RULING

In the case of:

Bar Standards Board v Stephen Kamlish QC
PC 2016/0340/D3

1) On Friday 7th August 2020 the Panel notified the parties that it had reached a decision on all three charges. After hearing the submissions of counsel and considering all the evidence presented before us, we indicated that we did not find any of the charges to be proved.

2) This is the full judgement setting out our reasons. There will be a hearing on a date to be fixed in September when we will deal with any ancillary matters.

3) To reach our decision we have had to make a detailed examination of numerous transcripts and skeleton arguments as well as hearing legal argument and evidence on 8 separate days. (July 14th to 17th, August 3rd to 6th) The only live witness was the Respondent himself. The BSB chose not to call counsel identified during the hearing as C1, 2, 3, or 4 or put the critical CCTV footage before us. We have determined this case upon the evidence that has been placed before us.

4) All parties agreed that it was appropriate to proceed by way of a Zoom remote hearing in light of the Covid 19 pandemic as the alternative of a face to face hearing would be very likely to have led to a substantial delay in a case that is already relatively stale.

5) We made a ruling on 27th July 2020 finding that there was a case for the Respondent to answer on all 3 charges. We did, however, accede to Mr Adrian Waterman QC's submission on behalf of the Respondent in relation to particular (v) in the 3 charges. The allegations set out in particulars (i) to (iv) remained.

6) We propose to adopt our analysis of the background to this case which we set out in that ruling and reproduce it where relevant in this judgment.

The BSB's case

7) The Respondent faces three charges of professional misconduct contrary to Core Duties 1, 3 and 5 and rC 7.3 of the Code of Conduct of the Bar of England of England and Wales (9th Edition) that, without having reasonable grounds to do so, he made four specific allegations of bad faith against various members of successive prosecution teams in a series of criminal trials in which he was defending. The allegations were made against leading counsel, junior counsel, and the CPS. The Particulars of Offence are stated as follows:

> *"At a hearing in the Warwick Crown Court on 1 November 2016, Stephen Kamlish QC failed to observe his duty to the court in the administration of justice in that, in written and oral submissions, he alleged that prosecuting counsel, including leading Counsel I, II, III and IV, their respective junior counsel, and the Crown Prosecution Service had acted in bad faith:*

i. *by deciding to rely upon the identification evidence of a police officer, DC Maher, instead of instructing an independent imagery expert, in order to secure a conviction by improper means,*
ii. *thereafter, by offering no evidence against one of the defendants, D1, but continuing with the prosecution of another, D5,*
iii. *by instructing a visual imagery expert from a firm called Acumé, knowing that the expert only worked for the police, did not have the required expertise, used a methodology which was not consistent with the accepted methodology in criminal cases and that his evidence was unfair and unreliable, and/or*
iv. *by causing the original trial judge, J1, to recuse himself, in an attempt to manipulate the criminal process, by threatening to call Counsel I and II (both of whom had now been appointed to the circuit bench) to rebut the defence allegations of abuse of process*

when he did not have reasonable grounds for the allegations.

8) It is the BSB's case that when Mr Kamlish made each of the allegations, he did not have reasonable grounds to do so.

9) The BSB have indicated that they rely upon allegations made in the written application for recusal (BSB A/53) dated 14th October 2016 and at the oral hearing on 1st November 2016 (BSB A/179.) As the dates relate to 2016, the criminal standard of proof applies. It is for the BSB to prove that the Respondent did not have reasonable grounds to make a particular allegation against a particular individual.

10) The allegations are based on rC 7.3 of the code of Conduct of England and Wales which states that "*you must not make a serious allegation against any person …. unless… you have reasonable grounds for the allegation."*

11) It is the BSB's case that the Respondent's conduct crossed the line between proper, fearless advocacy *and* making serious allegations of impropriety without having the grounds to do so. It is contended that it amounted to professional misconduct. (Charge 1: Failure to observe his duty to the court in the administration of justice; Charge 2: Failure to act with integrity; Charge 3: Acting in a manner likely to diminish the trust and confidence in which the public places him or the profession.)

12) The Respondent accepts that he did make the allegations particularised in sub-paragraphs i-iv. It is his case that he had reasonable grounds to do so.

History of case

13) In setting out the history of the case we propose to place the main issues we have to decide in context. It is important to understand the cumulative, developing nature of the facts upon which the Respondent based his allegations.

14) The prosecutions arose from a violent incident in Sparkbrook, on 2nd July 2014. Birmingham, which resulted in the death of the brother of D1 and D5 and serious injuries to others.

15) Three weeks later on 22nd July a consultation took place with prosecution C1 in his chambers. Its purpose appears to have been to review the evidence and to consider the future course of the investigation. There were a number of potential defendants. Some CCTV footage was viewed. It was of poor quality. Discussions took place as to the appropriate form of CCTV ID evidence. Apart from C1, Janet Holman (of the CPS) was present.

16) A note of the consultation prepared by Mrs Holman is to be found at BSB A/286 B. The important sentence "Visual imagery – avoid expert if poss" is at 286B. C1 was later to produce a note as to his recollection of the consultation (the final version is dated 3rd February 2016 – BSB A/287.)

17) At the consultation, a decision was taken to use a police officer as an ad hoc expert to undertake an intensive viewing of the CCTV footage rather than use an imagery expert. This decision was in line with the approach approved by the Court of Appeal in *Clare and Peach* [1995] 2 Cr. App. R. 333 that a police officer who has conducted appropriate lengthy and studious research viewing and analysing photographic images from the scene has "special knowledge which the court does not possess" and is entitled to assist the jury with identification evidence based upon that research.

18) The critical footage (JP/6) was from private CCTV. It lasted only 3 seconds with approximately 20 frames per second. It showed various figures running from right to left but contained no facial images. The figure later to be identified by DC Maher as D1 was wearing non-distinctive clothing with very few apparent features.

19) Later the Respondent was to allege and continues to allege that this footage was never of sufficient quality to be forensically capable of proving a case or to enable a positive identification. This, he claims, should have been evident to counsel viewing it.

