Neutral Citation Number: [2018] EWHC 2489 (Admin) Case No: CO/2890/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL

Date: 28/09/2018

Before :

THE HONOUORABLE MR JUSTICE BRYAN

- -

Between :

The Queen	**Claimant**
On the Application of	
(1) RONALD WYATT	
(2) MICHAEL WYATT	
- and -	
THAMES VALLEY POLICE	**Defendant**

- -

Hugh Southey QC (instructed by **Bark & Co**) for the **Claimants**
Matthew Holdcroft (instructed by **Thames Valley Police**) for the **Defendant**

Hearing dates: 5 September 2018

- -

Approved Judgment

- -

MR JUSTICE BRYAN

MR JUSTICE BRYAN :

Introduction

1. This claim for judicial review is brought by the Claimants Ronald and Michael Wyatt (the "Claimants"/the "Wyatts") against the Defendant, the Chief Constable of Thames Valley Police (the "Defendant"/the "Chief Constable") pursuant to the permission granted by Sir Stephen Silber (sitting as a Deputy Judge of the High Court) at an oral renewal hearing on 8 November 2017, permission having been refused, on the papers, by Sir Wyn Williams on 15 September 2017.

2. In this claim the Claimants challenge the decision of the Defendant, following a criminal complaint made by the Claimants to the Defendant, regarding the conduct of a public authority (Oxfordshire County Council), that there was insufficient evidence to meet the Crown Prosecution Service's threshold so as to justify any action against anyone, resulting in the closing of the investigation into the criminal allegations made by the Claimants, as recorded in a decision letter dated 15 March 2017 sent by Detective Superintendent John of the Defendant to the Claimants (the "Decision Letter").

3. The following issues arise from the grounds that have permission to apply for judicial review:

   (1) Whether the Decision was flawed on the basis that it was an unlawful failure to carry out a proper/diligent investigation;
   (2) Whether the Decision was flawed on the basis that it demonstrated a lack of independence;
   (3) Whether that Decision was flawed on the basis that it contained inadequate reasons; and
   (4) Whether the Decision was flawed because it contained a misdirection in law regarding potential criminal liability for copyright offences.

4. At the hearing the Claimants also sought permission to rely on further grounds which are said to have arisen in the light of disclosure that has been given:

   (1) Whether the Defendant misdirected himself regarding the *mens rea* required to establish perverting the course of justice; and

   (2) Whether the Defendant erred by adopting an unlawfully narrow approach to the circumstances in which an investigation should be referred to the CPS.

5. In relation to (2) the Claimants also sought disclosure of the Defendant's contact with the CPS in the context of a partially redacted entry on 13 February 2017 in the Investigation Log providing *"[redacted] who states it is not a CPS matter and has not reached the police threshold"*. The Defendant objected to disclosure on the basis of legal professional privilege and public interest immunity. In the context of consideration of the issues arising, the Defendant provided the Court with a copy of the associated email of 13 February 2017. The Defendant, without conceding the issues raised, did not object to the Claimants being informed that the email was headed "Advice", enclosed an MG3 seeking advice, and that the CPS had responded

   that it was not believed to meet the criteria for investigative advice from the CPS. In such circumstances the Claimants did not pursue their application for permission to rely upon further ground (2). I agreed that further ground (1) would be considered at a

rolled-up hearing, with permission being granted in due course if considered appropriate, at the same time as the grounds on which permission had been obtained.

The Parties and Relevant Individuals

6. The Claimants, Ronald and Michael Wyatt, are the directors of a company, Wyatt Bros (Oxford) Ltd (the "Company") that owns the Waterstock Golf Course in Oxfordshire (the "Golf Course"). The Company, and in consequence the Wyatts, have been involved in a number of disputes with Oxfordshire County Council (the "Council"/"OCC") in relation to planning matters and the land in the vicinity of the Golf Course. Much of the background to those disputes is set out in the judgment of Beatson J (as he then was) in the case of *Oxfordshire County Council v Wyatt Bros (Oxford Limited, Michael Wyatt, Ronald Charles Wyatt* [2005] EWHC 2402 (QB) which I will not repeat here.

7. In particular:

   (1) In 1997 the Council issued enforcement notices in relation to land owned by the Company for breach of planning control. Essentially it was alleged that material had been unlawfully deposited;

   (2) The enforcement notices resulted in a public inquiry that took place between 26 January 1999 and 3 February 1999. During the course of that inquiry the Inspector directed that three plans ("Plans A, B and C") should be produced by the Council that would make the requirements of the enforcement notices more precise and would make the monitoring of implementation more straightforward;

   (3) The Claimants challenged the decision reached following the first public inquiry. In 2003 a further public inquiry was held in which the Council relied on Plan C;

   (4) On 2 November 2005 the Council obtained an injunction from Beatson J. This essentially required the Company to return the land to levels shown on Plan C;

   (5) In July 2006 the Company applied to the High Court for an order that it was impossible to comply with Plan C. That application was never determined. Instead Crane J invited the parties to come up with a new plan by consent; and

   (6) The Company was subsequently found to have breached court orders. Ronald and Michael Wyatt, as directors of the Company, were sentenced to immediate sentences of imprisonment of six and four months respectively. Those contempt proceedings were eventually determined by the Court of Appeal.

8. As the Claimants identify at paragraph 5 of their Skeleton Argument, throughout the course of the proceedings described above, there has never been a final determination of the extent to which Plan C (which is at the heart of the criminal complaints made by the Wyatts) was inaccurate and the reasons why it was inaccurate in the light of all the evidential material that exists. As will be apparent it is almost twenty years ago

   since the original events that led to the creation of Plan C (albeit the Claimants also rely on subsequent events over an extended period of time). Inevitably those events are no longer fresh in the minds of those who had contemporary knowledge of such matters. This has an obvious potential impact in relation to a criminal investigation into, and any criminal proceedings in relation to, the circumstances in which Plan C was created (and thereafter deployed).

9. The parties' respective positions in relation to the Plan C, are divergent, in the context of the evidence that exists (much, but not all of which, is before the Court). For their part the Wyatts make a number of allegations regarding Plan C, and in particular the involvement of Suzi Coyne, a consultant working for the Council at the material time, which form the basis of the criminal allegations advanced by the Wyatts. In particular they refer to the fact that Ms Coyne stated in a witness statement in 2005 that the contours on Plan C had been taken from a plan known as "WAT9", and that she has continued to make similar statements thereafter, whereas the Claimants allege that in the light of other information that has emerged Ms Coyne's account is false, a submission which they say is supported by material obtained from a Christopher Bowden, an engineer instructed by the Claimants, which they say demonstrates that Ms Coyne's account of the origins of Plan C cannot be accurate. They say that further material that has been obtained, also supports the opinion of Mr Bowden. It is the Claimants' belief that such matters (as well as other matters they rely upon) demonstrate criminal behaviour including on Ms Coyne's part. For example, one of the allegations is that the submission of an inaccurate plan amounted (on the facts) to perverting the course of justice.

10. For its part the Defendant submits that the circumstances in which Plan C were created are apparent on the available evidence, and they do not give rise to any cause for criminal complaint against Ms Coyne or anyone else. On the contrary, the Defendant submits that the circumstances in which Plan C was created are readily apparent on the evidence that exists, and are entirely innocent. Far from there being sufficient evidence to provide a realistic prospect of success against any subject on any charge (the threshold test), there is, says the Defendant, no prospect whatsoever of success. What is more, says the Defendant, it is not a question of inadequacy of evidence, but rather that such evidence as exists is fatal to any realistic prospect of success.

11. It is important to bear in mind at all stages, as I have done, that what is under consideration is the merit or otherwise of the public law challenge to the Decision Letter and the grounds in relation thereto. It is no part of the role of this court to adjudicate or make findings as to the factual dispute that underlies the allegations of criminal conduct that are made. However, as was accepted by Hugh Southey QC on behalf of the Claimants, the merit or otherwise of such public law challenge cannot be considered in a vacuum. It is necessary to have regard to the evidence that exists (or which might be obtainable on further investigation) when evaluating the criticisms made of the Decision Letter.

12. Indeed in this regard Mr Southey QC submits that a "relatively intensive standard of review" is required when determining whether there has been compliance with the requisite standards imposed on the Defendant, that the materials establish important rights from the point of view of the individual, and that the Court is competent to assess the extent to which there are further investigative steps that can and should have been taken (relying upon what was said by Lord Sumption JSC in *Pham v Secretary of State* [2015] 1 WLR 1591 at [107]).

13. In such circumstances it is appropriate not only to identify the allegations made, and the parties' respective cases, but also the associated evidence that exists or might exist, against which the Decision Letter, and the attacks upon it, are to be considered

The Defendant's case on the evidence

14. The Defendant's case on the evidence is as follows. I take this summary from the Defendant's Skeleton Argument. In doing so I am not to be taken as accepting what is there said, but rather I am recounting the Defendant's case on the evidence it identifies.

15. In May 1993 Ian Lyne (a surveyor used by the Claimants) produced a plan "WAT9". WAT9 was prepared for the purpose of obtaining planning permission for a revised layout of nine golf holes from the Council. It was intended to assist the Planning Authority in relation to what the landscape would look like. No detailed survey was undertaken and the plan was drawn to eye with no measurements being taken.

16. In 1997 WS Atkins, Jerry Axford and Steve Luckett, completed a survey of the lake void. This survey permitted WS Atkins to produce contours of how the lake was in 1997 ("the Lake Survey").

17. At some point, probably in June 1998 (says the Defendant), Kerrie Durow (previously Kerrie Jardine) produced an Autocad drawing of the lake void using the Lake Survey. This drawing was to an engineering standard having been based upon the WS Atkins Lake Survey.

18. Prior to the inquiry in early 1999 Suzi Coyne, acting on the instructions of counsel, instructed WS Atkins to prepare a drawing that showed the layout of the golf course prior to the proceedings ('the Base Plan'). As there was no pre-existing survey the most accurate information available was WAT9.

19. As WAT9 was a hand drawn interpolation of the OS contours the Base Plan could not be produced on CAD and needed to be drawn by hand. The contour lines on the Base Plan were hand traced from WAT9. Joanne Derbyshire was capable of doing this. Once the contours had been hand traced the North sticker, the contour numbers and the WS Atkins Title Block were all pasted on to the Base Plan.

20. In order to locate the lake onto the Base Plan a feature that was common to both WAT9 and the WS Atkins Lake Survey was identified. The only common feature to both WAT9 and the Lake Survey was the driving range fence. As a result, the driving range fence on the survey was placed over the same feature on WAT9.

21. The drawing created by Kerrie Durow, of WS Atkins, was accessed and revisions were made to it by WS Atkins.The lake plot numbers were removed and the profile of a bund was prepared together with two further title blocks – one of which read "Original OS contour survey (New lake showing existing contours)". This title block bears Joanne Derbyshire's initials.

22. The edge of the driving range and the bund was added to the Base Plan by hand. A paper copy of the lake from the drawing created by Kerrie Durow was printed off and, using the driving range fence as a guide, pasted onto the Base Plan.

23. The Defendant states that this was not ideal, but was, it is said, the only option at the time. The Lake Survey was accurate but if the driving range fence was in the wrong position then it would result in the lake having been located in the wrong place. It is said that the Base Plan was completed to be as accurate as it could be. This resulted in the Base Plan - A plan on tracing paper/acetate with paper copies of the lake, title block, contour heights and North sign pasted onto it.

24. The Defendant states that the Base Plan was created by WS Atkins with input from Joanne Darbyshire and Kerrie Durow, and that it was created on 20 January 1999.

25. It is said by the Defendant that Jerry Axford checked the Base Plan and authorised it on 22 January 1999. Whilst it was not to an engineering standard, it is said that it was as accurate as it could be on the basis of the information available.

26. WS Atkins provided Ms Coyne with a paper copy of the Base Plan that included the amended Title Block bearing Joanne Darbyshire's initials which it is said had also been checked and authorised by Jerry Axford.

27. It is said by the Defendant that unlike acetate plans, plans that are printed onto paper are susceptible to stretching and distortion, and it is suggested that part of the issue in this instance may have arisen in this fashion. That paper plans are susceptible to stretching and distortion is indeed supported by evidence from Mr Bowden (the Claimants' own expert) in a witness statement on behalf of the Claimant dated 5 November 2009 (supplied to the investigating officer Stephanie Burleigh on 31 October 2016), in which he stated, *"I had prepared a transparent overlay of the OS 1:1250 base so that this can be compared to the Enforcement Plan. This acetate is an accurate representation of the Ordinance Survey and, unlike prints onto paper, does not stretch or distort".* He also referred to a telephone conversation with Ms Coyne in which she stated that she had re-printed the Enforcement Plan and *"it had, as I'd suggested, stretched and no longer matched".* He had already made a similar point in an email to the Claimants' then solicitors (Morgan Cole) on 30 January 2006: *"To obtain the negative would enable the comparisons to be made without any argument regarding stretching or distortion of the paper copies of the Enforcement Plan revision C".* Ms Coyne (in her interview with the investigating officer DC Stephanie Burleigh) when being questioned about Plan C expressly referred to *"a Base Plan…it was a copy… If you put this over that, it'll be exactly the same. There's some distortion because when you copy these things they get dragged through a plot printer, it creates distortion to the paper."*

28. At a late stage in these proceedings (on 26 August 2018) the Claimants lodged a third witness statement from a Mr Lyne (an architect previously involved in the landscaping of the golf course and copyright holder of drawing WAT9) who stated that, *"Whilst expansion or contraction may have occurred on the subject plans and may vary from time to time on each inspection, the distortion in this case, Plan C, is much more substantial and unequal such that none of the fixed point can be aligned to each other in a significant and non-uniform way".* He opined that he did *"not consider that distortion due to Plan C being printed on paper is a credible explanation of the full extent of the errors".* He also referred to the fact that in an email to DC Burleigh dated 21 November 2016 he had briefly addressed the issue of distortion and the use of WAT 9 in the enforcement plans stating*, "… The contours may have been the only guide easily available (although they suffered distortion and displacement through the amateurish cut and paste process to which OCC (Atkins) subjected them) – itself cause to invalidate their use".*

29. During the course of the inquiry (and it is said on the instructions of the Inspector) the Council made amendments to the paper copy of the Base Plan. In particular:

(1) They removed the annotations of the bund next to the driving range,

(2) They removed the mound next to the 18th fairway,

(3) The written explanation of the source of the contours was added, "*Pre-existing ground contours taken from I. Lyne drawing WAT9 (May '93) interpolated from ordnance datum contours of 5 metre intervals*".

