the taking and keeping of notes and records. The defendant has also been deprived of her right to cross-examine witnesses without their tailoring their evidence to the evidence of other prosecution witnesses. By enabling the witnesses to consult and collude in the preparation of their statements, the Prosecution ensured that the accounts given by the witnesses were consistent and the difficulties about the issue had been discussed. Thus, although the witnesses were excluded from hearing each other's evidence, the provision for collaboration in the making of the statements, reduced the possibility that witnesses would depart from the Prosecution line".

I turn to consider the implications for the evidence of the various witnesses of the evidence of Mr Mawer and
Mr Provoost, relating to the contact between them and between Mr Mawer and other witnesses; whilst all were awaiting cross-examination.

I recognise that there were very considerable practical difficulties facing Mr Provoost and his colleagues when they were required to arrange for evidence to be given by
Mr Mawer and his colleagues. This is a trial which involves consideration of a huge quantity of material that has been placed before the court, and I have no doubt that there is a very large quantity of other material that has not been put in evidence, but which has had to be considered when issues of disclosure have been

raised: Whether before the trial or during the trial. Disclosure issues have taken up a great deal of time, both before the trial and since it started.

As these matters have been dealt with by a Disclosure Judge, both ex parte and inter partes, my knowledge of what has taken place before him is limited to the information revealed by counsel during the trial, whether by way of statements by the Prosecution that disclosure has been refused or granted, or by Defence Counsel saying that they've been given certain documents, some of which have been produced as exhibits. The scale and complexity of the disclosure aspect of the case may be demonstrated by the Disclosure Judge devoting several weeks to disclosure hearings, since the start of this trial in September 2005. Mr Provoost has explained in passages which I have quoted from the transcript, what he was seeking to do, and elsewhere he referred to the difficulty created by his being the only officer available who was concerned with the covert side of 'Operation George', who could assess the sensitive nature of the contents of the managers' journals. I have borne these difficulties in mind when considering what has occurred.

I now turn to Detective Chief Superintendent Mawer's evidence. As his rank indicates, he is a very senior and experienced officer and as his demeanour indicated when being rigorously cross-examined for a considerable period of time, he is well used to giving evidence. He is aware of the restraints imposed on witnesses when discussing evidence before it is given in Court, or when a witness is giving evidence.

As is apparent from the passages from the transcript of his evidence which I have earlier set out, he contacted some of the managers when he and they knew that they were going to be recalled to give evidence. He repeatedly said and accepted that he briefed those he spoke to, he sought to explain what briefing meant when he referred to the issues being: "*Sort of general issues to get people up to speed around what the position is, in how you deal with intrusive surveillance*" and: "*It's looking, getting officers to be familiar with the particular material areas of the law, not to brief them in terms of what it was*".

In the passages from his evidence quoted earlier,
Mr Provoost was making the case that the journals contained highly sensitive and at times secret material, that disclosure issues were being raised during the course of the trial and that Mr Mawer had volunteered to act as the conduit between Mr Provoost and the managers, who may have entries in their journals that relate to any of the disclosure issues that were identified at that time.

However, there is evidence which suggests that Mr Mawer did not confine himself to merely acting as a conduit between Mr Provoost and the messengers, even if that were a proper role for him to perform; something I shall consider presently. First of all, he did not reveal what he had done until confronted with the entries from Mr Provoost's journals of the 24th of November and the 5th of December; having earlier defied that he had spoken to any of the managers: "*About any of the issues connected with this case*" since the 14th of November. Secondly, his ready acceptance of the term: "*Briefing*" suggests that he was seeking to convey instructions to those he spoke to about how they should give their evidence even: "*Getting officers to be familiar with the particular material areas of the law*" is indefensible. Thirdly, it is that although Mr Mawer gave evidence that he had spoken to Mr Leitch about these issues, Mr Leitch denied that any such conversation took place.
If any discussion had been confined to an innocent request it is very surprising that Mr Leitch purports not to recall such a discussion or conversation. Fourthly, Mr Mawer does not appear to have considered that what he was doing was, at the very least, capable of being considered as an improper attempt to influence witnesses who were still to give evidence. Whilst it may be said that that is a badge of innocence, I find it very surprising that a senior officer did not apparently have any qualms about the possible implications of such conduct, and apparently did not seek directions of prosecution counsel, or the Court, before he contacted those managers he spoke to.

So far as Mr Mawer speaking to the other managers before they all made their statements is concerned, I do not consider that it was improper for them to

confer before they made their statements. They had been brought together because the original documents which they may have to consult to recall what had been done more than five years before when they had not made contemporaneous statements to which they could refer to refresh their memories, are matters to which they were being asked to direct their attention. Nevertheless, there is an obvious danger that the position at which each arrived did not represent the true recollection each had, but was the result of a collective decision as to what they believed happened when some or all had no real recollection of what occurred, or represented a collective decision as to what they should say, whether each had a true recollection or not.

When considering whether the evidence of some or all of the managers can be accepted, what some did or recorded before or after is clearly of the utmost significance. So far as Mr Mawer is concerned, his journal entries of July and August 2000, to which I have referred, and the entry in Mr Provoost's journal of the 19th of October 2005, do not sit easily with the account he gave in his statement that he was unaware in 2000 that written notice had to be given to the authorising officer of the surveillance commissioners approval.

When I take into consideration the points I have made about his discussion with some of the managers, whilst he and they were awaiting cross-examination, I have concluded that the Prosecution have failed to satisfy me that it is safe to rely on Detective Chief Superintendent Mawer's evidence because they have failed to exclude the possibility that it has been fabricated.

Mr Mawer said that he had spoken to Detective Chief Inspector McMurdy, and so the possibility that her evidence has been contaminated cannot be excluded, although I bear in mind that she has not given evidence about this, as his approach only emerged when he gave his evidence on the 30th of January; that is, after she had done so.

I conclude that the Prosecution have failed to exclude the possibility that her evidence has been fabricated.