20) Whilst conceding the principle in *Clare and Peach,* the Respondent maintained in evidence before us that in this case no police officer, however many hours' viewing they undertook, would ever have been able to make a proper positive identifications of persons on the footage whose faces were covered. At the very least an expert should have been instructed to try and enhance the images. This underpins allegation (i). It was a recurrent theme in respect of the other allegations that the failure to instruct such an expert meant that the prosecution was deliberately avoiding obtaining evidence which might undermine its own case rather seeking the truth by using a proper and just method to investigate.

21) The next day DC Maher was appointed CCTV coordination officer.

22) Prosecution C1 returned the case not long afterwards on his appointment to the Circuit Bench (as he always knew he was going to have to do.) The various defendants had not been charged at that time. C2 took over as leading counsel.

23) In due course DC Maher produced a report in which he maintained that he was able to identify D1 and D5 from the CCTV footage. The defence had instructed various independent experts to consider the CCTV footage. We are told by the Respondent that the consensus of the defence imagery experts was that it was not possible to make reliable identifications from the footage.

24) The identification of D1 and D5 from this footage was strenuously contested. It was D1's case that he had never run or walked past the CCTV cameras. He had been taken to the scene in a VW Golf car and arrived after his brother had been attacked.

25) There was better quality footage showing various men arriving at Heartlands Hospital including Ikram Khan (the deceased) and his brothers D1 and D5. This was not disputed. It was the case of D1 and D5 that they left the scene in the same car with their injured and dying brother.

26) In due course, and after an earlier trial that did not involve D1 and D5, but in which the CCTV was relied upon by the prosecution, the prosecution accepted that one of the experts, David Thorne, was correct in respect of his observations as to the lack of synchronisation as between the audio and video on the private CCTV footage. They accepted that the soundtrack was 10 seconds out of sync with the audio and revised their position accordingly. This was of substantial importance as it had the potential to put a completely different complexion upon the interpretation of events in that the gun was only fired after those running had disappeared from view. However, the Crown continued to rely on DC Maher who had not detected this in his "appropriate and studious research viewing and analysing the images" and did not seek to have Mr Maher's opinion reviewed by an expert imagery expert.

27) The prosecution opted to proceed with two trials separating the defendants into two groups (referred to in the papers as 'the Afghani trial' and 'the Pakistani trial').

28) At the first trial four Afghani defendants were convicted of conspiracy to cause GBH receiving prison sentences between 17 and 24 years.

29) The second trial involving the Pakistani defendants included D1 and D5. They were all charged with two cases of attempted murder and conspiracy to cause GBH. The evidence against both D1 and D5 was based on the critical CCTV footage (See para. 18).

30) DC Maher produced the CCTV evidence and interpreted it claiming he could identify both D1 and D5 after "extensive" viewing of the footage. The jury acquitted the defendants of attempted murder, but were unable to agree on the charges of conspiracy to cause GBH. Accordingly, the judge (J1, HH Judge Patrick Thomas QC) discharged the jury and ordered a re-trial on the conspiracy charge.

31) The re-trial started in January 2016 before J1. By this time C3 had taken over as leading counsel for the prosecution as C2 had also been appointed to the Circuit Bench.

32) At the re-trial DC Maher gave his identification evidence based on the CCTV. D1 dismissed his counsel during the trial.

The Respondent's involvement

33) At this stage the Respondent and his junior Victoria Meads were instructed to represent D1. In due course the jury was discharged as it became clear that the Respondent needed time to ensure he was properly instructed and ready to proceed.

Late disclosure

34) Once on board the Respondent and Miss Meads made a number of written applications for disclosure. The persistence of these requests led to the discovery of the non-disclosure of highly significant matters that should have been disclosed as part of the initial disclosure. But for their intervention this may well not have been achieved. In particular, the existence of a 2nd set of viewing logs was disclosed which was inconsistent with DC Maher's "contemporaneous" typed viewing log upon which he hitherto had purported to rely.

35) Not surprisingly this fuelled defence submissions that the Crown should no longer seek to rely upon DC Maher's evidence. In evidence the Respondent stated that once Mr Maher had revealed himself to be a "palpably dishonest and unreliable", he expected the Crown to review its position and to abandon Mr Maher.

36) A scrutiny of the written submissions at this stage shows how the Respondent's submissions had developed against the background of late disclosure. In an admissibility and abuse note (BSB A/351) dated 27 January 2016 the Respondent and his junior set out the arguments they proposed to make. They asked for witnesses including DC Maher and the SIO DCI Marsh to be called on a voir dire in relation to these arguments. They indicated they would submit inter alia: that the Crown had not made disclosure of material which would undermine their case and assist the defence. This material went to admissibility and abuse in relation to DC Maher's evidence. The material would demonstrate that the evidence of DC Maher was fatally contaminated as an opinion/identifying witness.

37) They put down the following marker:

> *"The contamination was a deliberate strategy of this police investigation and may, therefore, have been created in bad faith."*

38) By 2nd February the Respondent and his junior had made clear in writing that they were now seeking a stay of proceedings on the basis of the Crown's failure to instruct an independent imagery and/or gait expert and the Crown's continued use of DC Maher as

an expert identifying witness and witness of truth. In the alternative they were seeking the exclusion of DC Maher's evidence under s.78 PACE (see BSB A/7 dated 2nd February 2016). Whilst bad faith was being alleged, it was not levelled against counsel at this stage, although it had been directed at "the Crown" at BSB A/352 on 27 January 2016.

39) Defence counsel were setting out their stall in preparation for argument at the end of the voir dire. Mr Nigel Lithman QC, on behalf of D5, on the same day served a skeleton putting forward similar arguments. Mr Waterman QC places great reliance upon Mr Lithman's position because it reveals that he too was limbering up to make similar allegations of bad faith that the Respondent was to make. The Respondent was not a lone voice.

40) The primary submission made by Mr Lithman QC was that, should the Crown continue to rely on the evidence of DC Maher, given the serious and justified concerns about his evidence, that would amount to an abuse of process and the case ought to be stayed. To continue to rely upon Mr Maher would be a complete derogation of the prosecution's duty to the court. He also indicated that the persistent failure of the investigation to deploy an expert and preferring the unsupervised efforts of DC Maher prompted serious concerns about its integrity. Mr Lithman indicated that he deferred to and adopted the submissions to be made on behalf of D5 (the Respondent's client) on this matter. Later Judge Thomas in his recusal ruling was to observe that it was not easy to see how Mr Lithman could stop short at the level of SIO (BSB A/264 para.21).