(4) Boundary features not present on WAT9 were added. During the inquiry the Council added the relevant boundaries for the purposes of the enforcement notices A, B and C. This was done in green pen and the originals were retained by OCC ("Plans A, B and C").

30. It is said by the Defendant that the amendment of the plan took place during the inquiry, under Suzi Coyne's direction, but with the participation of other witness and with the full knowledge of those attending the inquiry. WS Atkins were not involved in the amendments made by hand during the course of the inquiry. The parties were then provided with black and white copies of those notices.

31. The Claimants' counsel, Alun Aylesbury, annotated the Claimants' copy of the Enforcement Plan by adding "Requirements Plan OCC 2/2/99" (see Alun Aylesbury's email of 31 March 2017).

32. It is said by the Defendant that the written explanation/endorsement as to the source of the contours made it clear to all concerned that this was not an engineering standard drawing and accordingly of the limitations/shortcomings of it (although it is said by the Defendant that all at the inquiry should have been aware of this in any event).

33. This is entirely consistent with, and supported by, the evidence of the Claimants' barrister at the inquiry Alun Alesbury. For example, in an email of 21March 2017 from Mr Alesbury to Ronald Wyatt in relation to his interview with the interviewing officer DC Stephanie Burleigh he stated amongst other matters:

> "11. I did say (and I'm afraid that is my view) that it was not at all apparent to me that any kind of fraud or crime had been committed against Wyatt Bros in 1999, because we had all been aware that the composite plan had been 'cobbled together' by Oxfordshire from a number of different sources, and would not be 100% accurate. I had not myself seen or heard anything which showed that that had been done in a dishonest or deliberately misleading way."

34. In a further email to Ronald Wyatt on 18 April 2017 Mr Alesbury also stated, amongst other matters:-

> "The title block which you have sent me has prompted a few more recollections of what actually happened 18 years ago.
>
> The handwriting at the bottom, saying "Requirements Plan, OCC 2/2/9" is in fact my own handwriting, meaning that this is the copy that was handed to me as your advocate, when OCC produced the plan to the Inquiry on its second to last day.
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> …
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> My recollection remains that we at the inquiry (i.e. including our side) certainly knew that this was a composite plan which had been produced during the course of the Inquiry, based on information/input from a number of different sources or surveys, in response to the Inspector's very firm request for such a plan, agreed if possible.
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> …
>
> I think I probably did think at the time that OCC must have had some technical help in producing the composite plan, rather than (as we learnt quite some time later) Suzi Coyne just having put the plan together by herself.

> What I do think though is that we could not possibly have been misled by the title block into thinking it was a W.S.Atkins plan produced on 20th or 22nd January, because we knew perfectly well that it had been produced 'overnight' [or over a couple of nights] during the Inquiry itself, after the Inspector's request; and the title block looks (and then looked) as if it comes from a version of one of the pre-existing plans which had in fact been produced by Atkins, about the contours etc around the so-called 'new lake', in other words, the part in the middle of the composite plan, which Atkins had in fact had a hand in producing.
>
> …
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> I think the plan as presented probably was a bit misleading (and as we later learnt it was agreed to be wrong in a number of respects), but where I do I'm afraid think you are on a hiding to nothing is in suggesting that it was fraudulently presented as a pre-existing, properly surveyed plan which had been produced before the inquiry started by W.S.Atkins. That just wasn't the case, in my recollection."

35. Turning on to events after the initial inquiry, there was a hearing before Beatson J on 29 and 30 September 2005. At the hearing (*Oxfordshire County Council v (1) Wyatt Bros (Oxford) Ltd (2) Michael Wyatt (3) Ronald Charles Wyatt* [2005] EWHC 2402 (QB)) Ms Coyne's evidence was before the Court in the form of three statements (dated 31 March 2005, 1 August 2005 and 27 September 2005). There were no live factual matters in dispute and no live evidence was given.

36. Ronald Wyatt made it clear, in his statement of 19 September 2005, which was before Beatson J, that he was challenging the accuracy of Plan C. The Claimants had instructed Christopher Bowden before the hearing. As Beatson J stated at [55]:

> "Mr Wyatt's second witness statement, made very shortly before the hearing, raises the question of the accuracy of the enforcement plan and thus of the contours to which the land must be restored on the basis of a survey by Bowden Construction Services. The claimant submits that this survey in fact demonstrates that the defendants are not complying with the enforcement notices and that the recent activity on the site, the movement of material from one part of the site to another, is in itself operational development for which no planning permission has been sought and a
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> further breach of planning control. This issue is also raised by the defendants in the context of whether an injunction to comply with the enforcement notice plan would leave a dangerous edge to the proposed lake. The accuracy of the enforcement notice is a matter which should have been raised at the 1999 appeal when the proposal to restore to specified contours was agreed as an appropriate requirement should the notices be upheld. It was not raised then and, in view of the litigation up to the Court of Appeal on the enforcement notices, this is not an argument that can now be used in support of a submission that the breach is "technical"."

37. In Ms Coyne's third statement, which was before Beatson J, she acknowledged that there were "small differences" between Plan C and surveys of the site. In addition, she stated that the contours on Plan C were taken from WAT9. There was no detailed

evidence before Beatson J as to the origins of Plan C. The Defendant says that the statements served did not present Plan C as being the sole work of WS Atkins, and that it has never been said in any proceedings that Plan C was the sole work of WS Atkins (as to which see also what Mr Alesbury has said in this regard).

38. Ms Coyne prepared two further statements for the criminal proceedings brought by the Council against the Claimants dated 29 April 2006 and 9 March 2006, and these were served upon the Claimants.

39. In Ms Coyne's statement of 9 March 2006 she set out her evidence as to the process by which Plan C had been created as follows:-

> "3. … At the enforcement appeal inquiry in 1999, I was asked by the Inspector whether I thought the original form of the notices was unclear and responded that I did not think that it was. However, in the interests of making this particular requirement more precise, plans were produced for attaching to the enforcement notices to show the original contours of the land and the form of the lake, before it was the subject of unauthorised waste disposal. The defendants, the then appellants, agreed to this approach and raised no concerns about the form of the plan. The matter is recorded at paragraph 47 of the Inspector's decision letter on the enforcement notices at exhibit SC3 of my first witness statement.
> 4. It is further recorded at paragraph 47 of the inspector's decision letter (exhibit SC3 of my first witness statement) that the plans were based on a plan prepared by Mr Lyne in 1993. This was drawing no: WAT9 dated May 1993 which formed part of the planning application no: P93/N0476/CM for clay extraction at the site which received planning permission on 21 January 1994. WAT9 was described (by the defendants in their application) as showing (in addition to the proposed development) the pre-existing levels of the site at 1993, which was before any tipping (or clay extraction) had taken place at the site. As this drawing had been produced on behalf of the defendants to support a planning application it was considered to provide an accurate depiction of the form and original contours of the site. As noted above, the defendants accepted this approach at the time. A copy of WAT9 and the planning permission for clay extraction is at exhibit SC3 of my first witness statement.
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> 5. On 13 October 1997 WS Atkins on behalf of Oxfordshire County Council surveyed the void created by clay extraction. The results of this survey are shown on drawing no.: 922/759 dated 15.10.97, a copy of which is at SC13. Following the original grant of planning permission for clay extraction (P93/N0476/CM) a further permission P95/N0418/CM had been granted extending the time limit of the permission so that it expired on 1 November 1997. No further extensions of time were permitted and therefore this survey provides a very close representation of the form of tile clay void at the end of its permitted life.
> 6. On behalf of OCC for the purposes of the enforcement inquiry WS Atkins produced a base plan, drawing no.: 92957/922/002 1041. This drawing was a tracing of the boundaries of the site (including the River Thame, Waterstock Lane and the roundabout at the entrance to the golf course) and the pre-existing land contours, all taken from the defendants' plan WAT9. The clay void survey information from drawing no: 922/759 was then cut and pasted on to it. As the driving range had not been built in 1993 and is therefore not shown on WAT9, the location of the driving range netting was ascertained from a survey of the site by Komtech carried out on

behalf of the appellants in August 1998. The base plan also indicated the outline of the 10th fairway on the 18-hole golf course, a bund alongside the driving range and a mound adjacent to the boundary of the site with the property of Waterstock Mill. This base plan, drawing no: 92957/922/002 1041, as produced by WS Atkins, is the original drawing, prior to amendments A, B and C of the enforcement plan, referred to at paragraph 14 of Christopher Bowden's statement dated 22 February 2006 submitted on behalf of the defendants. A copy of the plan is reproduced at SC14.

7. When laid over WAT9, the base plan, drawing number 92957/922/002 1041, matches the pre-existing contours, and 'fixed' points of the roundabout, River Thame and Waterstock Lane as shown on WAT9. This is the only drawing produced by WS Atkins in connection with the instruction to provide a base plan for the purposes of the enforcement inquiry. I am not aware of any other plan produced by a method of cut and paste (or any other method) with the same drawing reference as referred to in the final sentence of paragraph 14 of Chris Bowden's statement, which is said to be among the plans in the possession of Mouchel Parkman.

8. The base plan, drawing no.: 92957/922/002 1041, was then amended by OCC to provide further clarification and remove information that was considered unnecessary. The annotations removed were the bund shown next to the driving range, the mound adjacent to Waterstock Mill and the 10th fairway on the 18-hole course. The further clarification comprised an explanation of the source of the contours and completion of the north eastern boundary of the site and adjoining land features, which are not shown on WAT9. Three alternative plans were then produced containing the same base information, but showing different green lines indicating the extent of the "tipped area", depending on the area of land covered by the different enforcement notices. The plans were given the revision numbers A, B and C to reflect the enforcement notices that they corresponded to (see paragraph 4 of my first witness statement). These amendments (removal of the bund, mound and fairway annotations, and new annotations to describe the source of the contours, site boundary features, "tipped areas" and drawing revision numbers) were made by officers of OGG, within the limited time available during the inquiry to provide the inspector with the necessary information."

40. Ms Coyne exhibited these statements to her statement prepared for the hearing before Crane J (dated 16 June 2006) as her exhibit SC39. On 18 July 2006 the Order was varied, by consent, by Crane J. The deadline was extended to 31 March 2007 and Plan C was replaced by a new agreed plan.

41. In her second affidavit, dated 13 March 2009, Ms Coyne further clarified the position in regard to the creation of Plan C, at paragraphs 81 to 86, as follows:-

"81. Following the enforcement inspector's request that a plan be produced, OCC asked WS Atkins to create a drawing combining the site boundaries and original land contours shown on the Respondents' drawing number WAT9 from 1993 and the WS Atkins survey data of the lake void from 1997. WS Atkins subsequently provided drawing number 92957/922/002 1041 ('The Base Plan'). This drawing was a tracing on transparent paper of the boundaries of the site (including the River Thame, Waterstock Lane and the roundabout at the entrance to the golf course) and the pre-existing land contours, all taken from the Respondents' plan WAT9 (a copy of which is at Exhibit SC3d of my first witness statement) at the same scale of 1:1250. A

paper plot of the clay void survey information, together with an overlying transparency showing the hand drawn outline of the void limits and contours across the lake base, also at the 1:1250 scale, were manually pasted onto the tracing. The base plan also indicated the outline of the 10th fairway on the 18-hole golf course, a bund alongside the driving range and a mound adjacent to the boundary of the site, with the property of Waterstock Mill all in accordance with OCC's instructions. Paper prints of a north sign and the WS Atkins drawing box were also cut and pasted onto the tracing. A copy of the base plan is reproduced at SC104.

82. Although I have said at paragraph 8 of Exhibit SC39 to my fourth witness statement, that the base plan was then amended by OCC it would be more accurate to say that a paper copy of the base plan was amended. The alterations comprised the following:

- The annotations of the bund shown next lo the driving range, the mound adjacent to Waterstock Mill and the 1 fairway on the 18-hole course were removed;
- A written explanation of the source of the contours was added.
- The north eastern boundary of the site and adjoining land features (parts of Waterstock Mill lane and the fork in river) which are not shown on WAT9 were drawn in.

83. This revised paper copy of the base plan was then produced as three alternative plans, showing the same information, with the exception of different green lines outlining the extent of the "tipped area" depending on the area of land covered by the different enforcement notices. The plans were given the revision numbers A, B and C to correspond to the different enforcement notices as the enforcement inspector had numbered them. (See paragraph 2 of the enforcement appeal decision letter at Exhibit SC3a of my first witness statement). The amendments of the paper copy of the base plan were carried out by a colleague of mine at that time, Adrian Purnell, and myself.

84. It is important to note that the plan that was reviewed by Atkins in their letter dated 10 July at page 127 of Exhibit DRS4 of Mr Scharf's affidavit is one of the (paper) enforcement plans, i.e. revision number C, not the transparency base plan with the same drawing number, but no revision references. I have also produced at SC105 correspondence from January 2006 in which Nick Graham, OCC's solicitor, explains the distinction between the negative base plan drawing number 92957/922/002 1041 created by WS Atkins and the enforcement plans of the same number but with revision numbers

85. I have also included at SC105 the Morgan Cole email dated 2 February 2006 to which the email from Nick Graham produced at page 124 of Exhibit DRS4 to Mr Scharf's affidavit is responding. More context is also provided at Page 12 of Exhibit DRS11 to Mr Scharf's third witness statement. This demonstrates how Nick Graham again tried very carefully to explain the distinction between the negative produced by WS Atkins as a base plan, which had and has not been altered by OCC, and the revised versions that comprised the enforcement plans. He further made clear that the essential features of the contours and the outline of the lake were the same on both form of plans. This confirms that, contrary to Mr Wyatt’s claim at page 13 of his witness statement, the WS Atkins plan was not altered through the incorporation of unreliable alterations. The amendments made to the paper copy of the WS Atkins base plan were purely for the purpose of providing missing context to the site (i.e. features outside the

tipped area), annotations to clarify matters, and removal of extraneous annotations not relevant to the enforcement plan.

86. At paragraph 1.02 of the complaint at page 279 of Exhibit DRS3 to Mr Scharf's affidavit it is stated: "The lake was cut from the original WS Atkins and pasted by Mrs Coyne onto the Plan ..... " This statement is clearly erroneous, because the original WS Atkins survey of the lake void (see Exhibit JDS of Jonathan Davy's first affidavit) is at a scale of 1:500 and the enforcement plan is at a scale of 1:1250. The lake void is obviously not pasted on at the original scale and I had no means of producing the void survey at the scale necessary to fit the enforcement plan. The base plan including the pasted lake void outline is clearly the work of WS Atkins and remained in their keeping and that of their successor (for the OCC property contract), Mouchel Parkman, until collected by the Respondents in February 2006. (See Morgan Cole email dated 2 February at SC105). Jerry Axford, the surveyor I had dealt with at WS Atkins, has previously corroborated my explanation of the origins of the enforcement plan."