The possibility of Mr Leitch's evidence has also been fabricated has to be

considered, because Mr Mawer says he spoke to him after the 14th of November, although, as I have pointed out, Mr Leitch denied this. However, I cannot see why Mr Mawer would say that this had happened if it had not, and I conclude that the Prosecution have also failed to exclude the possibility that Detective Chief Inspector Leitch's evidence has been fabricated.

Mr Mawer's evidence was that he did not think that he had spoken to any of the other managers, that is, to Detective Inspector Craig, Detective Inspector Fernandez and Detective Inspector Toyne. Detective Inspector Craig and Detective Inspector Fernandez were both called on the 12th of January. Neither was cross-examined and no application has been made to recall them after the 30th of January when it emerged that Mr Mawer had spoken to some of the managers.

Whilst I bear in mind that their statements were prepared in similar circumstances to the other managers, I do not consider that their evidence has to be viewed in the same fashion as that of Mr Mawer, Mr Leitch and
Miss McMurdy. Detective Inspector Toyne was recalled on the 2nd of February. He was not cross-examined on behalf of Fulton, but was by Mr Macdonald on behalf of Muriel Gibson. It was not suggested to him that Mr Mawer had spoken to him after the 14th of November. He had incorporated into his statement the two passages that appear in some of the other managers' statements, and his statement was prepared in similar circumstances to the other managers. He accepted that Mr Mawer had given him a copy of his statement, but insisted that his statement represented his recollection. Having observed his demeanour whilst giving evidence, I do not consider that his evidence has to be viewed in the same fashion as that of Mr Mawer, Mr Leitch, or Miss McMurdy.

I now turn to consider Mr Provoost's position. I have already held that there was nothing improper or untoward in his speaking to the managers to inform them what were the issues they were to address in their statements when they came to Belfast on the 2nd or 3rd of November. However, was he justified in providing them with transcripts of the evidence already given by himself, Mr Bailey and Sir John Evans? No doubt it was a convenient way of conveying to

them what some of the issues were that they had to address. However, I can see no valid distinction between providing a potential witness with the statement or proof of evidence of another witness and the transcript of the evidence given by another witness. The former is a practice that is forbidden for the reasons set out in Richardson and in Skinner; in essence, because the evidence the witness is likely to give, may be affected by prior knowledge of the evidence already given by the other witness. That all of the managers had access to the transcripts of the evidence of Sir John Evans, Mr Bailey and Mr Provoost before they made their witness statements was improper.

In addition to providing this material, Mr Provoost initiated the process where by Mr Mawer spoke to other witnesses and did so by approaching Mr Mawer at a point in the trial when both he and Mr Mawer were due to be recalled for cross-examination. As in the case of Mr Mawer, Mr Provoost is a very senior and experienced officer, and it was improper for him to behave in this way. I bear in mind that he did not have the assistance of Detective Chief Superintendent Bailey at this point, and that there were disclosure issues that had to be considered. However, whilst the practical difficulties to which I have referred may explain what occurred, they cannot excuse it. Mr Bailey's evidence was that he had taken copies of Mr Mawer's journals and retained the original journals belonging to

Miss McMurdy. Mr Bailey and Mr Frost had also read Mr Leitch's journals and Mr Craig's and the journals had been revisited in 2005 by Mr Bailey, once it had been realised that there was an issue about the notification of approvals. I do not accept that disclosure issues meant that it was permissible for Mr Provoost to approach Mr Mawer and ask him to approach the other witnesses. The journals could have been retrieved and examined again by Detective Chief Superintendent Bailey, if necessary in conjunction with Detective Sergeant Frost. That these officers had returned to their own Force was, no doubt, a complication, but there was no evidence before me to suggest that unsuccessful efforts were made to have them returned after the 10th and 14th of November to address whatever

disclosure issues involved the managers' journals, just as they returned earlier to revisit disclosure as Mr Bailey has described. If, as I do not accept was the position, it was necessary for the managers to be spoken to about the contents of their journals whilst they were awaiting cross-examination, this should only have been done by counsel or a professional member of the PPS after the Court's permission had been obtained, whether from myself or from the disclosure judge.

I now turn to consider the implications for the evidence of various witnesses of the conclusions I have reached. So far as Detective Chief Superintendent Mawer, Detective Chief Superintendent Leitch and Detective Chief Inspector McMurdy are concerned, as I have stated, the Prosecution have failed to exclude the possibility that their evidence has been fabricated. That is not to say that I am satisfied whether beyond reasonable doubt or on the balance of probabilities, that any of these witnesses have fabricated their evidence. The Prosecution have to satisfy me of a negative; that is, that their evidence has not been fabricated and, for the reasons I have given, have failed to do so. In these circumstances, I consider that it would be unsafe for me to take their evidence into account unless it is of assistance to the defence. I will have regard to it if it assists the defence.

So far as Detective Inspector Toyne, Detective Inspector Craig and Detective Inspector Fernandez are concerned, I have already given my reasons for holding that their evidence does not have to be viewed in the same fashion. But I will have regard to the implications of what occurred when considering the reliability of their evidence. In the case of Mr Provoost, I consider that his actions in providing transcripts to the managers, and then asking Mr Mawer to approach the managers about their journals, were probably errors of judgment rather than attempts to improperly influence the contents of the manager's evidence. However, for a senior officer to make two separate errors of judgment, each of such significance, means that I have to consider whether the Crown have satisfied me of a negative; namely, that he did not fabricate his evidence. They have failed to do so and I propose to approach his evidence on the same basis as that of

Detective Chief Superintendent Mawer, Detective Chief Inspector Leitch and Detective Chief Inspector McMurdy; namely that I will only take account of his evidence insofar as it assists the defence.

That means that the Prosecution cannot rely on his evidence on any aspect of this case, not just on the evidence he has given on the notification issue.