41) The Respondent invited the Crown to respond to his disclosure concerns on 3rd February (BSB A/19). In the defence note dated 4th February (BSB A/22) he suggested that DC Maher had perverted the course of justice as there was now evidential certainty that he had fabricated viewing dates. In evidence before us the Respondent stated that once Mr Maher had revealed himself to be "palpably dishonest and unreliable", he expected the Crown to review its position and to abandon Mr Maher. The continued reliance upon DC Maher after February 3rd by C3 who had now been revealed to be a flawed witness compounded the bad faith.

42) C3 spoke to C1 on the phone which led to C1 preparing a note (BSB A/287). That note and the Holman note were disclosed to the defence on 4th February at 10am. The Respondent's early reaction was to raise the possibility that C1, now a Judge on the Midlands circuit, might need to be called to give evidence if the Crown did not review the case properly (BSB B/517B). However, as time went by the Respondent's considered position was that neither C1 nor C2 would need to be called. He would rely on the documentation.

43) Whilst the s.78 voir dire on the admissibility of DC Maher continued, the transcripts of the proceedings show the judge was becoming increasingly concerned about his position and whether he should recuse himself. See for example BSB B/521E.

44) We have been taken through the transcripts of the evidence of DC Maher. There can be no doubt that a powerful s.78 argument was gathering pace. It went further than a failure to keep proper records/ make proper timely disclosure. There was mounting evidence to suggest that DC Maher had lied on oath during the voir dire. At the very least, it was becoming increasingly difficult for the Crown to maintain that Mr Maher had complied with the requirements necessary to enable him to make a proper identification.

45) Whatever had been said earlier about allegations of abuse, defence counsel adopted a position whereby they were now strongly urging the Judge to deal with the S.78 issue in respect of DC Maher's evidence first. Initially this was supported by C3.

46) The Respondent said in relation to his s.78 application that there was no situation in the circumstances of this case where he would be making allegations that C1 or C2 was guilty of abuse of process or acted in bad faith. This does not necessarily undermine any substance in his earlier bad faith submissions. Clearly defence counsel were entitled to seek to put any abuse arguments to one side for the time being. If the s.78 application was to succeed, the prosecution would probably have had to offer no evidence against D1 and maybe D5.

47) There came a time when C3 must have decided to adopt a neutral position upon recusal and simply to address J1 on the law surrounding recusal. There is an issue between the BSB who submit that C3 acted entirely properly and the Respondent who contends that, notwithstanding his ostensible position, C3 was seeking to encourage J1's recusal so as to buy time for the prosecution to enable them to find another identification witness. If the Crown lost the DC Maher s.78 argument which was becoming increasingly likely, the prosecution case against D1 would not survive a half time submission. This issue is critical when considering whether the Respondent may have had reasonable grounds to make allegation (iv).

48) Notwithstanding defence counsel's submissions, on 8th February J1 recused himself before completing the s.78 voir dire. He felt whichever way he ruled on the s.78 issue, there was a real risk of a perception of bias on the basis of whether he may have been influenced by the consideration of the knock on effect of such a decision on the position, or reputation of, C1. See para 15. BSB A/260.

Post J1 recusal developments

49) The jury was discharged. It was inevitable that there would need to be significant time before the case could be re-listed for trial before another judge.

50) The case was referred to J2, one of the circuit presiders Haddon-Cave J (as he then was), who took over the case management involving a number of hearings (16th May 2016, 7th October 2016 and 1st November 2016) culminating in his direction that the case should be tried in Birmingham in January 2017 before a High Court judge. It was at the hearing on 1st November 2016 that the Respondent applied for J2 to recuse himself and objected

to J2 making a 'threshold ruling' on the abuse arguments he was seeking to raise. It is important to consider the developments between the J1 recusal and that hearing.

51) In view of the defence allegations, prosecution C3 had withdrawn from the case after the recusal decision of J1. In due course C4 was instructed whose duty would have been to reconsider the prosecution case. On 19th April 2016 the CPS wrote to inform the defence that the Crown did not propose to rely on DC Maher at the re-trial. They would instruct another officer from a different force.

52) C4 sent a note, dated 14 June 2016 setting out the Crown's position in respect of DC Maher's evidence. (BSB A/ 30). C4 explained that the new officer, DC Rowland, had been unable to identify D1 or D5. In these circumstances the Crown had formed the view that it could not rely on DC Maher as an identification witness against D1. He continued at para 39 (BSB A/49):

> "The evidence suggests DC Maher's work records have been lost and he has sought to estimate the hours he spent viewing the CCTV. Once this was discovered and disclosure made to the defence DC Maher has given contradictory witness statements dealing with his inadequate record keeping. Having considered the discrepancies in DC Maher's account and the poor log keeping it is the prosecution view that he is an unreliable identification witness so far as Fazal Khan [D1] is concerned. In these circumstances the prosecution will offer no further evidence against Fazal Khan (D1) and invite the court to direct not guilty verdicts where he is concerned."

53) The Respondent contends that this assessment of DC Maher's evidence on oath in the voir dire was an understatement. He had lied on oath.

54) However, C4 concluded the note by stating that the Crown did not accept that DC Maher or any police officer or prosecuting counsel had been dishonest or had acted in bad faith. They submitted that DC Maher was an honest witness, and he was a reliable witness in respect of the 3 co-defendants. However, since those 3 co-defendants were now challenging the evidence of DC Maher, the Crown would no longer rely upon DC Maher for the presentation of the CCTV evidence. It would rely upon DC Rowland.

55) The CPS offered no evidence against D1 on 17th June. However, they continued with the prosecution of D5. The BSB maintain that this was a perfectly proper view for new prosecution counsel C4 to take when evaluating the relative strengths of the case as against each of the two defendants. In contrast, the Respondent was later to make allegation (ii) that this was a further act of bad faith in that in reality both cases depended upon there being a positive identification and there was no distinction to be made. Such supporting evidence as there was could not found a case to answer in respect of either D1 or D5. The prosecution was still seeking to build a case against D5 after their first identification witness had been revealed to be fatally flawed and their second had not identified D5.