The history of the Claimants' allegations

42. On 9 January 2007, the Claimants wrote to DS Clements at the Defendant (Thames Valley Police) regarding what the Claimants considered to be possible allegations of criminal behaviour. A subsequent meeting was held by DS Clements with employees of the Council. No further action was taken.

43. On 18 February 2010 the Claimants made a complaint to the Defendant. This was investigated by PS Mark Townsley. The Claimants take issue with the outcome of that investigation. In particular, it is recounted that they believe that PS Townsley believed what he had been told by those being investigated. The Claimants allege that insufficient efforts had been made to determine whether the claims of those being investigated could be undermined.

44. On 16 June 2013 a further complaint was made to the police about the conduct of the Council and its employees through "Action Fraud".

45. On 17 July 2013 DS Nicole James wrote to Mark Wyatt noting that she understood the complaint had been through the High Court and Court of Appeal. In light of this she asked a number of questions including whether the complaints had been pursued as part of a court process.

46. On 21 August 2013 the Claimants' solicitors wrote to DS James in response to the letter dated 17 July 2013. That letter identified evidence which was relied upon in support of the allegation that offences had been committed in relation to Plan C. The letter stated that attempts had been made to argue that the relevant plans were inaccurate.

47. On 16 October 2013 DS James wrote a letter headed "[a]llegation relating to [the Council] and [f]raud". She stated that it was her opinion that the matter did not warrant further investigation. She advised that the matter was best pursued through the civil courts. The reasoning was further expanded in an e-mail dated 8 November 2013. This stated that the prospects of obtaining best evidence had been undermined by the publication of evidence online as well as the age of the allegation. It was also said that the evidence was best presented to the civil courts.

48. On 19 November 2013 the Claimants' solicitors wrote seeking a review of the decision to decline to further investigate the allegations. That was investigated by DI Gavin Tyrrell.

49. On 4 February 2014 the Claimants submitted a complaint that DI Tyrrell and DS James had failed to perform their duty to investigate allegations made by the Claimants. The complaint was dismissed in a letter dated 13 November 2014.

50. The Claimants responded to the outcome of the complaint by submitting a statutory appeal. In particular they submitted a letter dated 9 November 2014 (submitted by email dated 9 December 2014). The statutory appeal was rejected in a letter dated 16 March 2015 from DCS De Meyer.

51. On 19 March 2015 DCS De Meyer wrote a second letter offering to consider points made in writing. The Claimants responded in a letter dated 24 March 2015. The letter asked, among other things, for the police to explain why they disagreed with the points made on appeal.

52. On 1 May 2015 DCS De Meyer wrote to one of the Claimants in response. This letter stated, among other matters, that the points raised in the appeal that did not relate principally to the underlying criminal complaint or did not amount to fresh points raised after the complaint, had been answered satisfactorily in the initial investigation.

53. The Claimants brought judicial review proceedings that argued that an unlawfully narrow approach had been adopted to the complaint and/or insufficient reasons had been given for the outcome of the statutory appeal.

54. On 19 October 2015 a Consent Order was agreed withdrawing the claim for judicial review "for the reasons annexed". The Annexure provided that, *"The Defendant has informed the Claimants that the decision …in respect of the Claimants' appeal under the Police Reform Act 2002 was flawed and that the decision will be reviewed"*.

The Investigation culminating in the Decision Letter

55. On 30 May 2016 Detective Inspector Nick Burleigh of the Professional Standards Department wrote to the Claimants. In that letter he stated amongst other matters that:-

    (1) He had read the original complaint, the report by DCI Hurley, the subsequent report by DS Smith and the Claimants' comprehensive written response as well as the outline document proposing judicial review of the complaint investigation. He stated that having read these documents it was quite clear that the Claimants had received a level of service from the Defendant, *"far below that to which you are entitled."*

    (2) He stated why he considered that this had occurred. He stated that there had been a failure to progress the real issue – *"have staff of the [Council] committed criminal offences or not"*.

    (3) He stated that in his letter he would like to lay out a formal apology along with some explanation and an agreed action plan to resolve the issues.

    (4) He proposed that the allegations against the Council be freshly reviewed by an experienced fraud detective who would be allocated by Detective Superintendent Nick John the Head of the Economic Crime Unit - in the event DC Stephanie Burleigh (the wife of DI Nick Burleigh).

    (5) It was stated that:

> "The report should consider whether there is a case for any of the following offences arising out of documents created and evidence given during proceedings between you and OCC regarding planning enforcement connected to Waterstock Golf Course:
>
> • Fraud – contrary to the Fraud Act 2006
>
> • Forgery – contrary to the Forgery and Counterfeiting Act 1981
>
> • Perjury –(misleading the court) – contrary to the Perjury Act 1911
>
> • Copyright Theft – contrary to Copyright, Designs and Patents Act 1988
>
> • Perverting the Course of Justice – contrary to common law."

(6) It was also stated that the enquiries that the Defendant should undertake as a minimum in order to make a full assessment of the allegations included the matters set out in further bullet points that followed. These included inspection of various plans including Plan C and WAT9, as well as various enquiries including an enquiry of Ian Lyne confirming his position on copyright of the original drawing and its subsequent use, and examination of the affidavits, statements and verbal accounts by OCC employees Suzi Coyne and Adrian Purnell given during planning enforcement proceedings against the Wyatts.

(7) It was also noted that the *"the investigator will no doubt want to spend some time with you and your solicitors who can explain the origin of these documents and provide copies of documents."*

(8) The letter concluded as follows, *"Can you please consider my proposals. You may wish to discuss this with your solicitors Bark and Co. Can you let me know if I have not identified all necessary enquiries or if you are not satisfied with my suggestions."*

56. The Claimants annotated their comments on the letter in an email dated 10 June 2016. It was confirmed by Mr Southey QC, during the course of the hearing, that it was not being suggested in this claim for judicial review, that the scope of the investigation proposed was anything other than appropriate – the challenge relates to the Decision Letter as the culmination of the investigation that took place, not its contemplated scope.

Legal framework to the Investigation

57. The applicable legal framework to the investigation was to a large extent common ground between the parties, and the Defendant accepts as correct the summary of the law as set out at paragraphs 25 – 31 of the Claimants' Grounds.

58. Section 23(1) of the Criminal Procedure and Investigations Act 1996 states that the Secretary of State shall issue a code of practice designed to secure, among other matters, that:

> "… where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued (section 23(1)(a))."

59. The Code of Practice issued under section 23(1) states that:

> "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances."

60. Section 39A of the Police Act 1996 gives the College of Policing the power to issue codes of practice. Such codes must be approved by the Secretary of State. The codes may be issued if, among other things, the College considers:

> "(a) it is necessary to do so in order to promote the efficiency and effectiveness of police forces generally, …
>
> (c) it is for any other reason in the national interest to do so (section 39A(1))."

61. A Code of Ethics was issued by the College of Policing under section 39A in July 2014 and sets out standards of professional behaviour expected of police officers. These include that:

> "I will act with fairness and impartiality. …
>
> I will be diligent in the exercise of my duties and responsibilities. …"

62. The requirement in the Code of Ethics to act impartially reflects public law duties to act impartially. The issue to be applied in that context is whether a fair-minded and informed observer would conclude that there was a real possibility of bias (*Magill v Porter* [2002] 2 AC 357 at [103]).

63. In the context of a police investigation, the Northern Irish High Court has held that previous failures in the course of an investigation can give rise to an appearance of bias in the course of further investigations (*In the matter of an application by McQuillan* [2017] NIQB 28 at [110] onwards). The Claimants accept that the judgment of the Northern Irish High Court concerned article 2 of the European Convention on Human Rights, but submits that the test applied when considering bias is no different. The Claimants submit that the approach of the Northern Irish High Court is hardly surprising. The primary purpose of the rule against bias is the need to ensure public confidence (*Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at [14]) and previous failures have the potential to undermine public confidence.

64. I accept that previous failings form part of the context to the later investigation, and may inform aspects of the enquiry to be undertaken to ensure that that subsequent investigation is properly conducted and that there is no appearance of bias, but what is being considered by a fair-minded and informed observer is the latter investigation and associated decision letter and whether a fair-minded and informed observer would conclude that there was a real possibility of bias. The mere fact that there have been previously failings cannot taint, or doom, a later investigation from the start – particularly as one of the very purposes of any later investigation is to cure any shortcomings of an earlier flawed investigation. It may mean, however, as I have identified, that previous failings may inform aspects of the enquiry to be undertaken and may mean that the investigation should be more extensive than might otherwise

have been the case. Ultimately any question of bias is sensitive to the facts of the particular case and whether a fair-minded and informed observer would conclude that there was a real possibility of bias on those facts.

65. Section 37A(1) of the Police and Criminal Evidence enables the DPP to issue guidance to custody officers on charging decisions. The guidance states that:

> "If the Test is not met and the case cannot be strengthened by further investigation the police will take no further action unless the decision requires the assessment of complex evidence or legal issues. (section 4) …
>
> Prosecutors may provide guidance and advice in serious, sensitive or complex cases and any case where a police supervisor considers it would be of assistance in helping to determine the evidence that will be required to support a prosecution or to decide if a case can proceed to court. (section 7)"

66. That is not directly applicable in the present case as there is no suggestion that any custody officer considered the Claimants' case. The Claimants submit that this provision demonstrates, consistent with the policies above, that investigations should only be abandoned when the case cannot be strengthened by further investigation. I address the question of further investigation in the context of charging decisions – it is in that context any question of further investigation arises.

Reasons

67. The trend in recent years has been towards a duty to give reasons (*North Range Shipping Ltd v Seatrans Shipping Corp* [2002] 1 WLR 2397 at [15]).

68. Section 32 of the Domestic Violence, Crime and Victims Act 2004 provides for the Secretary of State to issue a code of practice governing the interests of the victims of crimes. The Code of Practice for the Victims of Crime states that the victims of crime are entitled:

> "… to be advised when an investigation into the case has been concluded with no person being charged and to have the reasons explained to you. [1.1]"

69. In *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 Lord Brown stated that:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be,

> their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

70. I am satisfied that in the context of 23(1) of the Criminal Procedure and Investigations Act 1996 and Section 32 of the Domestic Violence, Crime and Victims Act 2004, a police force in the position of the Defendant was under a duty to give reasons for any decision not to proceed with potential criminal charges.

71. In this case, supplementary reasons have also been provided. The Claimants submits that to the extent that supplementary reasons are relied upon in addition to the initial reasons to demonstrate that adequate reasons have been given:

    (1) They should be discounted because this is a situation where there is an express duty to provide reasons set out in a statutory code, relying upon what was said in *R (Nash) v Chelsea College* [2001] EWHC 538 (Admin) at [34(i)].

    (2) Alternatively, those reasons should be approached with caution in circumstances in which those reasons have been prepared in the case of litigation, relying upon what was said in *Caroopen v Secretary of State* [2017] 1 WLR 2339 at [30]).

72. In this regard Stanley Burton J stated in the *Nash case* at paragraphs [34]-[36]:

> "34 In my judgment, the following propositions appear from the above authorities:
>
> (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in Northamptonshire County Council ex p D) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.
>
> (ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
>
> (a) Whether the new reasons are consistent with the original reasons.
>
> (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
>
> (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
>
> (d) The delay before the later reasons were put forward.
>
> (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must

> be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.
>
> 35 To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.
>
> 36 Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members."

73. That decision was referred to at paragraph 30 in the judgment of Underhill LJ in *Caroopen* in these terms:

> "…We were referred in particular to the decision of Stanley Burnton J in *Nash v Chelsea College of Art and Design [2001] EWHC (Admin) 538* . The judgment in that case contains, at paras. 27-36, a lucid discussion of the authorities as they then stood, together with his summary of their effect, which has been referred to in many other first-instance decisions. In particular, it has more than once been relied on by the Upper Tribunal in refusing to allow the Secretary of State to rely on reasons provided in supplementary decision letters: examples are the careful decisions of UTJ *Rintoul in R (AB) v Secretary of State for the Home Department* [2015] UKUT 00352 (IAC) and UTJ Coker in *R (Hamasour) v Secretary of State for the Home Department* [2015] UKUT 00414 (IAC) . Since (as the section in *Fordham* to which I have referred shows) there is voluminous case-law, including several authorities post-dating *Nash* , to which we were not referred, I prefer not to approve Stanley Burnton J's summary as a comprehensive account of the correct approach, and I will accordingly not set it out here. In broad terms, however, he recognised that even in a case where there was no explicit statutory duty to give reasons the courts should approach attempts to rely on subsequentlyprovided reasons with caution; and he said that that was particularly so in the case of reasons put forward after the commencement of proceedings and where important human rights are concerned. I would endorse that."

74. I consider that the present case falls within the first category as I have concluded that there was a duty to give reasons for any decision not to proceed with potential criminal charges. The point is, however, academic in this case, as in the light of the conclusions I have reached in relation to the Decision Letter, nothing turns on whether or not it is appropriate to have regard to subsequent reasons when assessing the adequacy of the reasons given in the Decision Letter.

Considering compliance with the duty to investigate

75. In relation to the level of scrutiny and considering compliance with the duty to investigate, the Defendant referred to the case of *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB). In that case two victims of convicted "black cab rapist" – John Warboys brought claims for damages under sections 7 and 8 of the Human Rights Act 1998 on the grounds that the failure of the police to conduct effective investigations into allegations of crimes committed against them constituted violations of the duty to investigate inherent in the right under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms not to be subjected to inhuman or degrading treatment. The judge gave judgment for the claimants on the basis of serious systemic failings and operational failures by the police and awarded them compensation in addition to the damages and compensation which they had already received from the rapist and the Criminal Injuries Compensation Authority. The Court of Appeal subsequently dismissed the defendant's appeal on the ground that, having regard to the multiple systemic failings and serious operational failures in the police investigation, a violation of the investigative duty under article 3 had occurred and the defendant was liable to pay compensation to the claimants, and an appeal to the Supreme Court was dismissed (reported at [2018] 2 W.L.R. 895).

76. In the course of his judgment at [212 - 226] Green J considered the scope and nature of the duty to investigate serious crime, and synthesised the principles laid down in Strasbourg case law. These principles included (amongst others):

(1) "Where a credible allegation of a grave or serious crime is made, the police must investigate in an efficient and reasonable manner which is capable of leading to the identification and punishment of the perpetrator(s) (*MC v Bulgaria* para [153]; *Vasiliyez v Russia* para [100])" ([216])

From which the Defendant submitted that the police must investigate allegations in an "efficient and reasonable manner" (which I understand to be common ground).