I consider that it is appropriate to allow the defence to rely on any evidence that he and the other witnesses have given that may assist the defence, because it is more likely that any evidence which assists the defence is correct.
And were the evidence to be excluded in its entirety, even if it assisted the defence, would be unjust.

I now turn to the submissions about the disclosure procedures adopted by the police. Mr Treacy's submissions can be considered under a number of headings, the first of which was that there were serious and material breaches of the various provisions of the code of practice issued under part 2 of the Criminal Procedure and Investigations Act 1996 - the 1996 Act. Section 26(4) of the 1996 Act provides that any provision of the code that is relevant to any question arising in criminal proceedings shall be taken into account in deciding the question. The matters upon which Mr Treacy relied were that material relating to what he described at paragraph forty was not dealt with in accordance with the code. He categorised the material as being what he termed:

1: The notification material.

2: Allen-type material oblique manager's notebooks and journals.

3: Drink and drugs.

4: Wages.

5: No arrest.

6: The FBI material.

7: The Port material.

These, together with the provisions of the Code to which he referred, were set out at paragraph 34 of his written submissions:

"It is submitted that:

I: Material was not examined in accordance with the code in breach of paragraph 2.1, and or;

II: Material was not revealed in accordance with the code to the disclosure officer in breach of paragraph 2.1.

III: Material was not revealed in accordance with the Code by the disclosure officer to the prosecutor in breach of paragraph 2.1 and paragraph 6.2.

IV: Material was not listed on a schedule in accordance with the Code in breach of paragraph 6.2.

V: Material which might, and in fact did satisfy the test for primary disclosure, was not referred to at all, much less listed and described individually, in breach of paragraph 6.11.

VI: Material which may fall within the test for primary disclosure was not specifically drawn to the prosecutor's attention by the disclosure officer in breach of paragraph 7.2.

VII: The disclosure officer was in breach of his specific duty to provide the prosecutor with a copy of any material which may satisfy the test for primary disclosure in breach of paragraph 7.3.

VIII: The disclosure officer falsely certified that all retained material had been made available to him and revealed to the prosecutor in accordance with the Code in breach of paragraph 9.1.

IX: The disclosure officer did not look again at the material and draw to the prosecutor's attention any material which might reasonably be expected to assist the defence in breach of paragraph 8.2.

X: The disclosure officer, after service of a defence statement, either did not certify at all or falsely certified that the material had been reconsidered in accordance with the Code in breach of paragraph 9.1".

In my ruling of the 13th of October 2005 at pages six to eight, I set out the nature of the Prosecution's duty to make disclosure, and the importance attached to disclosure procedures and systems being operated "with scrupulous attention". It is unnecessary to repeat what I said in that passage and I have borne it in mind

when considering these applications. I would only add that the purpose of disclosure is to ensure that material in the hands of the Prosecution that might undermine the Prosecution case, or assist the defence case, is made available to the defendant. The importance of the code and the procedures which it lays down are to ensure that this purpose is achieved, and in order to assess whether there has been a failure to make proper disclosure. And, if so, its significance. It is necessary to consider the significance of the disputed material in all of the circumstances of the case. I, therefore, propose to consider the material in Mr Treacy's seven categories in order to see whether disclosure should have been made, and if it should what the significance of non-disclosure has been.

(i) the notification material, that is the contemporaneous journal entries of Mr Mawer in July and August 2000 and of Mr Leitch of the 6th of June 2000. Mr Mawer's journal entries were not disclosed until the 13th December 2005 and Mr Leitch's journal entry was disclosed on the 27th of October 2005 according to Mr Treacy's unchallenged assertion to Mr Bailey, during the latter's cross-examination. Mr Bailey accepted that Mr Mawer's entries were highly relevant to the notification issue, and he was unable to explain why they had not been disclosed earlier. I consider that these should have been disclosed, at the latest, once it was appreciated that written notice had not been given to Sir John Evans. Whether these written entries represented practice of nominating officers to receive notification of approval from a Surveillance Commissioner or not, they plainly undermine the Prosecution evidence on this issue. Mr Bailey was unable to say, when he finished his review of the journals, which he especially embarked upon sometime in the Autumn of 2005 and in the absence of an explanation as to why they were not disclosed sooner that is something that I have to take into account. However, it is important to remember that they were disclosed several days before Mr Mawer's cross-examination resumed on the 19th of December 2005 and before Sir John Evans and the other managers were cross-examined.

(ii) Allen type material, that is material which indicated that there may have been admissions which were not spontaneous or unprompted, but which were induced by persistent questioning in discussions which were the functional equivalent of interrogation, thereby evading the protections conferred by the Police & Criminal Evidence Order. See *Allen v. UK* as applied in *R.v. Allen* [2004] EWCA Criminal, 2236. This includes defence Exhibit G.2, which was not disclosed until the 26th of January 2006 and commences: "*Socializing and related issues*" and Defence Exhibit F.11 which refers to Fulton smoking a reefer.

I accept that these were on the sensitive schedule and properly on it. The only item in the document, socializing and related issues, which is relevant under this heading is the entry about direct questioning on the 13th May 2000. Unless the conversation of the 13th May 2000 was being relied upon (and it was not) I am not persuaded that it required to be disclosed until the managers were cross-examined about direct questioning; something that was explored by Mr Macdonald, in particular, in his cross-examination of Sir John Evans on the 29th of October 2005 and of Mr Mawer on the 9th of January 2006.

I do not consider that the defence have established that there was a breach of the duty of disclosure in respect of this.