Mr Kamlish's involvement as Counsel for D5.

56) It was around this time that D5 sacked his counsel and instructed the Respondent and his junior.

57) The CPS instructed Acumé, said to be an imagery expert company, to review the footage. This represented the third attempt to identify D5 from the CCTV footage. Reports from Acumé were duly served on the Defence in July 2016. Stephen Cole of Acumé claimed to be able to identify D5 from 16 photographic similarities between the jacket of the suspect on the CCTV footage and D5 in the hospital footage. The Respondent indicated that he intended to renew the abuse argument on behalf of D5. In due course he made allegation (iii) alleging that the instruction of Acumé amounted to a further act of bad faith by C4. Included in this allegation was the suggestion that C4 knew that Acumé's evidence was unfair and unreliable in that it was demonstrably unfair.

58) A directions hearing took place before J2 on 7th October 2016. The Respondent was unable to attend. J2 directed that the Respondent should serve a skeleton setting out the abuse arguments.

59) The Respondent duly served a skeleton argument on 14th October 2016. This was followed by an annotated version of the prosecution skeleton dated the 21st October and a further note headed "re requirement that the Defendant must apply for leave before one learned Judge to be permitted to make an abuse of process argument before the trial Judge". This note is dated 23rd October 2016. The BSB relies upon the skeleton of the 14th October and the oral submissions on the 1st November in respect of the 4 allegations of bad faith said to have been made without reasonable grounds.

60) The preliminary hearing took place on 1st November 2016. A prosecution note as to the evidence against D5 was handed to the court at the hearing (BSB A/87A dated 31st October 2016).

61) The trial took place in January 2017. The trial Judge, King J stopped the case against D5 after the evidence of the then prosecution expert representing Acumé proved to be unsatisfactory.

The legal framework

62) It is for the BSB to prove its case against the Respondent to the criminal standard of proof as the alleged misconduct occurred before 1st April 2019. As we have stated the burden is upon the BSB to establish that a particular allegation of bad faith was made without reasonable grounds at the time it was made.

63) It is not professional misconduct to allege bad faith or wrongdoing provided there are reasonable grounds.

64) It is for the BSB to make us sure of an absence of reasonable grounds for a particular allegation of bad faith against a particular person. The particular allegation (or that particular taken with another or other particulars proved) must amount to professional misconduct contrary to Core Duty 1 (Failure to observe duty to the court), Core Duty 3 (Failure to act with integrity) and/or Core Duty 5 (Acting in a manner likely to diminish the trust and confidence in which the public places in him or the profession.)

65) It is clear that the charges and the particulars do not necessarily stand or fall together. Each requires separate consideration. However, we acknowledge that there are strands of evidence which are relevant to reasonable grounds in respect of more than one particular, not least the disputed quality of the CCTV footage. At times Mr Waterman submits that a proper evidentiary basis for reasonable grounds can be found when various strands are considered together and the effect can be cumulative.

66) Before we set out the reasons for our decisions in respect of each allegation of bad faith, we propose to set out how we have approached "bad faith" and "reasonable" grounds.

67) *"Bad faith"* The Respondent's allegations were made in the context of allegations of prosecutorial abuse of process. They relate to the manipulation of the proper process of the court to secure conviction by improper means. The Respondent was seeking to establish bad faith that fell into the *Ex parte Bennett* category i.e. conduct that offends the court's sense of justice and propriety to be asked to try the accused in the circumstances. See R v Horseferry Road Magistrates' Court, Ex parte Bennett [1994]1 AC 42.

68) *Reasonable grounds".* RC7.3 does not define reasonable grounds. The use of the word reasonable must mean objectively reasonable. However, that does not answer the question as to how we should approach reasonable grounds in the context of an allegation of professional misconduct against a criminal barrister.

69) Mr Waterman has sought to distil guiding principles in the light of the strong persuasive authority of the Canadian Supreme Court in *Groia v Law society of Upper Canada* [2018] 1 SCR 772:

> Advocates, and particularly criminal defence barristers should not be "*stymied by the threat of being labelled "unreasonable"* from criticising prosecution authorities.
>
> Fearless or *resolute advocacy"* and criticism, even of a distasteful kind, should not be blunted or chilled.
>
> The ultimate purposes of encouraging *'forceful partisan advocacy"* are to facilitate truth-seeking to ensure that the prosecutorial authorities, and other participants in the criminal justice system are held to account, and to defend the individual against the power of the state. They are principally *public* interests, not the private interest of the individual barrister.

70) Mr Waterman has referred us to some jurisprudence of the European Court of Human Rights ("ECtHR") *Nikula v Finland* 920040 38 E.G.R.R. 45; *Steur v Netherlands* (2004) 39 E.H.R.R. 33. The *Groia* approach is entirely consistent with European jurisprudence on the right to freedom of expression under Article 10 of the ECHR.

71) Mr Waterman further relied upon the judgment of Moldaver J. in *Groia* at para 88 where he was setting out his understanding of the Appeal Panel's reasonable basis requirement to have meant that "allegations made without a reasonable basis are those that are speculative or entirely lacking a factual foundation."

72) It is significant that in the preceding paragraph 87 Moldaver J also uses the expression a "proper evidentiary foundation" in the context of the Panel's reasonable basis requirement noting that that requirement would not chill resolute advocacy. Later in paragraph 88 there is a reference to sufficient factual foundation which is inconsistent with *any* factual foundation being enough to surmount the threshold.

73) Using the words of Moldaver J in *Groia,* we accept that the reasonable basis requirement in this context is not an exacting standard. However, when applying the principles to BSB RC7.3 we consider that the threshold is not as low as *any* factual foundation. Allegations made without reasonable basis are those that are speculative *or* entirely lacking in a proper factual foundation. Clearly context, which includes all the information available to the Respondent at the time, will be important when evaluating whether there was a reasonable basis.