(2) "the process of determining whether an investigation was "reasonable" or "capable" of leading to the apprehension, charge and conviction of a suspect is a fact sensitive exercise. It is also subject to a margin of appreciation and to proportionality. The law must not impose an excessive burden on police: *Osman* para [116]. Factors which may in a particular case be relevant include (but are not limited to): the resources available to the police; the nature of the offence; whether the victim fell into an especially vulnerable category; whether the operational failures were caused by (up-stream) systemic failings in the law or in the practices of the police."

([224] and see [226] as to a more detailed analysis of the capability test).

(3) "A failure to perform an individual act that really could have been performed will not trigger liability if: (a) notwithstanding that omission the investigation viewed in the round did in fact lead to the arrest of the suspect within a reasonable time; or (b) the investigation (even absent a prosecution) may still be said to encompass a series of reasonable and efficient steps. This is an important point since the Strasbourg case law repeatedly emphasises that the police must be accorded a broad margin of appreciation in the choice of means of investigation. The police have a discretion as to how they conduct an investigation so that if (say) they are faced with a choice of 3 reasonable

courses of action to adopt but chose only one or two of the courses of action and then perform those well it will generally not be a point of criticism that they omitted to adopt the third course which could, objectively speaking, have been capable of leading to the apprehension of the criminal." [226]

(4) "Various points have been raised by the Strasbourg case law as reflected in the synthesis of case law above, which in the course of argument were referred to as either leading to an intensification or a weakening of the duty to investigate. There are 5 points in particular which warrant mention:

i) The need to avoid an unacceptable burden being imposed upon the police: This was a point emphasised in Osman (para [116]), in relation to the right to life (under Article 2), and there is no reason why it should not apply equally to Article 3 cases. It is a reason for adopting a cautious approach to the law and in not setting the bar for liability at too low a level. It is also a point which underscores the statement made on a number of occasions that not every allegation of error or isolated omission in an investigation triggers liability…" [225]

77. The Defendant relies, in particular, on the passage quoted above that "A failure to perform an individual act that really could have been performed will not trigger liability if: (a) notwithstanding that omission the investigation viewed in the round did in fact lead to the arrest of the suspect within a reasonable time; or (b) the investigation (even absent a prosecution) may still be said to encompass a series of reasonable and efficient steps" and that "the Strasbourg case law repeatedly emphasises that the police must be accorded a broad margin of appreciation in the choice of means of investigation."

78. As will be apparent, Green J was undertaking a detailed analysis of the Strasburg case law, and the obligations imposed by the European Convention on Human Rights. He was not addressing the duties under the provisions that I have identified. The Claimants submits that as a consequence, such principles provide no real assistance.

79. I agree that the particular context in which these principles were identified is to be borne well in mind but I consider that much of what is stated is also apposite to an investigation carried out under Section 23(1) of the Criminal Procedure and Investigations Act 1996 and associated Code of Practice (given that where a criminal investigation is conducted all reasonable steps are to be taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are to be pursued). This is unsurprising given the obligations under the ECHR. In addition (in particular cases) it may well be that a failure to perform an individual act that really could have been performed will not result in an investigation being flawed if it may still be said to encompass a series of reasonable and efficient steps. It depends on the investigation in question and the steps that were undertaken.

80. However, I consider that it is necessary to be more cautious about what was said about a "broad margin of appreciation" for at least two reasons. First, what is being considered in this action is a challenge on public law grounds to an investigation and it is in that context that it is necessary to consider the level of scrutiny or review that is appropriate. Secondly, the present investigation had its own agreed parameters and

was set against the backdrop of a previous (flawed) investigation that the current investigation was designed to right.

81. In this regard the Claimants submits that a reasonably intensive standard of review is required when determining whether there has been compliance with the standards that have been identified above, that the materials establish important rights from the point of view of the individual, and that the Court is competent to assess the extent to which there are further investigative steps that can and should be taken. In this regard the Claimants refers to what was said by Lord Sumption JSC in *Pham v Secretary of State* [2015] 1 WLR 1591 at [107]:

> "107 The differences between proportionality at common law and the principle applied under the Convention were considered by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 , at paras 27-28. In a passage with which the rest of the House of Lords associated itself, he identified three main differences: (i) a proportionality test may require the court to form its own view of the balance which the decisionmaker has struck, not just decide whether it is within the range of rational balances that might be struck; (ii) the proportionality test may require attention to be directed to the relative weight accorded to competing interests and considerations; and (iii) even heightened scrutiny at common law is not necessarily enough to protect human rights. The first two distinctions are really making the same point in different ways: balance is a matter for the decision-maker, short of the extreme cases posited in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 . But it may be questioned whether it is as simple as this. It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject-matter. The differences pointed out by Lord Steyn may in practice be more or less significant depending on the answers to these questions. In some cases, the range of rational decisions is so narrow as to determine the outcome."

82. Whilst Mr Southey QC accepted that the central issue for determination was whether there was an unlawful response/compliance in public law terms in relation to the Decision Letter, in light of the approach in cases such as *Pharma* he submitted that the Court should, as he put it, undertake a "reasonably intensive standard of review" for three reasons:-

(1) Parliament, by virtue of section 23(1) of the Criminal Procedure and Investigations Act 1996 and stating that the Secretary of State shall issue a code of practice designed to secure, among other matters, that "… where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued" was legislating to ensure that there was an obligation upon the police to pursue investigations, and there was an important public interest in a diligent investigation.

(2) On the facts of this case, and the unfortunate history of a previous investigation that it was accepted had been flawed, it was particularly

important that the Court ensured that the subsequent investigation was not flawed.

(3) The Court is very familiar with assessing whether there was sufficient material to justify a criminal prosecution.

83. I agree that a "reasonably intensive standard of review" is appropriate in the present case having regard to reasons (1) to (3) above (with which I agree), albeit in relation to reason (3) it is to be born in mind that what is being considered is the investigation undertaken by the Defendant, and whether that Decision was flawed, not an assessment by the Court (in substitution for the conclusions reached by the Defendant) as to whether there was sufficient material to justify a criminal prosecution. However when undertaking a "reasonably intensive standard of review" I bear in mind that whether the Defendant took all reasonable steps and pursued all reasonable lines of inquiry is itself subject to a margin of appreciation and to proportionality.

Charging Decisions

84. In relation to charging decisions, section 37A of the Police and Criminal Evidence Act 1984 (as amended) provides the Director of Public Prosecutions with the power to issue guidance to enable custody officers to decide how to deal with charging decisions.

85. In this regard the "Director's Guidance on Charging 2013 - fifth edition" (the "Guidance") was published in May 2013. The Guidance provides that the police to,

> "4. Police duty to assess evidence before charging or referral
>
> Where a police decision maker considers there may be sufficient evidence to charge they will assess the key evidence to ensure the appropriate Test can be met before proceeding to charge or referring the case to a prosecutor. If the Test is not met and the case cannot be strengthened by further investigation the police will take no further action unless the decision requires the assessment of complex evidence or legal issues.
>
> Where the police proceed to charge in accordance with this Guidance they will assess the case to determine:
>
> the evidence which supports the charge;
>
> the justification for treating the case as an anticipated guilty plea suitable for sentence in a magistrates' court (where that is a requirement);
>
> the reason why the public interest requires prosecution rather than any other disposal.
>
> Where the police proceed to charge an offence where the suspect has put forward a specific defence or denied the offence in interview the police decision maker will record the reason for doing so on an MG6 and provide a copy to the CPS with the file for the first hearing in the case."

86. The appropriate test is the "Full Code Test" as set out in the Code for Crown Prosecutors. The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage.

87. Where the police are satisfied that the Full Code Test is not met and the case cannot be strengthened by further investigation ("the Threshold Test") then a suspect will not be charged.

88. When applying the Full Code Test the police must be satisfied that:

> "there is sufficient evidence to provide a **realistic prospect of conviction** against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction."
>
> (emphasis added)

89. The finding that there is a realistic prospect of conviction is based on the police's objective assessment of the evidence, including the impact of any defence, and any other information that the suspect has put forward or on which they may rely. It means that an objective, impartial and reasonable tribunal, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

Aspects of the Criminal Offences contemplated

90. The allegations being investigated related to potential criminal offences. At any trial, in order to establish guilt the burden of proof would be upon the prosecution, and the standard of proof would the criminal standard, namely that the tribunal was satisfied, so that they were sure, of a defendant's guilt. Where there are a number of matters to be proved in relation to a particular offence (for example dishonesty and intent) the tribunal must be satisfied so that that they are sure, that each of those matters has been proved to the requisite standard. If they were so satisfied the verdict would be guilty, but if they were not satisfied of any one such matter then the verdict would be not guilty.

91. It is accordingly important to identify particular elements of the offences that the prosecution would have to prove in the context of the application of Full Code Test to put in context the Decision Letter and the Defendant's conclusions as to whether there was sufficient evidence to provide a realistic prospect of conviction in relation to a particular offence, and if the Full Code Test was not met whether the case could or could not be strengthened by further investigation.

Fraud – contrary to the Fraud Act 2006

92. Section 2 of the Fraud Act 206 provides (amongst other matters):-

> "2 Fraud by false representation
>
> (1) A person is in breach of this section if he
>
> — (a) dishonestly makes a false
>
> representation, and
>
> (b) intends, by making the representation— (i) to
>
> make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if— (a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading".

93. Accordingly the prosecution must prove (amongst other matters) (i) a false representation (untrue or misleading and the person making it knows that it is, or might be untrue or misleading, (ii) the person must dishonestly (i.e. not negligently or innocently) make that false representation, and (iii) that person intends by making the representation (a) to make a gain for himself or another or (b) to cause loss to another or expose another to the risk of loss.

Forgery – Contrary to the Forgery and Counterfeiting Act 1981

94. Section 3 of the Forgery and Counterfeiting Act 1981 provides: "It is an offence for a person to use an instrument which is, and which he knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice."

95. Accordingly the prosecution must prove (amongst other matters) that the person knew or believed an instrument (for example Plan C or an underlying drawing) to be false and that they used it with the intention of inducing somebody to accept it as genuine and by reason of so accepting it to do or not do some act to his own or any other person's prejudice.

Perjury – contrary to the Perjury Act 1911

96. Section 1 of the Perjury Act 1911 provides:

"1.— Perjury.

(1) If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury"

97. Accordingly the prosecution must prove (amongst other matters) that the witness in judicial proceedings (defined in section 2) wilfully (that is to say deliberately and not inadvertently or by mistake) made a statement material in that proceeding which he knows to be false or does not believe to be true.

Perverting the Course of Justice – contrary to common law

98. It is a common law misdemeanour to pervert the course of justice. The offence is committed where a person or persons-

(a) acts or embarks upon a course of conduct

(b) which has a tendency to, and

(c) is intended to pervert

(d) the course of public justice

- see *R v Vreones* [1891] 1 QB 360, Archbold 2018 para 28-1.

99. In *R v Lalani* [1999] 1 Cr App R 481 Brooke LJ, delivering the judgment of the Court, stated as follows in relation to *mens rea* at 493C-D:-

> "It appears from the authorities that the prosecution must either prove an intent to pervert the course of justice or, as in *Meissener*, an intent to do something which, if achieved, would pervert the course of justice. The course of justice may be perverted if it is obstructed, interfered with, defeated, or changed. Thus passing information to a juror about a case he or she is trying, being information which has not been received in open court, would normally result in the course of justice being perverted in one of these ways. Although *Meissener* permits the prosecution to identify an improper act and prove an intent to bring that improper act about, it will normally be simpler to identify and prove an act which has a tendency to pervert the course of justice and which was done with the intent to pervert (in this wide sense) the course of justice."
>
> (emphasis added)

100. Accordingly, the prosecution must prove, amongst other matters, an intention to pervert the course of justice or an intention to do something, which, if achieved would pervert the course of justice. However even in the latter case, the prosecution must still prove an intent to bring the improper act about.

101. Even assuming that the evidential stage (as part of the Full Code Test) is passed in a particular case, the public interest may not be in favour of prosecuting an offence of perverting the course of justice. In this regard, it is stated in Archbold at para 29-2:

"An act or course of conduct tending and intended to interfere with the course of public justice will amount to the offence, but the offence should only be charged where there are serious aggravating features: *R v Sookoo* The Times, April 10, 2002, CA; and *R v Kenny* [2013] 1 Cr.App.R.23,CA." 102. In *R v Sookoo,* supra*,* Douglas Brown J stated at [8] to [9]:

> "7 It is the experience of the court, confirmed by counsel appearing today for the appellant from his experience, that counts for perverting the course of justice appear with increasing frequency in indictments along with counts for the principal offence or offences. It seems to us that in many cases these counts are quite unnecessary and only serve to complicate the sentencing process. Where, as here, an offender had attempted to hide his identity and inevitably failed, the prosecutors should not include a specific count of perverting the course of justice…
>
> 8 We would say this, however, there must be cases where there are serious aggravating features in the attempt to pervert the course of justice. There will be cases where a great deal of police time and resources are involved in putting the matter right, or there may be cases where innocent members of the

public have their names given and they have been the subject of questioning and even detention. That is not the situation in this case."

103. In *R v Kenny,* supra, Gross LJ (giving the judgment of the Court) stated at [36]:

> "In cases of breach of restraint orders, nothing we have said should encourage prosecutors to charge perverting the course of justice where it is unnecessary to do so; ordinarily the sanction of contempt of court will suffice. We would respectfully echo the observations in Archbold , at 28–2, themselves founded on *R v Sookoo* [2002] EWCA Crim 800 , that in such cases the offence of perverting the course of justice should only be charged where there are serious aggravating features…"

104. In the present case a comparable (primary) offence would be perjury. If the Threshold Test for perjury could not be met (for example in relation to knowledge of falsity), it would appear inherently unlikely that the public interest test would be passed for perverting the course of justice (even assuming the requisite intent was demonstrated). It has also been said that if perjury cannot be proved, the prosecution cannot be allowed to circumvent the statutory safeguard of proof of falsity, by charging attempting to pervert the course of justice – *Tsang Ping-Nam v R,* 74 Cr.App.R 139 PC.

Copyright – Copyright, Designs and Patents Act 1988

105. Section 107(1) of the Copyright, Designs and Patents Act 1988 (the "1988 Act") provides that:

> "A person commits an offence who, without the licence of the copyright owner— …
>
> (d) in the course of a business— …
>
> (iv) distributes, or
>
> (e) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,
>
> an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work."