(iii) This head overlaps to some degree with Mr Treacy's next category of material relating to drink and drugs, as these are mentioned in the same document. Fulton was well aware of his consumption of drugs and drink. That he was a habitual user of both may, of course, have a bearing on the reliability of his admissions, but even if this information should have been disclosed at either primary or secondary disclosure, and I am not persuaded that it had to be, as Fulton's case, in his Defence Statement, was that he was bragging in order to impress, not that he was drunk or under the influence of drugs, the information would not have affected Sir John Evans decision. He gave evidence that he knew Fulton was a drinker, and, although he could not recall if he had been told that Fulton consumed drugs, his decision would not really have been effected by such knowledge: see his cross-examination of the 13th January 2006, pages 43 and 44 of the transcript. I

accept Mr Kerr's explanation that disclosure was made because of the defence allegation

during cross-examination that there was a strategy to exploit Fulton's drinking and drug taking to his disadvantage. I do not consider that the defence have established a breach of the duty of disclosure under this heading.

(iv) Wages. Again, Fulton knew that he was being paid and whether the payments undermine the reliability of his admissions is a matter to be taken into account when their admissibility is considered. I do not consider that the payments required disclosure at any earlier stage, as being something that could be said to undermine the Prosecution case or assist the Defence, because Fulton did not make the case that he made the admissions in return for payment. If I am wrong about this, in any event, Sir John Evans said that he would not have expected to be told about these payments and there is nothing to show that it would have affected his decision to grant authorizations.

(v) the alleged failure to tell Sir John Evans that Fulton had not been arrested for Rosemary Nelson's murder.

Sir John Evans gave evidence that he was aware that Fulton had been arrested on another matter, and had been questioned about the murder of Rosemary Nelson, and at later reviews he was informed that Fulton had denied involvement in that crime: see page 53 of the transcript of the 12th of January 2006. There is no basis for considering that Sir John was misled and there was no obligation to disclose this information when it was plainly sensitive.

(vi) the FBI material. Mr Treacy's argument had three limbs. The first was that a paragraph of a letter of the 15th of September 2005, from the PPS to Fulton's solicitor, was misleading when it said in relation to the investigations in respect of which Fulton was held in prison in the USA:

> "*The investigations by the American authorities were unconnected with the investigation out of which your client presently stands charged*".

However, this reply verged on the disingenuous.

Mr Mawer accepted that it was inaccurate, and that the American recordings were part of the strategy of the senior Management Team in their investigations. While it may be that Fulton was held in relation to other matters, as suggested at 3(c) of the PPS letter of the 23rd of September, the reply was less than frank, at best, and on one construction deliberately misleading. The second limb was the failure to disclose these recordings earlier.

However, this material was plainly of the utmost sensitivity and, although its existence was known from 2000, according to the PPS letter of the 15th of September 2005, the material was not made available for inspection by the PSNI until November 2004 and not received by them until late June of 2005. Mr Kerr said that the material had then to be put before the Disclosure Judge and he approved edited transcripts, which were served (it seems from the exhibited correspondence under cover of a letter from the PPS of the 9th of September 2005). Given the sensitivity of these documents and the need to obtain them from a foreign Government, I consider that disclosure was made in the appropriate fashion and there was no breach of its duty by the Prosecution. The third limb of Mr Treacy's submission on this point is that he asserts that the prosecution has failed to: "*Disclose other material relating to this period*" as stated by the Disclosure Judge in his ruling of the 13th December 2005. Mr Kerr's response is that this referred to the meeting of Fulton at Heathrow by Special Branch officers when he returned from America. I see no reason not to accept this, when it was not directly challenged by Mr Treacy in his reply. I am satisfied that the prosecution had complied with its disclosure obligations in relation to this material. Related to this is the submission that Sir John Evans was not told that Fulton had denied involvement in the murder of Rosemary Nelson whilst in prison in America and that, as a result, all relevant material was not placed before him. However, the evidence does not establish that Sir John Evans was not told that Fulton had been covertly recorded in America. During cross-examination on the 12th of January 2006, he said that he had a vague recollection of America being mentioned during the two year period during which he was being briefed on these matters, but he

did not know by whom and what the detail was: See pages 29 and 30 of the transcript. It was also suggested that Sir John Evans had not been told whether Fulton had been interviewed about the murder of Rosemary Nelson and, therefore, the Surveillance Commissioners were not told of this either.

As I have earlier pointed out, Sir John gave evidence that he had been informed of Fulton's denials of responsibility for the murder of Rosemary Nelson. I'm satisfied that the Defence have failed to establish that Sir John, and hence the Surveillance Commissioners, were misled by not being given both these pieces of information.

(vii) the Port material. This relates to a statement apparently made by Colin Port, who was the officer in overall charge of the investigation into the murder of Rosemary Nelson. It was to the effect that Fulton was not a suspect for or being sought for interview in connection with that murder. There are two aspects of this that have been raised, the first is whether Sir John Evans was informed of this and, if not, what the effect of that was. The second is whether any documents relating to it should have been disclosed. It is accepted by the Prosecution that Mr Port made such a statement apparently in the form of a press release. And it appears from the evidence of detective Chief Inspector McMurdie that it was made, although she did not know when. However, it appears that it must have been made before Fulton was placed under surveillance early in March 2000. Sir John Evans said that he was unaware of this and that if it had been drawn to his attention he imagined that he would have asked Port if it was accurate: "*Because if it was that it was the firm belief of the Management Team that might well affect the decisions I was arriving at in terms of authorizations*": see page 39 of the transcript of the 12th of January 2006. Mr Kerr's response to this, as I understood it, is that this statement had nothing to do with the present charges. Whether or not that is the case, the evidence is that the statement was made, was not conveyed to Sir John Evans and that Sir John Evans has said that if he'd been told about it, he would have asked, because if the Management Team did have such a belief it might well have affected the decisions he was arriving at in terms of authorizations. It may be that there was a good reason for Mr Port saying what he did. As Sir John

pointed out at page 40, it may have been for the protection of Mr Fulton, but as he said, that was speculation on his part. At this point I propose to turn to the second question, namely disclosure of documents relating to the statement.

In his submission Mr Kerr has stated that the text of the press release could not be found, and he submitted that in the absence of such material there was nothing to disclose and, hence, no duty of disclosure. That is not necessarily the case, because the definition of '*material*' at 2.1 of the Code includes: "*Information and objects which is obtained in the course of a criminal investigation and which may be relevant to the investigation*".