74) The crucial question is whether, on all the information then available to him at the time, the Respondent did not have reasonable grounds for making such a serious allegation. As Mr Waterman put it, the word "reasonable" is tethered to grounds. There is no special deference towards protecting the reputations of those in positions of judicial or prosecutorial eminence in the face of a situation where there are reasonable grounds for making such an allegation.

75) However, we repeat we must look to see whether there is evidence of absence of reasonable grounds to have made an allegation against any named individual. It does not follow that if there may have been reasonable grounds for a bad faith allegation against the police and/or the CPS, there were also reasonable grounds for such an allegation against prosecution counsel.

76) It follows that in principle, one strand of evidence can provide a proper evidentiary foundation for reasonable grounds. We accept that it may be possible to draw two totally different inferences from the same evidence. If the Respondent's interpretation was one which could found reasonable grounds, when considered with the other information available to him at the time, the BSB will not have proved its case simply because there is another interpretation, even if that interpretation is a more likely one. Whether in fact the evidence was capable of founding reasonable grounds depends upon an evaluation of the evidence together with all the other information then available to the Respondent as to

what was reasonable for him to allege. In pursuit of his duty the Respondent would have been entitled to go to the outer limits, but not beyond those limits, in his permissible interpretation of the material.

77) A finding by this Tribunal that the Respondent may have had reasonable grounds to make an allegation of bad faith against an individual based on one interpretation of the evidence (whether or not at the outer limits of permissibility) does NOT represent a finding of actual bad faith by that individual. Nor does it mean that there was sufficient evidence for it (on its own or taken with other allegations) to have amounted to an abuse of process argument with a realistic chance of success. The burden is upon the defence to establish abuse in a criminal trial on a balance of probabilities. As the law stands that is a relatively high threshold.

Other matters material to our consideration of the case

78) We confirm that we have not taken into account the findings and reasons given in the ruling (now unredacted) of Haddon-Cave J (as he then was) dated 29th November 2016 (BSBA/ 268). Whilst we need to know the background, the reasoning and findings in that ruling are irrelevant to our considerations. We must consider the evidence afresh. We note that the Respondent takes issue with a number of the judge's findings. We observe that, in any event, there is substantially more evidence before us than was deployed before the judge on the 1st November when the Respondent simply gave headline submissions.

79) In determining this case, we do not accept that the Tribunal is confined to looking at the written application for recusal (BSB A/ 53) dated 14th October 2016 and the transcript of the oral hearing on 1st November 2016 (BSB A/ 179.) We will consider all the evidence that has been placed before us and was known to the Respondent.

The Respondent's character

80) We have been provided with 36 impressive testimonials in respect of the Respondent. These are relevant when we come to consider our approach to the Respondent's evidence before us which we heard over the course of the 3 days having read his statement which was treated as his evidence-in-chief. At the conclusion of the statement (Para 194) the Respondent stated:

> "I would estimate that when asked to consider running an abuse of process argument I decline to do so in the majority of cases. This is, usually, because, despite a client's, and even my own suspicions about wrongdoing, there is simply not enough to justify making the argument. I explain that when accusing anyone of acting in bad faith it, firstly needs to be true or at least appear to be true, and secondly, there must be material which supports the contention. In this case both myself and Vicky Meads conducted ourselves in accordance with these principles."

81) In the testimonials frequent reference is made to the Respondent's high quality as a fearless and tenacious jury advocate and his integrity. We observe that 2 important points are made. Firstly, it is said that he has a quality which one witness Mr Tayab Ali, a partner in Bindmans, describes as "his extraordinary ability to recognise impropriety in criminal cases and then bring that behaviour to the court's attention." Secondly, it is of note that distinguished judges (including a members of the Senior Judiciary), barristers and solicitors have found that the Respondent, however combative his style may be, stays within his appropriate professional boundaries.

82) The testimonials provide some support for the Respondent's credibility generally and also may shed some light on whether he would cross appropriate professional boundaries on this occasion when those who have great experience of him have never seen him do so.

83) We have taken into account the testimonials when we came to consider the issue of the Respondent's own good faith i.e. whether he genuinely believed that he had reasonable grounds to make the allegations he did. We find that none of the allegations he made were of a "scatter-gun nature" as some were originally alleged by the BSB (For example as allegation (i) against C4 would have been see para 76. However, the resolution of this issue in the Respondent's favour does not provide an answer as to whether he did, in fact, have reasonable grounds.

Particular of Offence (i)

84) The particulars of the three charges at (i) recite that all counsel involved in the prosecution and the Crown Prosecution Service acted in bad faith by deciding to rely upon the identification evidence of a police officer, DC Maher, instead of instructing an independent imagery expert, in order to secure a conviction by improper means.

85) In our earlier ruling we made it clear that we do not consider that this allegation was ever made against Counsel 4. It follows that we will consider the allegation separately as against C1, 2, and 3.

86) **Allegation against C1** Following the violence on 2nd July 2014 which gave rise to the prosecution, there was a conference on 23rd July 2014 attended by a Mrs Holman on behalf of the CPS and C1 and various police officers. Mrs Holman's note of the conference included the words "visual imagery-avoid expert if possible". The senior investigating officer then instructed DC Maher to do the work necessary to become what is called an ad hoc expert i.e. to look through a large amount of CCTV evidence with a view to giving evidence about whether any of the proposed defendants could be identified. It is on the basis of that note that the Respondent made the allegations that he did. Mr Waterman QC for the Respondent says that the note is capable of being open to more than one interpretation and that it gives a proper evidentiary foundation for the criticisms which the Respondent later made.

87) Mr Waterman seeks to place emphasis on the choice of the word ‘avoid’ which he argues sits uncomfortably with the role of a prosecutor as a minister of justice. He argues that to adopt the natural meaning of “avoid” is well within the limits of permissible interpretation and the poor quality of the CCTV cried out for an expert to, at the very least, evaluate whether the footage was of sufficient quality to be capable of founding an identification. ‘Avoid’, he submits, suggests deliberate closing down of an obvious and necessary line of investigation.

88) This is compounded, contends Mr Waterman, by the passage in the note at 5t where C1 stated that the defence could have conducted any expert analysis of the CCTV material that they saw fit if so advised. “Had this happened then he would not have ruled out the instruction of and calling of an expert to rebut the evidence.” Mr Waterman submits that this has the strong flavour of a policy of only using an expert as a last resort and only in order to rebut a defence expert, rather than to provide an independent expert assessment.