106. Section 107(2A) of the 1988 Act provides that:

> "A person who infringes copyright in a work by communicating the work to the public–
>
> (a) in the course of a business, or
>
> (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work."

107. Accordingly the prosecution must prove, amongst other matters, in relation to an offence under section 107(1) of the 1988 Act, (i) a person without the licence of the copyright holder, (ii) in the course of business distributes or (ii) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright (iii) an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work. Such an offence therefore requires the person to be distributing in the course of business or if not in the course of business then it is not mere distribution which suffices rather it must be proved that the distribution is to such extent as to affect prejudicially the owner of the copyright. What must be proved is also "distribution" and of an "article", an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work.

108. It is therefore the article which is distributed (eg Plan C) which the person must know is an infringing copy of a copyright work. In the present case it is WAT 9, not Plan C in respect of which copyright is claimed (albeit on Ms Coyne's evidence WAT 9 is used as part of the process to create Plan C). As Mr Holdcroft, counsel for the Defendant pointed out, there is something of a tension in the case advanced by the Claimants (and that would be advanced in any prosecution) viewing all potential offences together. The evidence the Claimants seek to adduce (and which would be before a tribunal trying any alleged criminal offence) is that Ms Coyne's evidence that she used WAT 9 (subject to copyright) for contour information when producing Plan C is **untrue** as (it is said) it cannot be the basis for the contours shown on Plan C. However, it is not objectionable in principle for a Janus like stance to be adopted by a prosecutor in the context of different offences though this may, of course, impact upon any charging decision in the context of the Threshold Test and the public interest test (given the potential to weaken the prosecution case on all offences and/or create a potential for doubt arising out of inconsistent evidence). I have already identified the underlying factual evidence, and address the issues in relation to copyright and the Decision Letter in due course below.

109. Section 107(2A) of the 1988 Act provides that a person who infringes copyright in a work by communicating the work to the public (a) in the course of a business, or (b) otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright commits an offence if he knows or has reason to believe that, by doing so, he is infringing copyright in that work. Accordingly the prosecution must prove, amongst other matters (i) communication of a work to the public done in the course of business or done otherwise in the course of business to such an extent as to affect prejudicially the owner of the copyright and (ii) knowing or having reason to believe that by doing so he is infringing copyright in that work.

110. Section 45(1) of the 1988 Act provides that:

> "Copyright is not infringed by anything done for the purposes of … judicial proceedings."

111. Section 178 of the 1988 Act provides that:

> " "judicial proceedings" includes proceedings before any court, tribunal or person having authority to decide any matter affecting a person's legal rights or liabilities"

112. An issue would therefore arise in relation to any prosecution for copyright violation as to whether anything that was done in relation to WAT9 was done for the purposes of "judicial proceedings." The Defendant submits that the planning inquiry before an inspector are proceedings before a person having authority to determine a "matter affecting a person's legal rights or liabilities".

113. However the Claimants draw attention to Rule 20 of the Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules 2002 (SI 2002/2686) which makes it clear that a decision of a planning inspector reviewing an enforcement decision is not binding. Ultimately, the Secretary of State takes the final decision and can reject the conclusions of an inspector.

114. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2003] 2 AC 295 it was held that the decision making by the Secretary of State lacked the independence required by a court to comply with article 6 of the European Convention on Human Rights. However, judicial review meant that the Secretary of State's role did not violate article 6. It was judicial review that ensured the planning process complied with article 6 [54].

115. In relation to the Defendant's suggestion that section 45 applies, the Claimants state in their Skeleton Argument (at paragraph 47), "It is not accepted that is correct. A decision of a planning inspector is not binding. That implies that it is administrative rather than judicial proceedings (*Alconbury*)."

116. On any view this is itself an issue of some complexity and it is at least arguable that the nature of a planning inquiry before an inspector is such that it is to be regarded, for the purpose of section 45, as being proceedings before a person having authority to determine a "matter affecting a person's legal rights or liabilities" – that would certainly be argued by any defendant. Such arguability would be a factor when considering whether there was a realistic prospect of conviction when overlaid against the elements of copyright offences identified above applied to the specific facts of the present case. In this regard it might also be difficult to satisfy the public interest test. It is also to be borne in mind that copyright right offences are routinely brought by trading standards rather than the CPS.

Section 31 of the Senior Courts Act 1981

117. In the context of the grounds for judicial review, both parties remind me of section 31 of the Senior Courts Act 1981 and the associated case law which was common ground, and which was the subject of an agreed Note from the parties' counsel. 118. Section 31 of the Senior Courts Act 1981 provides:

> "(2A) The High Court—
> (a) must refuse to grant relief on an application for judicial review, and
> (b) may not make an award under subsection (4) on such an application,
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest."

119. The Claimants accept that following the judgment in *R (Goring-on-Thames PC) v South Oxfordshire DC* [2018] EWCA 860 it is not open to them to argue before this Court that section 31(2A) only applies to procedural issues [47] .

120. In *R (Williams) v Powys CC* [2018] 1 WLR 439 the Court of Appeal held:

(1) In general the interest of a lawful decision must prevail [72].

(2) The Court should be careful before trespassing into the domain of a decision maker by refusing relief [72].

121. Similarly, in *R (KE) v Bristol City Council* [2018] EWHC 2103 (Admin), HHJ Cotter QC

(1) Noted the approach in *John v Rees* [1970] Ch 345 that apparently open and shut cases may not actually be [140].

(2) On this basis accepted the submission: *"that great caution must be exercised by the Court in second guessing, according to a high standard of probability and on an entirely hypothetical basis, what the outcome would have been if the conduct complained of had not occurred"* [140].

The Decision Letter

122. On 15 March 2017 Detective Superintendent Nicholas John wrote to Ronald Wyatt in an email (the Decision Letter) that is the subject of the claim for judicial review. In the Decision Letter DS John expressed his opinion in these terms:-

> "As you know from previous conversations with both myself and DI Nick Burleigh, having reviewed the case with the OIC [Officer in Charge], DC Steph Burleigh, I do not believe that there is a sufficient material to meet the CPS 'threshold test'. This is the first evidential test that once met, enables a formal referral for a charging decision to be made to CPS. As you know, we have engaged with CPS around this and they confirm that this case does not meet the criminal test."

123. The Decision Letter also provided :-

> "As you are aware from our meetings and phone calls, both with myself and DC Steph Burleigh, the investigation to the allegations you made focused on specific areas around the criminal conduct of those within the OCC. In the

agreement with DI Nick Burleigh this investigation centred around the following;

1.Fraud by false representation – Fraud Act 206

2.Use a copy of a false instrument with intent that it be accepted as genuine – Forgery and Counterfeiting Act 1981.

3.Perjury – (misleading the court) – contrary to the Perjury Act 1911

4. Copyright theft – Contrary to the Copyright, Designs and Patents Act 1988."

124. D. Supt John indicated that his rationale for reaching his decision was contained within the report from DC Burleigh which he provided to the Claimants (the "Report") which D. Supt John essentially adopted when expressing his opinions. The Report contains a detailed description of the investigation that DC Burleigh had conducted into the Claimants' allegations, as well as the conclusions reached by her on the basis of the evidence obtained and criminal offences considered by her.

125. Mr Southey QC confirmed to me orally that the Claimants do not object to the approach of an (experienced) officer such as DC Burleigh undertaking the investigation or a senior officer such as D. Supt John adopting the conclusions reached, nor is objection taken to the fact that the investigation and Report were undertaken by the wife of an officer who had had involvement in the earlier complaint (DI Burleigh). However it is submitted by the Claimants that the Report was flawed in a number of respects which underlie the grounds for judicial review. 126. Before turning to the Claimants' submissions in that regard, it is worth noting that D.
Supt John, no doubt having regard to DC Burleigh's Report and conclusions, expressed his opinion in relation to various potential offences before concluding:-

"In short, having reviewed [the Report] and discussed this case with DC Burleigh I believe that she has completed a thorough and detailed investigation and has carried out a significant number of enquiries."

127. D. Supt John addressed fraud, use of a false instrument, perjury and copyright (the latter in erroneous terms). In the light of the fact that considerable emphasis was placed by the Claimants during the course of the hearing on the origins of Plan C and fraud (addressed below in relation to the conclusions of DC Burleigh) it is worth noting the opinion expressed by DS John in this regard:-

> "… the fraud aspect is complex but in short, in my view, it would be very difficult to prove any fraud as Jerry AXFORD confirmed that ATKINS created the tracing plan. Whilst we have not been able to identify which individual completed the plan we do know that Mr AXFORD conformed he quality assured the plan and it was his signature on the block. There has been concern from yourselves over the criminal behaviour of Suzi COYNE. Suzi COYNE admits to creating 'Plan C' by changing the paper copy base plan. This she states was completed during the 1999 inquiry and was done so in front of the Planning Inspector and all parties, which followed confirmation given by Ian BALDOCK and both Barristers, indicates there was no criminal behaviour by Suzi COYNE.

> I do no [sic] believe a jury would be able to find guilt improving any dishonesty by Suzi COYN (R v Ghosh) [I would interject that it was not suggested before me that there is any significance in *R v Ghosh* no longer representing the state of English law on dishonesty]. Both Barristers spoken to that were involved during the 1999 hearing have also confirmed they do not believe there was any dishonesty. Added to the fact that this case [is] in excess of 20 years old and the witnesses are vague and unclear on what has taken place, this all added together does not pass the threshold test on this element."

128. The Claimants make the following submissions in relation to the Report itself (at paragraph 24 of the Claimants' Skeleton Argument):-

"a. Despite the terms of the letter from DI Burleigh dated 30 May 2016, there was no consideration in the report of the offence of perverting the course of justice;

b. 'Copyright theft' was said to be solely a civil matter. This conclusion would appear to be inconsistent with the terms of section 107 of the Copyright, Designs and Patents Act 1988 …;

c. The consideration of perjury appeared to be focused on what happened during the public inquiry. There appeared to be little or no consideration of what happened during subsequent litigation;

d. A number of potential witnesses and/or suspects had been spoken to. However, the Claimants had not been spoken to as witnesses. It is accepted that there has been considerable contact between the Claimants and the police. That does not undermine the significance of the failure to speak to the Claimants as witnesses. The fact that the Claimants were not spoken to as witnesses means that there appears to have been no consideration of the evidence that they could give. The importance of this is clear when the allegations are considered. For example, as noted above, one allegation is that contours on plan C were not accurate … Ms Coyne essentially stated that the source of the contours was a plan known as WAT/9 … This is consistent with the evidence of Ms Coyne in earlier proceedings. However, the Claimants had evidence that demonstrated that was wrong … No account was taken of that;

e. There had also been a failure to seek evidence from the Claimant's planning advisor who attended the public inquiry in 1999;

f. One witness who had been interviewed was Alun Alesbury. He was the barrister who had represented the Claimants at the public inquiry. There appears to be issues with the accuracy of the record kept of Mr Alesbury's evidence …; and

g. It appears to have been concluded that amendments were made in front of the inspector … In fact there is evidence that is not correct …"

129. Following receipt of the Decision Letter and Report, correspondence ensued between the parties. In this regard on 4 April 2017 Mark Wyatt emailed D. Supt John as well as other including DI Burleigh making a number of points in response and also seeking a meeting. Further correspondence between the Defendant the Claimants, and

their solicitors ensued culminating in an email from D. Supt John to the Claimants' solicitors indicating that the Defendants would not respond to further questions or correspondence from the Claimants unless guided to do so by the Professional Standards Department (which was reviewing the investigation conducted by the Economic Crime Unit).

130. The Claimants served evidence in support of its application for permission (including a large volume of correspondence) and, before the oral renewal hearing, an email from the Claimants' barrister Alun Alesbury dated 1 November and a witness statement from Ian Lyne dated 7 November 2017. Following the granting of permission, Detailed Grounds of Resistance were filed on 5 January 2018 together with statements from DC Stephanie Burleigh dated 29 December 2017 and DI Burleigh dated 5 January 2018. In turn the Claimants served a second statement from Ian Lyne dated 26 January 2018 and a statement from Ronald Wyatt dated 28 January 2018.

The Grounds for Judicial Review

131. It will be recalled that the following issues arise from the grounds that have permission to apply for judicial review (see paragraph 1 of the Grounds):

(1) Whether the Decision was flawed on the basis that it was an unlawful failure to carry out a proper/diligent investigation;

(2) Whether the Decision was flawed on the basis that it demonstrated a lack of independence;

(3) Whether that Decision was flawed on the basis that it contained inadequate reasons; and

(4) Whether the Decision was flawed because it contained a misdirection in law regarding potential criminal liability for copyright offences.

132. In relation to (1) (whether the Decision was flawed on the basis that it was an unlawful failure to carry out a proper/diligent investigation), the Claimants submit that the Defendant unlawfully failed to pursue the investigation into the Claimants' complaints diligently so that all reasonable lines of inquiry were pursued. In particular the Claimants submit that:

(1) There was a particular need for this investigation to be pursued diligently in light of the previous history of the investigation into the Claimants' complaints. It was accepted that the police had failed the Claimants in the past. That implied that diligence was required to ensure the necessary independence. Repeated failures to investigate undermine public confidence (*McQuillan*).

(2) The investigation in this case failed to address a matter that DI Burleigh had agreed to investigate in his letter dated 30 May 2016. That was the offence of perverting the course of justice. The explanation given is that dishonesty needed to be established. That is not said in the initial report. More importantly, dishonesty is not required. It is sufficient that there was an intention to submit a misleading document and that that misleading document had the potential to pervert justice (*Lalani*). As a consequence, there was a misdirection. The failure to investigate perverting the course of justice should also be considered in the context of the fact that the investigation into perjury

failed to address the full scope of the Claimants' complaints. These matters suggested a failure to fully engage with the Claimants and their complaints

(3) The suggestion that the police failed to fully engage with the Claimants is supported by the failure to interview the Claimants as a witness. It is accepted that there was significant contact with the Claimants. However, none of that appeared to be on the basis that the Claimants might have evidence to give. There is nothing within the reasoning in the decision in question that suggests any account of the possibility of the Claimants giving evidence. It should be remembered that the initial promise to refer the matter to the CPS was explained on the basis that the Claimants' evidence was potentially significant. That implies that account needed to be taken of that evidence.

(4) It was not only the Claimants who might have had evidence. The Claimants' planning advisor might also have been able to give evidence. He had attended the public inquiry in 1999.

(5) The Claimants submit that the evidence demonstrates that WAT9 cannot have been the origin of the contours on Plan C. That undermines the account given by Ms Coyne. However, there is no attempt to investigate whether that is correct and why, if it is correct, Ms Coyne gave an inaccurate account.