Given that Sir John Evans thought that he "would want to know about it", see page 40 of the transcript, it was information that should have been disclosed at the secondary disclosure stage if it had been on the sensitive disclosure schedule. If it was not, then the terms of Fulton's Section 8 application on the 25th of January 2005 where copies of the Police Act and RIPA applications, authorisations, extensions and renewals were sought to enable the accused to assess both technical compliance or non-compliance of the Crown with the statutory framework, should have alerted the police to the possible significance of this information and the need to consider whether it should be disclosed.

It does appear that the Prosecution have made disclosure of what has been described as a policy document. This was stated to have been placed before the disclosure judge and he directed that it be disclosed in edited form. Sir John Evans was asked at page forty whether he had any recollection of a policy decision having been taken in relation to any statement by Mr Port, and he said that he had not. The policy statement was not put to him, nor has it been put in evidence before me. Mr Kerr did start to refer to it during his submissions, but didn't pursue the matter on Mr Treacy's request, so I have no knowledge of the contents of the edited policy document.

The failure to inform Sir John Evans of Mr Port's statement is one of the matters upon which Mr Treacy relies as demonstrating a misuse of the authorisation process by the police. I consider that there is some substance to this

suggestion. I have to consider whether that failure is of such significance that it justifies the grant of a stay of the entire proceedings against Fulton. I have concluded that it does not for the following reasons:

First of all, Sir John only said that the content of the statement "might well effect the decisions I was arriving at in terms of authorisations". He did not say that it would have affected his decisions.

Secondly, the defence have the edited policy document and if its contents would have assisted the defence no doubt the contents would have been placed before me.

Thirdly, as the authorisations were renewed, the significance of the non-disclosure of that statement to
Sir John Evans may have become less important, or even relevant, with the passage of time. This is a matter that can be addressed in the context of admissibility when I can consider it in the context of Article 76.

Therefore, so far as Mr Treacy's seven main headings are concerned, only in respect of the following do I accept the Prosecution may be said to have failed to make proper disclosure.

1: The notification material, and (7) Port material. So far (6), the FBI material is concerned, I have concluded that the response of the PPS in the letter of the 15th of September 2006 was, at best, less than frank and on one construction deliberately misleading. I shall return to this later.

I now turn to consider the submission that there has been systemic failure of the disclosure process, something principally argued by Mr Macdonald on behalf of Muriel Gibson, although Mr Treacy advanced similar arguments.

Mr Macdonald's submissions also related to alleged collusion between the managers, and I now propose to consider his submissions that relate specifically to disclosure and the operation of the disclosure process by the Prosecution, which embraces both the PPS and police. Against the background of my decision to prevent the Prosecution from relying on the evidence of Mr Mawer, Mr Leitch, Miss McMurdy and Mr Provoost.

Mr Macdonald criticised Mr Bailey's evidence about the manner in which he, as the officer responsible for disclosure in relation to the covert operations, decided to put the managers' journals on the sensitive schedule in their entirety. It is correct that at various passages during cross-examination Mr Bailey accepted that each entry should be considered individually. However, it appears from the evidence that the sensitive schedule ran to 934 pages with over 4,000 entries. Some of these were described as bulk entries; that is, when an item consisting of a number of items was listed as a single item. There were several journals, and I do not consider that it was unreasonable to enter them as individual items, rather than going through the journals and entering the entries that were non-sensitive on the relevant schedule. I consider it would have been impractical and of limited benefit in the context of such huge volumes of documentation, as clearly existed in this case. Every one has to accept that there may be occasions when the letter of detailed procedures devised for other circumstances may have to give way to other methods which can achieve the objective of those procedures provided that those methods are applied in the spirit of the original procedures. What is required is that where bulk entries are made, proper consideration is given to identifying individual parts that should be disclosed because they undermine the Prosecution or assist the defence.

Mr Bailey's evidence was that he had considered all of the journal entries on more than one occasion. I have earlier referred to the entries from the journals of Mr Mawer and Mr Leitch, and to the absence of an explanation as to why they were not provided to the defence until the 13th of December 2005 and the 27th of October 2005 respectively. That they were disclosed indicates that the journals had been considered and these entries identified, although the journals were collectively entered on the sensitive schedule. I am not persuaded that this establishes that the disclosure process is not working.

I was invited to reconsider my ruling of the 13th of October, that the disclosure process was being conscientiously and scrupulously operated by Crown counsel, and Mr Provoost and those responsible to him. So far as

Mr Provoost is concerned, my ruling that his evidence cannot be relied upon by the Crown clearly requires me to consider whether I am now satisfied that the disclosure process is being operated conscientiously and scrupulously by the Prosecution in its widest sense. In order to reach a conclusion on that, I have to take into account what happened before the 13th of October and what has happened since. Some of the later disclosure issues have been dealt with individually, but I am satisfied that the decision must be made after a process that requires me to consider the collective effect of individual instances where disclosure should have been made as well as looking at each individual instance.

But before embarking on that process I must now turn to a matter that I have not yet considered, and that is what had been referred to as the typed taped summaries.

Considerable attention has been devoted to whether proper disclosure has been made of the typed taped summaries, TTS for short. They are summaries of each recording whether they were used in evidence, the so-called evidential tapes, or not. As there are tens of thousands of hours of recordings, the TTS provide the only practical means of identifying whether a recording that has not been used in evidence may contain material that could undermine the Prosecution case or assist the defence case. I have been informed that there are some 4,068 TTS.

On the 16th of June 2005, Higgins J ordered all the TTS to be disclosed to Muriel Gibson's solicitors, Hart, Coyle and Collins. It appears that there was a disagreement about what the disclosure judge's order had been and he gave a further ruling on the 22nd of September 2005 confirming his earlier ruling. It also appears that on a later occasion he ordered that all the TTS were to be served on Fulton's solicitors, Gabriel Ingram and Company. I should say that, as will appear later, some TTS had already been served on both solicitors.