89) Of course, as Mr Waterman readily concedes, there is a rather less colourable interpretation. C1 did not, of course, know at that stage upon what evidence the Defendants would seek to rely. The reference to rebuttal could simply have meant that C1 was not ruling out that the prosecution might at some stage in the future want to instruct a different type of expert to match any defence expert pre-trial so as to advise on any possible points made by defence experts.

90) *The evidence of DCI Marsh* Mr Waterman further submits that SIO DCI Marsh’s evidence at the voir dire would have provided further evidence of bad faith in respect of the avoidance of the use of an imagery expert in this case. He suggested that a reasonable interpretation of her evidence was that DC Maher was used as an ad hoc expert because he was more likely to make a positive identification than an independent imagery expert. He said that there was a clear inference from her evidence that she was not genuinely seeking clarity. Every working day juries are being instructed as to how to approach expert evidence and that included the evidence of experts who regularly give their conclusions using relative scales of certainty. Rather, the SIO’s main concern was to obtain evidence that identified the defendants with certainty. This had led the police and prosecution to use a police officer who would give them certainty and the officer chosen (DC Maher) had turned out to be at best very unreliable and at worst dishonest.

91) There is another interpretation of the evidence of DCI Marsh. What she was saying was that when she had previously used imagery experts there had been very poor results because they provided a scale of probability with words like "it might be", "highly likely" or "possibly", which was unhelpful to the court. She went on "in my mind if you want somebody identifying, you either need somebody to say, "that is the person", or, "that is not a person". We observe that this may be especially so in a case where there is no or little other evidence and that the use of an ad hoc expert was approved by the court in the case of Clare and Peach (see supra paragraph 13). That experience which she had was echoed by C1 in his note at BSB A/ 291-292.

92) The evidence of DCI Marsh does link CI to the decision-making process in respect of the use of a police "ad hoc expert" rather than an imagery expert. Although she was not present at the preliminary conference with C1, DCI Marsh volunteered in evidence during the voir dire that the decision was made jointly between herself, the CPS and counsel, which must mean at the very least C1 as DC Maher was given his task the day after the conference.

93) It is important to remember that C1 was only involved at a very early stage and he did not stay with the case for long after that preliminary consultation as he returned the case some months before he was appointed to the Circuit Bench in October 2014. In his words "the conference was to examine and to prepare the evidence in a fair and measured way." He would not have known that DC Maher would not and did not carry out his duties in a manner in line with Clare and Peach. He would not have known of the internal contradictions within Mr Maher's evidence. Nor would he have had any inkling as to the late disclosure failures. Furthermore, C1 had to deal with a significant number of potential defendants. Such CCTV as he saw at the conference was of poor quality. It did not capture the critical moments of the events. Nor did it show anybody's face. In his note at BSBA/ 287 dated 3/2/16 C1 recollects that, based on all of the material presented including the CCTV footage he had viewed, he had not thought that this was a case that would be driven to verdicts by a detailed analysis of the CCTV. We do not think it is reasonable to conclude that it should have been immediately apparent to him at the conference that no positive identification could ever be properly made from the footage.

94) In his note C1 provided an explanation for his recommendation about expert evidence based upon his experience. He did set out that he thought a police "expert", an officer with real and detailed knowledge of the CCTV was far more likely to be an effective and reliable "expert" witness as to the proper identification of persons than an expert video analyst. He was shown no images of the incident itself on the street that might be suitable for facial mapping, accurate height or gait analysis or anything of the sort. He made the strong assertion at 5n that the note "avoid expert if possible" should not, under any circumstances, be taken as an indication that he, the police or the CPS were seeking to avoid the instruction of an expert in order dishonestly to prevent the production of evidence that might undermine conclusions that the police had already reached about the identification of certain men.

95) Finally, Mr Waterman argues that the very fact that C1 spoke with C3 about these matters on the phone during the evening of 3rd February 2016 was further evidence of bad faith on the part of both C1 and C3 in that C3 wanted C1 to consider what his position would be if the prosecution sought to call him as a witness of the events of the conference. (2k) Once that was known counsel was discussing material matters with a witness. Neither should have done so. We accept that any discussion over the telephone as to what happened at the conference was wrong. However, on its own, it does not provide an evidentiary basis to suggest a planned improper use of experts by the prosecution.

96) The advice which C1 gave is supported by authority and it is a very large step to go from the giving of that advice to saying there may have been reasonable grounds for suggesting it was motivated by bad faith. This was at a very early stage of the investigation before Mr Kamlish's clients were charged and was clearly a preliminary conference to advise in general terms what evidence the police should be seeking. It could not have been known then that DC Maher would turn out to be such an unsatisfactory witness or that there would be such lamentable disclosure failings.

97) The issue is whether what C1 did is reasonably open to the interpretation by October 2016 that he may have been acting in bad faith with a view to obtaining a conviction. It is not our role to determine whether C1 acted in bad faith and from the evidence before us, we consider that an interpretation that he did not is perfectly reasonable. However, when all the strands of evidence available to the Respondent are considered together, we cannot be sure that the Respondent's interpretation was not also reasonable, or that he strayed beyond permissible limits when making the allegation in particular (i) against C1.

98) **Allegation against C2.** In relation to C2 he was instructed at a fairly early stage but there is no evidence at all before us that he had any input into what expert evidence should be obtained. When he first took over, he was entitled to assume that C1 had given proper advice in the absence of any indications to the contrary. However, he was instructed before Mr Kamlish's clients were charged and obviously had the conduct of the case from then until he conducted the first trial of D1 and D5 and the first retrial. At the second retrial, DC Maher revealed himself to be a very unsatisfactory witness but that could not have been known in advance by C2.