(6) There was an obvious inconsistency between the account given by Ms Coyne and that given by Mr Lyne. The updated reasoning recognises that witnesses could have been spoken to about which account is accurate. That never happened despite the potential for evidence supporting Mr Lyne to undermine the credibility of Ms Coyne.

(7) The failure to record accurately what was being said by Mr Alesbury suggests a failure to engage properly with the case being made by the Claimants. It suggested a lack of care.

(8) It is relevant that the police misdirected themselves that there could be no criminal liability under copyright legislation. It is accepted that decision makers can innocently but unlawfully misdirect themselves regarding the law. However, in this context, when taken with the matters above it suggests a lack of care.

133. In relation to issue (2) (whether the Decision was flawed on the basis that it demonstrated a lack of independence), the Claimants submitted that the police are subject to a duty to act impartially and refer to the Code of Ethics that states that police officers will act impartially which is consistent with the public law duty to act impartially. The duty to act impartially is not in dispute. However the Claimants, relying upon that duty, submit that a fair-minded and informed observer would conclude that there was a real possibility of bias in the police investigation. In particular the Claimants submitted that:

(1) There had already been a failed investigation. That was likely to undermine public confidence into the impartiality of the investigation. It implied that the investigation was not being handled in an even handed manner (*McQuillan*).

(2) The failures in the most recent investigation support that submission *(McQuillan*). It was said that they are likely to be regarded as particularly significant by the fair-minded and informed observer. The Defendant recognised a need to correct previous failures but then failed to do so.

(3) It is significant that the failures identified above are all matters that suggest that the Claimants' complaints were not given appropriate weight. That suggests a failure to treat all parties involved in the criminal complaints equally.

(4) It is also significant that there was a failure to refer the matter to the CPS. That suggests a lack of openness with the Claimants.

(5) It is significant that the supplementary report was submitted in circumstances in which the purported reason for it (namely a desire to correct a typographical error) appears inaccurate. That report appears to be an attempt to revise earlier reasoning; and

(6) All of these matters are matters that will undermine public confidence in the impartiality of the investigation.

134. In relation to point (4) above, and as already addressed, there was, in fact, contact with the CPS. However I understand the point about lack of openness is still pursued.

135. In relation to issue (3) above (whether that Decision was flawed on the basis that it contained inadequate reasons), it was submitted that there was a duty to give reasons (which is accepted) and that the duty to provide reasons was not met in this case because (it is said) there was a failure to give reasons addressing principle controversial issues (*Porter*). In particular the Claimants submit that:

(1) The reasons given failed to address a matter that DI Burleigh had agreed to investigate in his letter dated 30 May 2016. That was the offence of perverting the course of justice. The reasons given for that failure have been demonstrated to be unlawful for the reasons set out above.

(2) The reasons failed to address the full scope of the Claimants' complaints regarding perjury in circumstances where the complaints were not restricted to 1999. More generally there was no attempt to engage with what the Claimants would have said if giving evidence.

(3) There was no attempt to engage with the specific allegation that WAT9 was not the origin of the contours;

(4) There was no statement as to whether further investigative steps could/should be taken; and

(5) To the extent that the additional report is being relied upon, it cannot supplement the reasoning set out in the initial report, and even if the additional report could be relied upon (which is denied) this is a case in which late reasons were provided without good reason.

136. In relation to issue (4) (whether the Decision was flawed because it contained a misdirection in law regarding potential criminal liability for copyright offences) the Claimants submitted that the Defendant had misdirected itself in law in concluding that copyright is purely a civil matter. The terms of section 107(2A) of the Copyright, Designs and Patents Act 1988 (as quoted above) make it clear that there is a potentially relevant criminal offence. As already noted in riposte to the Defendant's submission that section 45(1) of the 1988 Act applies the Claimants stated that, "It is not accepted that is correct. A decision of a planning inspector is not binding. That implies that it is administrative rather than judicial proceedings *(Alconbury)."*

137. In addition the Claimants also sought to advance a further ground of review, submitting that the decision contained a material misdirection regarding perverting the course of justice on the basis of their submission that the *mens rea* required to establish perverting the course of justice is not dishonesty (relying on *Lalani*, as quoted above).

138. For its part, the Defendant submitted that there was nothing in any of the grounds, and that the claim for judicial review should be dismissed. In relation to issue 1 (whether

the Decision was flawed on the basis that it was an unlawful failure to carry out a proper/diligent investigation), the Defendant submitted that this ground was totally without merit, submitting that:-

(1) The investigation into the Claimants' allegations was impartial, reasonable and proportionate. All reasonable lines of inquiry were pursued and all of the lines of inquiry identified as relevant before the investigation were completed.

(2) The Claimants accept that they have no further disclosure or information to provide. Accordingly, it is difficult to see what further reasonable lines of inquiry are said to have been available.

(3) The Claimants have wrongly conflated the concept of investigation/reasonable inquiry with that of admissible evidence. At the investigative stage the question of admissibility does not need to be considered and consequently information does not need to be in evidential form. In this instance the Defendant had all of the information that the Claimants could provide albeit, had criminal proceedings been commenced, it may have been necessary to reduce the information provided into evidence.

(4) There was (as the Claimants accept) "significant contact". They provided substantial amounts of material to the investigation and the investigation had the benefit of 12 statements from the First Claimant ranging from 14 July 2005 until 1 October 2012. Reference is made to the statement of DC Stephanie Burleigh, and the exhibits thereto, which sets out in more detail the contact with the Claimants and the extent of the material provided, gathered and considered.

(5) The investigation fully considered all of the information provided by the Claimants and their advisors (the Defendant notes that Ian Lyne did not attend the entirety of the inquiry). The formalisation of the Claimants' complaints/information into statements would not amount to further evidence it would simply have been the same evidence in an admissible form. The fact that statements were not requested does not equate to a failing to consider the information that they had been provided with.

(6) The Claimants' submissions are not evidence e.g. in relation to the submission that the evidence demonstrates that WAT9 was not the origins of the contours of Plan C. In this regard the Defendant says that the Claimants' submission disregards the totality of the evidence demonstrating that this was the case and ignoring the Claimants' own expert's explanation for the difference between WAT9 and Plan C.

(7) On any objective view of the evidence, it was abundantly clear that no criminal offences had been committed. The Defendant had investigated all reasonable lines of inquiry and properly considered all of the voluminous material supplied by the Claimants.

139. In relation to issue 2 (whether the Decision was flawed on the basis that it demonstrated a lack of independence) the Defendant submitted that a fair-minded and informed observer would (most certainly) **not** conclude that there was a real possibility of bias in the police investigation. In relation to the more general allegation of a lack of independence the Defendant submitted that:-

(1) The Claimants had not set out how it was said that there was a lack of independence, and if the Claimants considered that the Defendant could not

perform an impartial investigation from the outset then they should have raised this matter before the investigation commenced.

(2) The Defendant's officer sought the input from the CPS to consider whether the threshold test was met i.e. whether there was sufficient information for the file to be formally passed to the CPS. The CPS responded that it was not believed to meet the criteria for investigative advice from the CPS. In such circumstances it would have been entirely inappropriate to have referred the matter.

(3) The Defendant undertook an entirely independent and thorough investigation and followed the evidence where it led.

(4) Any partiality in the matter was entirely on the part of the Claimants. An objective assessment of the evidence entirely undermined the Claimants' view that criminal offences had been committed.

140. In relation to issue 3 (whether that Decision was flawed on the basis that it contained inadequate reasons), the Defendant submitted that the reasons given were more than adequate. More specifically the Defendant submitted that:-

(1) The Report, which had been disclosed in full, sets out the reasons for considering that there was no realistic prospect of any individual being convicted in relation to the Claimants' allegations.

(2) The investigation report does not address the issue of perverting the course of justice. However, it recites the relevant evidence and includes a rationale in relation to the allegation of perjury. The allegations of perjury and perverting the course of justice would stand or fall together and it would be clear to anyone reading the investigation report why an allegation of perverting the course of justice could not properly be pursued.

(3) The report sets out the rationale for concluding that there were no criminal offences to be considered. The conclusion in this regard was correct and any objective person considering the report would be entirely aware of the reasons for that conclusion – all of the principal and controversial issues were addressed.

141. In relation to issue 4 (whether the Decision was flawed because it contained a misdirection in law regarding potential criminal liability for copyright offences), the Defendant accepted that the Report contained an error in that it inaccurately stated that copyright matters may only be dealt with within the civil jurisdiction. However the Defendant submitted that :-

(1) The Report and the Decision Letter both rehearse the relevant considerations in relation to such offences and the rationale for rejecting them is cogent.

(2) It is clear that Plan C was produced for the purposes of the planning inquiry. This is not in dispute. The planning inquiry involves the determination of a "matter affecting a person's legal rights or liabilities." Consequently, the inquiry constituted legal proceedings for the purposes of the Copyright, Design and Patents Act 1988 and accordingly the production of the Plan C did not infringe copyright (by virtue of section 45 of the Act).

(3) Suzi Coyne was not acting in the course of a business when preparing Plan C, nor did she distribute Plan C to such an extent as to affect prejudicially the owner of the copyright.

(4) There was no prospect of copyright offences being made out in this instance.

142. In relation to the additional ground that the Claimants sought to advance, based on the submission that the Decision contained a material misdirection regarding perverting the course of justice on the basis of the Claimants' submission that the *mens rea* required to establish perverting the course of justice is not dishonesty (relying on *Lalani*, as quoted above), the Defendant submitted that there was no misdirection, and the conclusion reached was the right conclusion in any event based on the facts of the case.

143. Each of the parties developed their submissions during the course of oral argument, and I bear well in mind such submissions when considering the grounds that are advanced and for which permission has been granted.

Discussion Ground (1) Whether the Decision was flawed on the basis that it was an unlawful failure to carry out a proper/diligent investigation

144. DC Burleigh's Report is, on any view, a very detailed report running to some 16 single-spaced pages. It sets out the allegations being made (in terms which are not criticised), the individuals involved and DC Burleigh's investigatory actions which included interviewing numerous witnesses, specifically Suzi Coyne (the individual against whom the allegations were centred), Jerry Axford (previous Atkins employee), Joanne Darbyshire (previous Atkins employee), Kerrie Durrow (previous Atkins employee), David Jefferies (currently employed by Atkins), Ian Lyne (surveyor used by the Claimants and the copyright holder of WAT9), David Baldock (planning inspector), Ashley Grey (Bristol Planning Inspectorate), Adrian Purnell (previously with the Council), Chris Bowden (surveyor used by the Claimants), Nick Graham (Head of Legal at the Council), Chris Hodgkinson (Enforcement Officer with the Council), Alan Aylesbury (the Claimants' barrister) and Harriet Townsend (the Council's barrister). DC Burleigh also made enquiries of Ordinance Survey Mapping

(OS Mapping), Get Mapping and AUTOCAD (in the context of mapping and imaging data and its accuracy).

145. DC Burleigh also had over 50 email communications with the Claimants, many of which were lengthy emails setting out the Claimants' views and concerns. There were also three meetings in person with the Claimants on 18 October 2016, 4 November 2016 and 8 February 2017. DC Burleigh also had 2 large A4 ring binders provided by the Claimants' solicitors within which were no less than 12 witness statements produced for the High Court by Ron Wyatt created between 2005-2012 (and so far more contemporaneous than anything created in 2018). It is self-evident from such material that the Claimants had every opportunity to, and did, provide whatever information they regarded as relevant to DC Burleigh as part of her investigation, a view I have formed from a consideration of the documentation itself, although I note in passing that this accords with DC Burleigh's evidence that, *"In my 30 years of police service I have never had as much contact from a witness/complainant as I have had in this assessment from Ron and Mark WYATT. I repeatedly told them they could provide me with any information they thought relevant to this review, which they did in person and in email."*

146. After summarising the evidence she had received in her Report, DC Burleigh then addressed the criminal offences of fraud, use of a copy of a false instrument, perjury and copyright, identifying relevant evidence set against elements to be proved, and expressing her conclusions on each, followed by an overall conclusion on the facts.

147. The report was the product of a seven month investigation involving, as is apparent from the material before this Court, extensive interviewing of relevant witnesses, as

identified above, and examination of relevant documentation and correspondence set against the backdrop of factual events and the allegations that had been made.

148. Following my consideration of all material before me, and all the submissions made by the parties both written and oral, it is readily apparent to me that the investigation that was carried out by DC Burleigh was impartial, reasonable and proportionate set against the backdrop of previous failings. Viewing the allegations made at the highest level (i.e. in general terms of whether there was an unlawful failure to carry out a proper and diligent investigation), those allegations are not reasonably arguable – and indeed are hopeless. The available material speaks for itself – DC Burleigh's investigation was reasonable and proportionate in terms of methodology and content – and she took all reasonable steps for the purpose of the investigation and pursued all reasonable lines of inquiry (for the purpose of section 23(1) of the Criminal Procedure and Investigations Act 1996 and the associated Code of Practice). Indeed her investigation might be thought to go beyond that which would ordinarily be expected by way of investigation of criminal allegations (albeit no doubt understandable, justifiable, and appropriate in the context of the history of past failings). The methodology adopted, and the work undertaken, cannot properly be criticised.

149. Equally there is nothing to support the suggestion that the investigation by DC Burleigh was other than impartial (as addressed further under ground 2 below). I find it unsurprising, and entirely consistent with my consideration of the material before me and the conclusions that I have reached, that DC Burleigh's evidence is that she had, *"dedicated months of work to go above and beyond, to be fair, impartial and to complete a thorough and balanced review."* That is the impression created by the Report and the underlying documentary and evidential material before me (an impression formed without regard to the statement evidence before me from DC Burleigh herself).

150. Nevertheless it is possible that an otherwise reasonable and proportionate investigation may be unlawful if it is flawed in some material respect. It is accordingly necessary to have regard to each of the criticisms of the Report made by the Claimants. When doing so it is important to bear in mind that what was being considered by the Defendant was whether there was sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge, considering what the defence case may be, and how it is likely to affect the prospects of conviction (and whether the case could be strengthened by further investigation). I will now turn to address such criticisms.

151. I accept that there is a particular need for the investigation to be pursued diligently in the light of previous history of the investigation into the Claimants' complaints, but the evidence supports the conclusion that there was a proper and diligent investigation - subject only to a consideration of the specific allegations and criticisms made by the Claimants as addressed below to see whether any of them mean that what was otherwise a reasonable and proportionate investigation was nevertheless flawed in any of the respects alleged.