The TTS were, it seems, delivered to the defence solicitors in electronic form on CD on the 30th of September 2005 and on subsequent dates, some of which I shall refer to later. These were not accompanied by any form of index. On the 26th of January 2006, further disclosure of documents, including what is now

defence exhibit G2, suggested that there may be other TTS which had not been disclosed. As the result of what must have been a painstaking, very laborious and thorough process of checking, Miss Coyle concluded that there may be 19 TTS relating to four dates in April to June 2000 that had not been disclosed. And Mr Macdonald raised this in court on Monday the 6th of February. After continued defence efforts to ascertain whether in fact all the TTS had been disclosed, it emerged that they had not. On the 14th of February Mr Miller for the Crown informed the Court that it now appeared that not all the TTS had in fact been served.

So far as Muriel Gibson was concerned, there were
45 new TTS, although five related to evidential tapes that had already been served; so forty represented hitherto undisclosed material and there were another 11 TTS referring to Fulton - 56 in all.

As the Crown were unable to state whether this represented the final position, I granted their application to adjourn the matter until the beginning of this week, as I wished to know what the Prosecution's final position was on this issue, and because they said it would take until the end of last week to check all the material.

On Monday the 20th of February, when the hearing resumed, I was informed that it had now been established that a further 13 TTS had not previously been served, bringing the total to 69, of which 42 are attributable to Muriel Gibson and 22 to Fulton. None of these TTS had been seen by the defence before.

For the sake of completeness, I should also record that it has emerged that during his review of the TTS, Detective Sergeant Frost had omitted to consider 16 of them. None of these are included in the total of 69. And Mr Kerr informed me, and this has not been challenged, that non-evidential tapes to which the 16 TTS refer, had previously been served on the defence. A list of the 16 was produced and I shall mark it exhibit A114, subject to that being an unused exhibit number so far. By this stage I had already heard submissions from counsel on disclosure and

when Mr Miller informed the Court of the existence of the 56 TTS on the 14th of February 2006 it was necessary to await the outcome of any further enquiries. On Monday the 20th of February I gave Defence Counsel the time they asked for to look at the documents they had been given and then heard further submissions from Mr Treacy and Mr Macdonald, in the course of which they relied upon some of the documents they had been given. However, in view of the quantity of this material, I felt that they should have the opportunity to consider it further and adjourned the matter to 2:00 pm on Tuesday the 21st of February to enable them to submit any further material which they wished to rely upon.

On Tuesday they produced a total of 57 documents,
33 relied upon by Mr Treacy and 14 by Mr Macdonald. I was taken through each of these and I also heard submissions from Mr Kerr and was given a 93 page schedule by him, referring to all the TTS. This lists each TTS by its reference, date, source, when it was served, whether it was served in edited or unedited form and details of when and on whom it was served. It also contains references to further details in some few instances. These are whether the TTS is duplicated under another reference, whether it relates to an Exhibit and, if so, on whom was the reference served and when. This schedule will be Exhibit A.112. I also received from Mr Kerr a copy letter from the PPS to Mr Ingram dated the 25th of February 2004, which will be Exhibit A.113.

I should say that at that time he (that is Mr Ingram) was acting for Muriel Gibson as well, but the letter was headed:

R.v. William James Fulton. It appears from a reference in that letter at (e) to a letter of the 24th of February 2004, regarding secondary disclosure in Muriel Gibson's case, that the letter of the 25th of February 2004 was intended to refer to the case against Fulton only. Sent with it were what were described as records of tape recorded conversations, each referred to by their reference number; eg, AWH 355. Mr Kerr said that these records were copies of the relevant evidential transcripts relating to the respective tapes, the unchallenged inference being that the original source of this material in the form of the transcripts was available to Fulton's

solicitor since February 2004.

I have examined each of the 33 documents relied upon by Mr Treacy and the 14 relied upon by Mr Macdonald and checked the summary reference for each entry relied upon, against the letter and the schedule from the PPS of the 25th of February 2005 that is Exhibits A.112 and A.113 respectively. Each of these 47 documents is an extract from Detective Sergeant Frost's record of his review of the TTS concerned. I do not propose to refer to the summary references in every case, I shall merely refer to the entries by number in respect of Mr Treacy's bundle, which will be defence Exhibit F.22 and by page number in Mr Macdonald's bundle, which will be defence Exhibit G.6.

Of Mr Treacy's documents it seems from the schedule that the following is the position so far as service of the relevant TTS on Fulton's solicitor is concerned:-

(a) ten of the documents relate to TTS served on the 15th of July 2005, namely Tabs 1, 4, 5, 7, 11, 16, 19, 22, 23 and 26;

(b) two relate to TTS served on the 29th of July 2005, Tabs 18 and 29;

(c) two relate to TTS served on the 30th of September 2005, Tabs 6 and 20;

(d) two relate to TTS served on 7th October 2005, Tabs 17 and 24;

(e) six relate to TTS served on the 1st of December 2005, Tabs 10, 12, 25, 32, 33 and 3.

3 contained two references that are relied upon;

(f) three contained a third reference relied upon, the TTS relating to it was served on the 14th of February 2006;

(g) eight related to WHD 228, which was one of the evidential transcripts sent by the PPS on the 25th of February 2004;

(h) three of the documents appear to relate to TTS which were not served on Mr Ingram but were served on Hart, Coyle, Collins, namely Tabs 13, 21 and 30;

(i) a further seven do not seem to have been served on Fulton's solicitor either, namely Tabs 9, 14, 15, 27, 28, 31 and 2.

2 contains two references.