99) On behalf of the Respondent it is said that C2 must have seen the CCTV, upon which DC Maher relied, which was of very poor quality and that it is a reasonable inference that C2 was part of the decision making progress to rely on an ad hoc expert rather than an independent imagery expert. The Respondent also relies upon the fact that reliance on DC Maher continued after the Defence disclosed expert reports saying that the CCTV footage was of insufficient quality to make an identification and that there was a failure to provide proper disclosure of DC Maher's notes. In particular, an important document in the case (GAM/3) apparently existed in two different versions and only the one most helpful to the prosecution was disclosed, but not, initially, the more damaging alternative version. Clearly, there was a substantial failure in this regard but the BSB say that although as leading counsel, C2 was responsible, it does not mean that he was aware of the alternative document and, if someone else was, it would be unlikely that C2 would be told. As to the experts' reports, the BSB are correct to say that it is not uncommon for defendants to serve experts' reports which challenge the evidence of the prosecution evidence and it is not bad faith to continue to rely upon the prosecution expert.

100) Considering the stages of the proceedings when C2 was involved, the BSB have made us sure that there were no reasonable grounds for the allegation that the Respondent

made against him. This particular allegation went beyond permissible limits. There was simply no material upon which to base such an allegation.

101) **Allegation against C3.** C3 was the counsel who conducted the trial when DC Maher's evidence fell apart. He could not have known in advance that that was going to happen. Furthermore, he had not been responsible for the instruction of DC Maher rather than an independent imagery expert.

102) The Respondent relies upon the fact that C3 continued to maintain reliance on DC Maher even after his evidence was shown to be very unsatisfactory at the first re-trial. This included late disclosure of material which was capable of seriously undermining his evidence. It is said that by 5th February 2016, C3 should have acknowledged that the prosecution of D1 could not survive.

103) C3 is also criticised because, after disclosure of the note from Mrs Holman, he telephoned C1, who by this time had been appointed a Judge to tell him of the evidence that DCI Marsh had given and to ask him about the note and it was as a consequence of this telephone call that C1 wrote his note at BSBA/ 287. (See para 86) The BSB describe the call as unfortunate but suggest that is no basis for a bad faith allegation.

104) The Respondent also relies upon the observation of J1 at BSBA/ 267 in his judgment that he should recuse himself when he said at paragraph 10, "one of Mr Kamlish's assertions, growing in strength and significance as the voir dire has gone on, is that the failure of the prosecution as a whole to instruct a visual imagery expert, either instead of DC Maher or to check his findings, demonstrates bad faith, an intention to avoid finding evidence which might assist the defence". The Respondent says that is an expression of that Judge's opinion rather than a description of the assertions which Mr Kamlish was making.

105) The BSB say that the use of an ad hoc expert and continued reliance upon him was proper and reasonable. He was not seriously exposed as unsatisfactory until the voir dire. It was not bad faith not to abandon the case against D1 halfway through the voir dire i.e. not to take the decision away from the Judge and to let the Judge make his decision. The BSB agree that it was unfortunate that C3 contacted C1 but suggest that is no basis for a bad faith allegation.

106) It is of significance that the Respondent was not alone in making an allegation of abuse of process. Mr Lithman also made a submission that there had been abuse (BSBA/98) that extended 'well beyond' DC Maher, and included DCI Marsh (BSBA112-3). The Respondent points to J1's comment in his recusal decision that Mr Lithman 'adopts Mr Kamlish's approach to most of the issues at this stage', and his scepticism that such being the case, it is 'not easy to see how he can stop his allegations of bad faith short at the level of the Senior Investigating Officer' (BSBA/264).

107) We are urged to consider the context and not to underestimate the extent to which DC Maher's evidence had been discredited. In our view, his ever changing accounts were capable of leading to a strong inference that he had lied on oath in a voir dire. We have been reminded of the words of the Court of Appeal in Early and others [2002] EWCA Crim 1904 where Rose LJ warned of the serious view to be expected to be taken by the courts in such a case and how it would be likely that a prosecution case would be tainted beyond redemption.

108) The BSB have not proved that the Respondent was outside the realms of permissible boundaries when he included C3 in the allegation in particular (i). That is far from concluding that such an allegation was established.

Particular of Offence (iv)

109) It is convenient to deal with particular (iv) at this stage as it to some extent it overlaps with particular (i) as the recusal decision came during the s.78 argument before that issue was resolved.

110) The particulars of the three charges at particular (iv) allege that the Respondent alleged that prosecuting counsel [and here it has been clarified that this refers to C3 and his junior] had acted in bad faith by 'causing the original trial judge, J1, to recuse himself, in an attempt to manipulate the criminal process, by threatening to call counsel 1 and 2 (both of whom had now been appointed to the Circuit Bench) to rebut the defence allegations of abuse of process;… when he did not have reasonable grounds for the allegation.' The allegation relates to comments made by C3 at a hearing before J1 on 4th and 5th February 2016 (transcripts begin at BSB B/513 and at BSB A/88).

111) It is difficult to see how the allegation could have been put as high as the suggestion that C3 caused J1 to recuse himself. It is clear from the transcript that it was very much J1's decision. If J1 had embarked upon an abuse hearing, given that the good faith of the prosecution from the outset was likely to be in issue, he might well have wanted to hear evidence from C1 on a voir dire (if C1's note was not accepted as correct.) This prospect troubled J1 who felt whichever way he resolved the s.78 issue there would be a perception of bias.

112) Mr Waterman has suggested that what occurred was an opportunistic response by C3 to the rapidly deteriorating prosecution case during the course of the s.78 voir dire. He contends that a careful analysis of the relevant transcripts reveals that, whilst ostensibly maintaining a neutral stance, C3 encouraged J1 to recuse himself in order to give the prosecution time to seek other identification evidence. If this was the case, it would have been an improper manipulation of the process of the court albeit it should have been phrased "encouraging J1 to recuse himself on the basis that he might have to adjudicate upon evidence of judges known to himself."

113) Mr Counsell QC, on behalf of the BSB, contends that we should confine ourselves to the precise wording used by the Respondent. We accept that if a serious allegation is to be made, care should be taken to avoid loose language. However, we do not consider the way Mr Waterman now puts it to be significantly removed from the original allegation. Both would have involved manipulations of the process of the court by counsel for the same improper motive. In the circumstances, we do not consider it to be the correct and fair approach to find this allegation proved by virtue of the fact it was poorly expressed.