152. It is true that the matters that DI Burleigh agreed would be investigated in his letter of 30 May 2016 included the offence of perverting the course of justice. However any such offence is to be set against the backdrop of the investigation into, and conclusions reached, in relation to all potential offences including not only fraud (which was at the heart of the allegations) but also the offence of perjury which was closely linked to any allegation of perverting the course of justice, as well as the elements of the offence of perverting the course of justice (and applicable principles in relation thereto).

153. In relation to perjury, DC Burleigh expressed the following (amongst other) conclusions:

> "The allegation is that Suzi COYNE misled the planning inspector by lying during the hearing. This has been disproved by inspector BALDOCK who stated in his 1999 findings that he knew the WAT9 contours were not accurate and discounting LYNES' evidence. BALDOCK has also stated in his answers to my questions that he was aware that Suzi COYNE was amending/creating an enforcement plan throughout the hearing in 1999 and it was agreed by all parties.
>
> The WYATTS state that they would have challenged the Enforcement plan if it had not been created by the ATKINS. They state they were under the impression it was an accurate engineered plan by ATKINS. This not agreed by their barrister Mr AYLESBURY who states that everyone at the inquiry was aware. Enquiries within this investigation reveal it was created by ATKINS at Suzi COYNES request and then amended by Suzi COYNE. Although proved to be slightly inaccurate and superseded in 2006 this appears to be a miscalculation and human error and not a criminal act.
>
> …
>
> I do not believe that it can be proved that she completed the offence of perjury as we cannot prove she "Wilfully made a false statement".
>
> *The prosecution must prove that the false statement was made wilfully (deliberately or intentionally) and not accidently or mistakenly. It is common for witnesses to be disbelieved by a court without them being guilty of perjury."*

154. As has already been identified above, for the offence of perjury to be committed the prosecution must prove (amongst other matters) that the witness in judicial proceedings (defined in section 2) wilfully (that is to say deliberately and not inadvertently or by mistake) made a statement material in that proceeding which she knows to be false or does not believe to be true. DC Burleigh's statement as to particular elements of the offence of perjury was accordingly accurate.

155. One aspect of the evidence that Ms Coyne would undoubtably have relied upon (in addition to her own denial of the deliberate making of any statement by her known to be false or not believed to be true) is the evidence of the barristers that appeared in the planning proceedings, specifically the Claimants' barrister Alan Alesbury, and the Council's barrister Harriet Townsend. I have already set out what was said by Mr Alesbury in his email of 21 March 2017 to Ronald Wyatt in relation to his interview with the interviewing officer DC Burleigh. It will be recalled that he stated amongst other matters:

> "11. I did say (and I'm afraid that is my view) that it was not at all apparent to me that any kind of fraud or crime had been committed against Wyatt Bros in 1999, because we had all been aware that the composite plan had been 'cobbled together' by Oxfordshire from a number of different sources, and would not be 100% accurate. I had not myself seen or heard anything which showed that that had been done in a dishonest or deliberately misleading way."

156. Mr Alesbury had also stated, amongst other matters, in a further email to Ronald Wyatt on 18 April 2017 as follows:-

> "My recollection remains that we at the inquiry (i.e. including our side) certainly knew that this was a composite plan which had been produced during the course of the Inquiry, based on information/input from a number of different sources or surveys, in response to the Inspector's very firm request for such a plan, agreed if possible.
>
> …
>
> I think I probably did think at the time that OCC must have had some technical help in producing the composite plan, rather than (as we learnt quite some time later) Suzi Coyne just having put the plan together by herself.
>
> What I do think though is that we could not possibly have been misled by the title block into thinking it was a W.S.Atkins plan produced on 20th or 22nd January, because we knew perfectly well that it had been produced 'overnight' [or over a couple of nights] during the Inquiry itself, after the Inspector's request; and the title block looks (and then looked) as if it comes from a version of one of the pre-existing plans which had in fact been produced by Atkins, about the contours etc around the so-called 'new lake', in other words, the part in the middle of the composite plan, which Atkins had in fact had a hand in producing.
>
> …
>
> I think the plan as presented probably was a bit misleading (and as we later learnt it was agreed to be wrong in a number of respects), but where I do I'm afraid think you are on a hiding to nothing is in suggesting that it was fraudulently presented as a pre-existing, properly surveyed plan which had been produced before the inquiry started by W.S.Atkins. That just wasn't the case, in my recollection."

157. Such evidence from Mr Aylesbury would (in the words of Sir Wyn Williams in refusing permission, with which I agree), be a *"very potent obstruction to a successful prosecution"* and this would be so not only in relation to fraud and forgery but also in relation to perjury and perverting the course of justice, going as they do (from an independent professional witness present throughout the proceedings and representing the Claimants' interests) to the question of Ms Coyne's intent. Such evidence contradicts any suggestion (which would, of course be denied by Ms Coyne herself in evidence) that she deliberately (and not inadvertently or by mistake), made any statement material in the proceedings knowing it to be false or not believing it to be true. This would be true not only in relation to what happened during the course of the public inquiry, but also what happened during subsequent litigation (thus also cutting across the Claimants' complaint about any alleged lack of focus by DC Burleigh in that regard as well).

158. There is also the written note of the Council's barrister Harriet Townsend dated 11 December 2017, following her interviews with DC Burleigh, in which she recounted her previously expressed view that, "*I have a particularly high regard for the way Suzi Coyne handled the case and received very clear instructions from her on this point [that is the production of Plan C] over the period 2005-2010"* and stated, amongst other matters that:

> "I have worked closely with the Council over the period since 1999, and despite my unfettered access to documentation and the detailed conversations we had both formal and informal over this period. I have no reason to doubt that they, and Suzi Coyne, were at all times seeking to exercise the Council's statutory powers in the public interest without any improper motive."

159. Such evidence would also be likely to be fatal to any prosecution case alleging perverting the course of justice where the prosecution must prove, amongst other matters, an intention to pervert the course of justice or an intention to do something, which, if achieved, must pervert the course of justice (see *Lalani).* However even in the latter case the prosecution must still prove an intent to bring the improper act about. The same sentiments expressed by DC Burleigh about perjury (the deliberate

or intentional making of a false statement) as quoted above, would be equally applicable to the requisite intent necessary for the offence of perverting the course of justice, and the views expressed by Mr Aylesbury and Mrs Townsend would in this area too, be a very potent obstacle to a successful prosecution. In short their likely evidence would be highly toxic to any potential prosecution for perverting the course of justice.

160. In circumstances where DC Burleigh concluded that there was not sufficient evidence to provide a realistic prospect of conviction against Ms Coyne in the context of intent in relation to perjury (or indeed fraud and making false representations known to be untrue with the requisite intention, which is at the heart of the Claimants' allegations and which suffers from similar difficulties), and in circumstances where DC Burleigh would appear to have been entitled to so conclude based on the material before her, the prospects of success would be no greater in relation to perverting the course of justice and for similar reasons.

161. However there is the additional consideration in relation to perverting the course of justice that the public interest may not be in favour of prosecuting an offence of perverting the course of justice, and that the offence should only be charged were there are serious aggravating factors (see the authorities cited above) – which I do not consider would be the case based on the available evidence that was before DC Burleigh (not least in the context of the difficulties that existed in the context of prosecuting other offences for the reasons expressed by DC Burleigh and which are in any event self-evident). It is obvious that would also be the view of DC Burleigh based on the views she did express and conclusions she did come to.

162. Thus I do not consider that the Decision was flawed, or that there was an unlawful failure to carry out a proper and diligent investigation, by reason of the fact that DC Burleigh did not address the additional possible offence of perverting the course of justice. Even if (which I do not consider the case) DC Burleigh was obliged to consider the offence of perverting the course of justice in its own right and a failure to do so rendered the Decision unlawful (which I also do not consider was the case) this would have been a classic case where s.31(2A) of the Senior Courts Act 1981 would be applicable as I am satisfied (to a very high degree of probability, and for the reasons that I have given) that it is (very much more than) highly likely that had DC Burleigh addressed perverting the course of justice she would have expressed similar conclusions with the result that the outcome for the Claimants would not have been any different if the omission complained of had not occurred.

163. Equally I do not consider that the failure to address perverting the course of justice expressly evidences a failure to address the full scope of the Claimants' complaints or

suggests a failure to fully engage with the Claimants and their complaints given the considerations that would have arisen (as identified above) upon any consideration of perverting the course of justice, and what was addressed and concluded in the Report.

164. Nor do I consider that the suggestion that the Defendant failed fully to engage with the Claimants is supported by the fact that the Claimants were not interviewed as witnesses. I have already identified that DC Burleigh had before her numerous statements from the Claimants, that she had a large volume of documentation provided by them, that she had meetings with them, and that they had every opportunity to express their views and provide any information or evidence they had

to her. DC Burleigh's work was at an investigatory stage. There was no requirement for her to take statements from the Claimants before any charging decision.

165. In any event it is difficult to see what evidence the Claimants could give that was admissible other than as to contemporary events in relation to which DC Burleigh already had evidence from independent witnesses (whose evidence would be likely to carry considerable weight) including Mr Alesbury and Mrs Townsend as well as all the documentation, information and views that were supplied by the Claimants themselves to DC Burleigh. There is nothing to suggest that DC Burleigh did not take account of all such evidence (as well as submissions) that had been given and made by the Claimants over an extended period of time. In this regard one can take into account submissions that are made without agreeing with such submissions or considering that they support the allegations being made. The investigation, and the conclusions to be reached, were a matter or DC Burleigh. Whether the Claimants agreed or disagreed with the conclusions of DC Burleigh is not a relevant consideration.

166. In addition, and given the evidence that witnesses such as Mr Alesbury and Mrs Townsend were likely to give, this was also not a case where the case could be strengthened by further investigation – the existing evidence would remain, it would justify the conclusions that were reached, and it would tell against any case against Ms Coyne.

167. It is doubtful whether the Claimants' planning advisor could have added, in any material way, to the evidence. His evidence would have been in the context of attendance at the 1999 inquiry – in relation to which DC Burleigh already had a considerable volume of evidence from a number of witnesses (again including independent evidence from the likes of Mr Alesbury and Mrs Townsend). I do not consider there was any error, or any failure to carry out a proper and diligent investigation in not obtaining such evidence from the Claimant's planning advisor.

168. The next point advanced on behalf of the Claimants (on which some considerable reliance was placed at the hearing before me) was based on a submission that the evidence demonstrates that WAT9 cannot have been the origin of the contours on Plan C which is said to undermine the account given by Ms Coyne, and it is said that there was no attempt to investigate whether that was correct and why, if it was correct, Ms Coyne gave an inaccurate account. It is also said that there is an obvious inconsistency between the account given by Ms Coyne and that given by Mr Lyne.

169. I have already set out at some length the Defendant's case on the evidence, and what supporting evidence there is for the history of the production of Plan C and (amongst other evidence) Ms Coyne's account of how it came about. The explanation given, including as to distortion and stretching through use of paper copies, is supported by the evidence of a number of witnesses including the evidence of Mr Bowden in his witness statement dated 5 November 2009, his email to the Claimant's then solicitors

Morgan Cole on 30 January 2006, and Ms Coyne's own evidence, including in her interview with DC Burleigh (as already quoted above). Whilst in his third witness statement (filed on 26 August 2018 some 19 years after the contemporary event) Mr Lyne opines (as set out at paragraph 28) that he did *"not consider that distortion due Plan C being printed on paper is a credible explanation of the full extent of the errors"* (my emphasis) he had also stated an email to DC Burleigh dated 21 November 2016 (in which he had briefly addressed the issue of distortion and the use of WAT9 in the enforcement plans) that *"...The contours may have been the only guide easily available (although they suffered distortion and displacement through the amateurish cut and paste process to which OCC (Atkins) subjected them) – itself cause to invalidate their use."* It is not difficult to envisage Mr Lyne's views at various times (and any potential inconsistencies in that regard) being vigorously explored in the context of a defence to any charges.

170. However the real difficulty with the Claimants' reliance on alleged inconsistencies between Ms Coyne's account and the views expressed by Mr Lyne (quite apart from the fact that there is support for Ms Coyne's explanation to justify some, and potentially all, distortion) is that it takes matters little further than to highlight inaccuracies in Plan C and how they may have come about. There is no dispute (a) that Plan C was not accurate and (b) that there is evidence of witnesses present at the time of the inquiry (including Mr Alesbury) who knew the plan had been "cobbled together" from a number of different sources, and in consequence was not 100% accurate. Quite apart from the fact it does not appear that anyone was relying on Plan C being 100% accurate, the fact that there were inaccuracies does not begin to establish the requisite *mens rea* for any possible offence. It is, for example, a major leap (of logic and evidence) to go from knowledge on Ms Coyne's part that Plan C may not have been 100% accurate to Ms Coyne having produced Plan C dishonestly making a false representation and intending by making that representation to make a gain for herself or another or cause loss to another or expose another to the risk of loss (to take the example of Fraud Act). Similar points could be made in relation to each of the other offences. It is a very long way from showing inconsistencies in accounts (in relation to events long ago, and at a time when a plan was being produced in less than ideal circumstances, and in a short period of time from multiple sources) to proving the requisite elements of any of the offences under consideration.

171. It is important to bear in mind that what DC Burleigh was considering was not a civil trial, and whether the evidence of Ms Coyne or Mr Lyne might be preferred, for example to establish the accuracy or otherwise of Plan C or its origins for the purpose of some civil finding on balance of probabilities impacting upon the rights or obligations of the parties to the inquiry, but whether there was a realistic prospect of conviction against Ms Coyne on a particular charge having regard to the need for the prosecution to prove, to the criminal standard, the requisite *mens rea* for any particular offence.

172. It is only necessary to have regard to the evidence that was before DC Burleigh in this regard (and which has been identified above) – to see that there was no flaw in her reasoning in relation to any case against Ms Coyne. It is also clear that she did give proper regard to all the evidence before her – and reached the very conclusion that the Claimants disagree with, but on a reasoned basis and in terms which cannot be subject to valid criticism. Whilst her reasoning is best seen by reading her Report as a whole (including the section where she addresses Ms Coyne's evidence over 21 numbered paragraphs including in relation to the creation of Plan C and the source of the contours – during which she recognises inconsistencies with the evidence of Mr

Lyne), her ultimate conclusion on fraud highlights the difficulties facing any prosecution very clearly whilst also demonstrating the validity of her reasoning:-

> "The barristers at the hearing have been spoken to and they do not believe that Suzi COYNE showed any dishonesty and completed the plan in the Inquiry best interest. Both barristers would obviously [be] called as witnesses.
>
> In my opinion the prosecution witnesses in this case are all very vague especially jerry AXFORD,. Joanna DARBYSHIRE is very hostile and would not make a good witness for either prosecution or defence. The case is in excess of 20 years old and most witnesses spoken to have vague and unclear memories and would not withstand cross examination by either side"

173. Such factors would undoubtably be in play, and I do not consider that there is any flaw in her reasoning or unlawful failure to carry out a proper and diligent investigation in the context of the origins of Plan C and WAT9's role in relation thereto.