It therefore appears that the relevant TTS relating to these entries were not served on Fulton's solicitor in ten instances, although in three of those instances the TTS were served on Hart, Coyle & Collins. In respect of twenty-three of the documents relied upon by Mr Treacy it can, therefore, be said that as the TTS had been served on Fulton's solicitors, the material was already in the possession of the defence to analyse and so it cannot be said to have been withheld from the Defence. That is not the case for the ten documents where the relevant TTS had not been served in the past. The significance of material which has not been made known to the defence has, therefore, to be considered. However, it can be argued that Detective Sergeant Frost's entries should have been disclosed if they contained any material that should have been disclosed, if only to simplify the task of analysis. I have, therefore, considered each document with this in mind, irrespective of whether the TTS in question, or the evidential tape had been made available in the past, in order to see whether disclosure should have been made. There are a number of different categories of references and I shall refer to them separately.

(1) References to drink or drugs. For the reasons I have given earlier in this ruling I do not consider that these required to be disclosed. Fulton's case was not that he made the admissions under the influence of drink or drugs, but was bragging. In this category are Tabs 1, 2, 5, 11, 16, 18, 19, 21, 22, 27, 28, 29, 30 and 31.

(2) Documents where there are entries relating to references being removed. Mr Kerr has explained this as meaning that this was to assess whether the tape needed to be edited, but in such cases the unexpurgated version was contained in

the relevant TTS. Where the reference is to removal from the DPP file, that was because there were no charges in respect of that matter. I do not consider that these required to be disclosed, and in any event, where the TTS was served the defendant had access to the relevant material through the TTS. In this category are Tabs 2, 3, 4, 5, 12, 14 and 15.

(3) Entries relating to wages or other payments. I've already explained why I do not consider that these require to be disclosed and I do not intend to repeat these. In this category are Tabs 2, 3, 4, 5 and 7.

(4) Documents relating to TTS which had not been served on Fulton's solicitors in the past. These can be substantially divided into two groups: (a) tabs which did not require to be disclosed for reasons already given, namely Tabs 2, 15, 21, 27, 28, 30 and 31 as these did not require to be disclosed there is no breach of the duty of disclosure;

(b) the second group contains Tabs 9 and 13.

9 contains a reference to TSL 500, attributing to Fulton the comment: "*Anything I said is third-hand, it's hearsay*". Although this is a self-serving statement it is admissible to rebut an allegation of recent fabrication: see Phipson on Evidence, 16th Edition, paragraph 12-75. As Fulton's case was that he had picked up information and was bragging when he used it, this could assist his case and should have been disclosed. 13 does not relate to his case, but to Muriel Gibson's, so far as the remark about repeating things that appear on the news is concerned. The other references to an Inspector and to Bogle do not appear relevant to the case at present, and so are not disclosable. I do not consider the reference to bugging the house could be said to be disclosable. If the references to Mr Bogle are later shown to be, or possibly relevant, they can be reconsidered.

(5) Another category relates to those documents other than tab 9, where entries where prefaced by "undermine". TTS relating to tabs 10, 17, 20, 23, 24, 26, 32 and 33 were all served.

So far as tab eight was concerned, it refers to WHD228 which was one of the evidential transcripts sent by the PPS with the letter of 25th February 2004.

(6) Tab 25 was not disclosable.

Therefore, of the 33 documents referred to by Mr Treacy, I consider that only tab 9 reveals material which was both subject to a duty of disclosure and contained information which was not contained in documents already made available to Fulton's advisors. I understood Mr Kerr to say it was served on the 1st of December 2005, but there is no entry to that effect on the schedule, and I, therefore, proceed on the assumption that it was not served.

Looking at tab 9 on its own, I consider that the failure to disclose it is not sufficient to justify a stay. The defence now have this document and can make such use of it as they consider appropriate.

I now turn to consider Mr Macdonald's 14 documents in the same fashion.

A: Page 10 relates to RLA139 which was

connected to document RLA138E sent to Mr Ingram by the PPS on the 25th of February 2004.

B: Page 14 relates to TTS served on the 29th of April 2005.

C: Page 10 relates to TTS served on the 26th of June 2005.

D: Pages 6, 7, 8 and 9 relate to TTS served on the 15th of July 2005.

E: Pages 2 and 5 relate to TTS served on the 30th of September 2005.

F: Pages 1, 3, 4 and 11 relate to TTS served on the 7th of October 2005.

9: Page 13 relates to TTS served on the 14th of February 006.

Of these pages, four, six, seven, eight, nine and ten appear to have been served on Mr Ingram and not on Hart, Coyle, Collins. The 14 documents can be divided into the following categories:

1: Documents where there are references to removal. I have referred to Mr Kerr's explanation about similar entries in the documents referred to by Mr Treacy. I do not consider that these require to be disclosed and in any event the defence had the relevant TTS. In this category are pages 1, 2, 3, 4 and 5.

Two: Documents referring to cigarettes, wages, other financial benefits and drugs. I do not consider these require to be disclosed, as Gibson was not making the case that she made these admissions in return for payment or because she was on drugs. In this category are pages 1, 2, 3, 4, 5, 11 and 14.

3: References to Mr Bogle. At present I see no relevance in these to this case and so there was no obligation to disclose them. If it is established that they may be relevant, the matter can be reconsidered. This relates to pages 6 to 10 inclusive and page 12.

4: Pages where entries were prefaced by "undermine". Pages ten and 12 are relevant.

A: Page 10 contains a reference to Fulton saying that when Muriel talks about home she "flowers things up". This should have been disclosed as it may have been used to rebutt recent fabrication. However, the evidential tape LRA138E was sent to Mr Ingram by the PPS with a letter on the 25th of February 2004. As Mr Macdonald pointed out, and Mr Kerr conceded, although Mr Ingram was acting for both Fulton and Gibson at this time, the letter referred to Fulton. It is, therefore, understandable that the significance of this was not appreciated by the defence and although that would not remove the obligation from the Prosecution to make disclosure to Gibson's advisors, it does establish that there was no intention to conceal the information. On its own, I do not consider that this failure justifies a stay.