174. The Claimants also suggest that DC Burleigh's failure accurately to record what was being said by Mr Alesbury suggests a failure to engage properly with the case being made by the Claimants and suggests a lack of care. I do not consider there is any substance in this suggestion. The evidence, taken as a whole, shows that DC Burleigh undertook a diligent investigation and one that was carried out with care. An example of an inaccurate recounting of a piece of evidence does not of itself mean that the investigation as a whole was not carried out with care. I would only add that the conclusions reached by DC Burleigh in relation to Mr Alesbury – are justified and corroborated by the evidence that was undoubtably given by Mr Alesbury and which I have already quoted.

175. Finally it is said that coupled with the other matters raised, the fact that the Defendant misdirected itself that there could be no criminal liability in relation to copyright legislation suggests a lack of care. I address ground 4 and the question of copyright generally below. However a misdirection on one aspect of the law cannot in of itself mean that there was not a proper and diligent investigation, and the error that was undoubtably made in this area does not undermine the detailed investigation and consideration of the facts that was undertaken by DC Burleigh.

176. In the above circumstances, and for the reason I have given, I am satisfied that there was a proper and diligent investigation undertaken by the Defendant, with the Defendant having conducted all reasonable steps and investigated all reasonable lines of inquiry including the consideration of all of the documentary and factual evidence that was available, following which DC Burleigh and D. Supt John were entitled to conclude that there was no realistic prospect of conviction in relation to any offence. Accordingly there was no unlawful failure to carry out a proper/diligent investigation by the Defendant and ground 1 fails.

Ground (2) Whether the Decision was flawed on the basis that it demonstrated a lack of independence.

177. It is common ground that under the Code of Ethics issued by the College of Policing under section 39A of Police Act 1996 the defendant had a duty to act with fairness and impartiality, which is itself an aspect of the public law duty to act impartially. I have already referred to the case of *Magill v Porter*, supra and the question of whether a fair-minded informed observer would conclude that there was a real possibility of

bias, and expressed my views in relation to the situation where there has already been previous failures of investigation (see paragraphs 63 and 64 above).

178. I can deal with ground 2 relatively shortly as it is obviously without merit. None of the points advanced on behalf of the Claimants bears examination. No fair-minded and informed observer would conclude that that there was a real possibility of bias in the current police investigation.

179. True it is that there had been a previous failed investigation, which the Defendant recognised needed correcting, but there is nothing in relation to the subsequent investigation that was likely to undermine public confidence in the impartiality of that investigation. In addition, had the Claimants considered that the Defendant could not perform an impartial investigation, this is a matter which they should have raised at the outset – but did not do so.

180. All the indications in relation to the investigation carried out by DC Burleigh are that the investigation was handled in an even handed manner, and did that which was required following a previous failed investigation. Much of the Claimants' submissions in this regard are predicated on the basis that the subsequent investigation was flawed and unlawful, in particular for the reasons identified under ground 1 – but I have found that that was not the case.

181. There is no basis for the submission that the Claimants' complaints were not given appropriate weight. It was their complaints that were at the heart of the investigation. I have already referred to the extensive contact between DC Burleigh and the Claimants. She had before her numerous statements from the Claimants, she had a large volume of documentation provided by them, she had meetings with them, and the Claimants had every opportunity to express their views and provide any information or evidence they had to her. DC Burleigh was well aware of the Claimants' complaints (summarising particular allegations on the first page of her Report).Whether there was substance in the complaints, and what weight to give to a particular complaint, was a matter for DC Burleigh as the investigating officer as part of a proper and diligent investigation. Once again the Claimants pray in aid alleged failures on the part of DC Burleigh (which I have found not to be made out) in support of the assertion that the Claimants' complaints were not give appropriate weight. There is nothing which suggests that there was a failure to treat all parties involved in the criminal complaints equally.

182. There was email contact with the CPS enclosing an MG3 seeking advice, but the CPS had responded that it was not believed to meet the criteria for investigative advice from the CPS – and in such circumstances it would not have been appropriate to have referred the matter. There is nothing that suggests a lack of openness on the Defendant's behalf.

183. I do not consider that the supplementary report, or the expressed reason for it, impacts upon the impartiality of the Defendant and there is nothing in the Report, or the surrounding investigation that undermines public confidence in the impartiality of the investigation.

184. Nor is there any merit in relation to any wider allegation of lack of independence. On the contrary the evidence – in the form of the Report of DC Burleigh – strongly support the conclusion that DC Burleigh conducted her own independent investigation, and reached her own independent conclusions based on a proper and diligent investigation.

185. In the above circumstances I am satisfied that a fair-minded and informed observer would most certainly <u>not</u> conclude that there was a real possibility of bias in the police

investigation or any lack of independence or partiality, and accordingly ground 2 is not made out. The Decision was not flawed on the basis that it demonstrated a lack of independence.

Ground (3) Whether that Decision was flawed on the basis that it contained inadequate reasons

186. I have already identified (at paragraph 70 above) that in the context of 23(1) of the Criminal Procedure and Investigations Act 1996 and Section 32 of the Domestic Violence, Crime and Victims Act 2004, a police force in the position of the Defendant was under a duty to give reasons for any decision not to proceed with potential criminal charges.

187. The Claimants submit that the duty to provide reasons was not met in this case because (it is said) there was a failure to give reasons addressing principle controversial issues (*Porter*). However the Report does give detailed reasons addressing the conclusions reached and the reasons for those conclusions, having first identified the relevant evidence and relevant offences. Anyone reading the Report would be well aware of the reasons for the conclusions reached. Once again, the particular points relied upon by the Claimants do not bear examination.

188. It is said that the reasons given failed to address a matter that DI Burleigh had agreed to investigate in his letter dated 30 May 2016, namely perverting the course of justice. However I have already identified the inter-relationship between perjury and perverting the course of justice at paragraph 152 and following above, and concluded that there was no failure to undertake a proper and diligent investigation in that regard. The Report recites the evidence that would be relevant to both perjury and perverting the course of justice, and the rationale in relation to perjury would be equally apposite in relation to perverting the course of justice and the requisite intent that would be required for perverting the course of justice, as I have already addressed above. In such circumstances it would be clear to any one reading the Report as a whole as to why an allegation of perverting the course of justice could not properly be pursued.

189. The points made in the Report in relation to perjury and the inquiry applied equally to subsequent events and for the same reasons, as would again be apparent to any reader of the Report.

190. The Claimants repeat the allegation that there was no attempt to engage with what the Claimants would have said if giving evidence, or to engage with the allegation that WAT9 was (allegedly) not the origin of the contours. These points have already been addressed in detail in the context of previous grounds. It would be clear to a reader of the Report that DC Burleigh was well aware of what evidence the Claimants were in a position to give, and what their complaints were, including how plan C was produced and Ms Coyne's evidence, and that of other witnesses, in relation to WAT9, DC Burleigh giving reasons in relation to each of the offences which were understandable and adequate.

191. In the light of the evidence before DC Burleigh, and the conclusions she reached, it would be readily apparent to any reader that further investigative steps were not required. It was not a case where there was no realistic prospect of success due to lack of evidence, but rather that the evidence that did exist (including from multiple witnesses including the parties' respective barristers) meant that there was no realistic prospect of success, and there was no basis for concluding that the case would be strengthened by further investigation. That was readily apparent and did not require

further reasons or reasoning. Nor was there a need to supplement the reasons given in the Report, whether by the additional report or otherwise.

192. Far from the reasons in the Report being inadequate, they explained, in an appropriate level of detail, why it was considered by DC Burleigh that there was no realistic prospect of any individual being convicted in relation to the Claimants' allegations. The Report did not contain inadequate reasons and the Decision was not flawed in that regard. Ground 3 is not made out.

Ground (4) Whether the Decision was flawed because it contained a misdirection in law regarding potential criminal liability for copyright offences.

193. It is common ground that the Report contained an error in that it inaccurately stated that copyright matters may only be dealt with in the civil jurisdiction. However that, in of itself, does not necessarily mean that the overall decision was flawed having regard to the evidence that was before DC Burleigh and the conclusions that she expressed. On a proper examination of such matters it is apparent that her reasoning (and her conclusions) would apply equally to any potential copyright offence, and that there were in any event specific, and formidable, hurdles that would arise in relation to any copyright offence with the result that there would be no realistic prospect of a conviction, as addressed below.

194. For example, the prosecution would have to prove, amongst other matters, in relation to an offence under section 107(1) of the 1988 Act, (i) a person without the licence of the copyright holder, (ii) in the course of business distributes or (ii) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright (iii) an article which is, and which he knows or has reason to believe is, an infringing copy of a copyright work.

195. Such an offence therefore requires the person to be distributing in the course of business or if not in the course of business then it is not mere distribution which suffices rather it must be proved that the distribution is to such extent as to affect prejudicially the owner of the copyright. Ms Coyne would no doubt say that she was not acting in the course of a business when preparing and distributing Plan C – a submission that the prosecution might find hard to counter. If she was not acting in the course of business it would be difficult to establish that she was distributing "an article" to such an extent as to affect prejudicially the owner of the copyright – bearing in mind that the copyright is in WAT9, and at most WAT 9 was used as but one element of what became Plan C which was the only article put into distribution. It is not clear that she was distributing an article (Plan C) to such an extent as to affect prejudicially the owner of the copyright in another document (WAT9).

196. What must be proved is also "distribution" and of an "article", an article which is, and which Ms Coyne knows or has reason to believe is, an infringing copy of a copyright work. It is far from apparent that Plan C, as an article, is an infringing copy of a copyright work (WAT9). From what is said by DC Burleigh from her questioning of Ms Coyne in relation to copyright (on page 15 of the Report) it also does not appear that Ms Coyne was aware of, or put her mind, to any question of copyright. However even assuming she did, it is far from clear that it could be proved that Ms Coyne knew that what was being distributed was an infringing copy of a copyright work. I also cannot help but feel that even a lawyer (unless well versed in, and specialising, in copyright law) might struggle to reach an answer as to whether the use of WAT 9 in the production of Plan C constituted a criminal offence, as indeed might any tribunal. There is also the tension in the Claimants' case that Ms Coyne's evidence that she

used WAT9 (subject to copyright) for contour information when producing Plan C is untrue (as addressed at paragraph 108 above).

197. There is also the over-arching threshold question of whether section 45 of the 1988 Act applies on the basis that what was done was done for the purposes of judicial proceedings so that copyright was not infringed given the definition in section 178 of the 1988 Act that "judicial proceedings" includes proceedings before any court, tribunal or "person having authority to decide any matter affecting a person's legal rights or liabilities". I have already addressed the arguments that would arise in this regard at paragraph 112 to 114 above.

198. As I have already concluded, on any view this is itself an issue of some complexity and it is at least arguable that the nature of a planning inquiry before an inspector is such that it is to be regarded, for the purpose of section 45, as being proceedings before a person having authority to determine a "matter affecting a person's legal rights or liabilities" – that would certainly be argued by Ms Coyne. Such arguability would be a further factor when considering whether there was a realistic prospect of conviction when overlaid against the elements of copyright offences identified above applied to the specific facts of the present case.

199. In this regard it might also be difficult to satisfy the public interest test (not least in circumstances where it had been concluded that none of the other potential criminal offences carried any realistic prospect of success), set against a backdrop of the fact that copyright offences are routinely prosecuted by trading standards, and the somewhat unique circumstances of the present case are very far away from the usual type of breach of copyright case that it is regarded as in the public interest to prosecute by trading standards.

200. In such circumstances I am in no doubt whatsoever that DC Burleigh would have concluded (justifiably) that there was no realistic prospect of success in relation to any prosecution of Ms Coyne for copyright theft.

201. In the context of the fact that the Report and Decision Letter did contain a misdirection in law I have considered whether that in of itself renders the Decision unlawful such that the Decision should be quashed (at least so far as it relates to any potential copyright offences). In that regard Mr Southey QC accepted that if the challenge based on a failure to carry out a proper and diligent investigation failed (as it has) then any order should only relate to a re-consideration of any copyright offence.

202. However, having regard to the Report as a whole, the evidence that was before DC Burleigh and the conclusions that she expressed, I do not consider that the Decision was flawed such as to justify the quashing of the Decision, by reason of the misdirection.

203. In any event, the Court must refuse to grant relief on an application for judicial reviews if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (section 31(2A) of the Senior Courts Act, as addressed above).

204. I bear well in mind what was said in cases such as *R (Williams) v Powys CC, R(KE) v Bristol City Council* and *John v Rees*, supra. However for the reasons that I have identified at paragraphs 193 to 200 above, I am satisfied that it is highly likely that the outcome for the Claimants would not have been substantially different if the Defendant had not misdirected itself in relation to copyright offences. Indeed I would go further than that. As set out at paragraph 200 above, I am in no doubt whatsoever,

that DC Burleigh would have concluded (justifiably) that there was no realistic prospect of success in relation to any prosecution of Ms Coyne for copyright theft.

205. In such circumstances had I otherwise considered that it was an appropriate case for relief (contrary my conclusions above) I would in any event have refused the relief sought, applying section 31(2A) of the Senior Court Act 1981, there being no reasons of exceptional public interest to disregard the requirements in subsection (2A).

206. So far as the further ground on which permission was sought, namely whether the Defendant misdirected itself regarding the *mens rea* required to establish perverting the course of justice (having regard to *Lalani*), I am prepared to grant permission on the basis that the point is (just) arguable, but on substantive consideration of the ground, and having regard to what must be proved in relation to intent in the context of perverting the course of justice (as identified at paragraph 100 above) there was, on analysis, no misdirection, and in any event DC Burleigh's conclusion in relation to perjury was equally applicable in relation to perverting the course of justice and the requisite intent that was required, and there was no realistic prospect of the prosecution proving the requisite *mens rea* as identified in *Lalani*. The Claimants' additional ground also fails in such circumstances.

207. Accordingly, and for the reasons set out herein, the claim for judicial review fails.

208. I would hope that the parties will be able to agree the Order consequential upon this judgment including as to the incidence of costs (which prima facie follow the event), but if any issues remain outstanding I will hear argument from the parties on the handing down of the judgment.