B: Page 12 contains an entry that Muriel only repeats things that she hears on the news. Mr Kerr has said that further examination of the original tape revealed that it was not she but he, meaning that Gibson was referring to Fulton. The TTS AWH356 is said to be the same material contained in evidential transcript AWH355 sent with the PPS letter of the 25th of February 2004. The schedule shows that the TTS was served on Hart, Coyle Collins on the 22nd of June 2005 and not on Ingram and Company. Whilst this does not assist Gibson, it does assist Fulton. I do not consider that such an error justifies the grant of a stay in favour of Fulton.

5: Page 13 contains a reference to LM20. Mr Macdonald argued that this showed that Detective Sergeant Frost had not appreciated the need to include references to direct questioning revealed in that document. I do not consider that if there was such a failure, which I do not accept, that it justifies the grant of a stay.

I have so far considered the significance of the various documents individually, and considered whether the grant of a stay is justified in those three instances, where I have concluded that disclosure should have been made. One, tab 9 of defence exhibit F22, the reference to Fulton claiming that anything he said was third hand hearsay.

Two: What now is said to be a reference to Fulton only repeating things that he heard on the news.

Three: Page 10 of defence exhibit G6 which refers to Muriel Gibson flowering things up when she talks of home.

However, it is appropriate to consider these as a group and the wider issue of the failure by the Prosecution to produce the 69 TTS in the context of the defence submissions that there had been a systemic failure of the disclosure process, an issue neatly encapsulated by Mr Treacy's response on the 14th of February, that Mr Miller's description of what had occurred was an excellent example of systemic failure.

When one looks at the Prosecution case, the following matters are relevant to this issue:

1: Failure of the disclosure process to reveal at an earlier stage that 37 of the 99 evidential transcripts upon which the Prosecution rely, were not dealt with in accordance with the appropriate statutory procedures.

2: The failure of the Prosecution to reveal Mr Mawer's journal entries of July and August 2000 until the 13th of December 2005.

3: The assertion, which verged on being disingenuous, in the PPS letter on the 15th of September 2005, that the American investigations were unconnected with the investigations out of which Fulton presently stands charged.

4: The failure to inform Sir John Evans of Mr Port's statement that Fulton

was not a suspect for and was not being sought for interview about the murder of Rosemary Nelson.

5: The failure to disclose the contents of tab 9, that is Fulton's assertion that anything he said was third hand and hearsay.

6: The failure to disclose what is now known to be a statement by Muriel Gibson that Fulton only repeats things that he hears on the news.

7: The failure to disclose the conversation in 2001 in which Gibson expressed an opinion about Fulton. I dealt with this in my ruling of the 10th of November 2005.

8: The failure to disclose to Gibson's solicitors that when she talked about home she flowers things up.

9: The failure of the Prosecution to produce 69 TTS in compliance with the order of the disclosure judge.

10: The ruling that the Crown cannot rely on the evidence of Mr Provoost and Mr Mawer, Mr Leitch and Miss McMurdy.

Of these points, one, two, nine and ten relate to both Fulton and Muriel Gibson. Three, four, five, six and seven relate to Fulton alone. Eight relates to Gibson alone.

I have borne in mind the principles governing the grant of a stay to which I referred in my ruling of the 13th of October 2005 and the principles relating to the manner in which disclosure is to be approached that I referred to in the same ruling. Points one, two and ten taken together require me to consider whether all the defendants can receive a fair trial because these points bear on all of the defendants and not just Fulton and Gibson.

When considering this, one of the relevant questions is whether the trial process is equipped to deal with these issues, and the ruling at ten shows that it can. So far as nine, that is the failure to produce the 69 TTS is concerned. Although the number is very small when compared to the total of 4,068, that is not important as the Prosecution must have in place the necessary mechanisms to make disclosure. Nor do I overlook that it was only because the defence refused to

accept the assertion that all the TTS had been disclosed, that it emerged that 69 had not been. Had it been the case that the contents of the 69 TTS revealed important material that had not hitherto been capable of identification by the defence from material they already had, that would be one thing. However, the only documents placed before me have been entries in Detective Sergeant Frost's notes of his analysis of the TTS, and of those only the material referred to at five, six, seven and eight should have been disclosed. Even when taken together, these do not materially add to the defence application for a stay, nor does three.

Four, that is the failure to inform Sir John Evans of Mr Port's statement, lends some support to the argument that there was a misuse or manipulation of the process that led to the authorisation being granted.

I also have to consider whether the trial process can ensure that the defendants can receive a fair trial and I am satisfied that it can. Questions of admissibility in respect of all of the defendants can be addressed in the context of the evidence so far, including that of Mr Provoost, Mr Mawer, Mr Leitch and Miss McMurdy, so far as it assists the defence, and can be considered in the light of the power of the Court to exclude evidence under Article 76.

A further consideration is the nature of the case against the defendants and whether they have suffered prejudice. Fulton's case is that whilst he made the admissions attributed to him, they were untrue. Gibson has put the admissions attributed to her in issue, but in interview on the 18th of July 2001, she made remarks that are open to the inference that she had said the things attributed to her, but had heard them on television. See volume 9 page 692.

Whilst there are legitimate criticisms that can be levelled at the way in which disclosure has been made, the disclosure process has resulted in the defence becoming aware of the material at five, six and seven for Fulton and at eight for Gibson. It also enabled the defence to have the material at two which contributed to the ruling in relation to Mr Mawer and the others. I consider that the trial process can ensure the defendants receive a fair trial and that were I to grant the application for a stay, I would be exercising a disciplinary jurisdiction. I do not

consider that this would be a proper exercise in my discretion in all of the circumstances of the case. I, therefore, refuse the applications to stay the proceedings.

Now, gentlemen, as soon as the stenographers can perform their usual excellent service you will get copies of the ruling. It's quarter past 4:00. I don't propose to go any further. We will resume on Monday - I should say I will not be sitting on Monday afternoon.