114) It is necessary to scrutinise the transcripts closely to discern whether there may have any proper factual foundation for such an allegation when C3 addressed the judge on the basis that he was adopting a position of neutrality.

115) Context is all-important. We have been taken through the transcripts of the evidence of DC Maher. There can be no doubt that a powerful s.78 argument was gathering pace. It went further than a failure to keep proper records or make proper timely disclosure. As we have said there was mounting evidence to suggest that DC Maher had lied on oath during the voir dire. At the very least, it was becoming increasingly difficult for the Crown to maintain that DC Maher had complied with the requirements necessary to enable him to make a proper identification.

116) On 4th February 2016 shortly after receiving C1's note the Respondent stated that C1 had provided a long statement and had said he was prepared to give evidence. He added that C1 and C2 would be required to give evidence if the Crown did not 'review this case properly' (BSB B/517B).

117) It was Mr Raggatt QC (co-defending counsel) who first raised the possibility of J1 having to become a tribunal of fact. This thought had already apparently occurred to the judge (BSB B/521E).

118) C3's proposal at this time was for the judge to deal with the s.78 matter first, only moving to the question of abuse afterwards if necessary (BSB B/532A- 533C).

119) Mr Lithman QC on behalf of D5, registered his concern and foreshadowed this argument long before it was deployed by the Respondent. He described DC Maher as having now become "a busted flush." He suggested the discussions about recusal were only happening to give the Crown "another bite of the cherry" as the prosecution could buy time if the proceedings came to an abrupt end by reason of the J1 recusing himself.

120) C3's stance changed on the 5th February. The Respondent contends that this was after DC Maher's "catastrophic" performance in the witness box which would almost inevitably have led to the exclusion of his evidence under s.78 meaning that C3 would no longer have had any case against the Respondent's client. It is suggested that C3's action the next day in setting out (albeit accurately) to the Judge the legal position with regard to the perception of bias was a 'skilful but transparent' 'strong nudge' to get him

to recuse himself, with the primary objective of preventing the discrediting of DC Maher's evidence from causing the end of the prosecution's case. R's argument is that C3 was therefore keen to see J1 recuse himself, knowing that this would cause the case to be adjourned, and hence giving the Crown more time to secure additional evidence and get a positive identification against R's client (as it ultimately sought to do, first via DC Rowland, then Acumé – see e.g. BSBA/25 para 9).

121) From the transcripts it would appear that C3 had informed some of his colleagues about his intended change. He then in open court adopted a position of ostensible neutrality on recusal.

122) When such an issue arises, it will often be entirely appropriate for prosecution counsel to be neutral whilst bringing the law about the perception of bias to the attention of the judge. C3 warned the judge of the dangers that would be likely to arise if he had to determine factual issues after hearing evidence from fellow judges. However, in doing so he chose to use strong language saying that "the allegations that have been made are so serious that they have doomed, overshadow everything." He also pointed out that an independent bystander would say "how could J1 do that (i.e. rule on s.78) knowing the allegations being made?" Whichever way J1 was to rule, the problem of perceived bias would arise. "It poisons the judicial well frankly." See BSB A/ 101ff.

123) Not long afterwards C3 made a second submission in which he claimed that he had not been suggesting that that the allegations against prosecution counsel in the trial would be a reason for J1 to recuse himself and he was "not making submissions one way or another." See BSB A/ 116.

124) Mr Waterman suggests that C3 had realised he had gone too far in his earlier submissions and this final intervention sits uncomfortably with C3's earlier words.

125) Defence counsel continued to press for a resolution of the s.78 issue and addressed J1 on the basis that he should do that, and he did not need to recuse himself.

126) Notwithstanding defence counsel's submissions, on the 8th February J1 recused himself before completing the s.78 voir dire. He felt whichever way he ruled on the s.78 issue, there was a real risk of a perception of bias on the basis of whether he may have been influenced by the consideration of the knock on effect of such a decision on the position, or reputation of, C1. See para 15. BSB A/260

127) There is significant evidence of motive. However, as we observed in our earlier ruling, motive cannot provide sufficient evidence on its own. In our view, this issue turns on what inferences can properly be drawn from C3's change of stance and the nature of his recusal submissions against a backdrop of the likelihood of the Crown losing the s.78 argument and the repercussions that would follow. Given the context, we have concluded that this allegation was more than just speculation and we cannot be sure that the Respondent did not have a proper evidentiary foundation.

Particular of Offence (ii)

128) The particulars of the three charges at (ii) recite that all counsel involved in the prosecution and the Crown Prosecution Service acted in bad faith by offering no evidence against one of the defendants, Fazal Khan (D1), but continuing with the prosecution of another, D5 (Pier Zada Khan). In reality, however, the Respondent only made this allegation in relation to the CPS and the counsel identified as C4 and his junior and the BSB accept that.

129) Mr Counsell made a number of persuasive points on behalf of the BSB. He argued that it was a reasonable distinction between D1 and D5. The defence may take a different view as to the relative strengths of the supporting evidence as against each defendant, but ultimately it is a matter of judgment. A decision which proves to be incorrect does not remotely justify the Respondent in saying that the prosecution was motivated by bad faith. This was a criminal trial in respect of very serious charges. It was incumbent on a responsible prosecution to see if new expert evidence would or would not provide supporting evidence.

130) Mr Waterman invited us to consider the context when that decision was made. It is contended that the bad faith was cumulative. The Crown had abandoned DC Maher very late in the day. They had attempted to draw a veil over his probable lies on oath during the voir dire and sought ad hoc expert evidence from a second police officer. In the event, she had been unable to identify anyone (hence the decision not to proceed against D1). The quality of the CCTV and its capability to produce a proper identification must have been seriously in issue after consideration of the defence expert reports.

131) The Respondent made a number of points during the course of his evidence in support of his claim that the distinction between D1 and D5 could not be justified and was being made in bad faith.

(i) Given that both D1 as well as D5 had been in the car which took their brother to hospital, the balaclava scientific evidence described in D5's note could take the prosecution case no further against D5. The prosecution was in precisely the same position as against D5 as it had been against D1. It was wholly reliant upon any identification evidence and at the stage after DC Rowland's conclusion they had none.

(ii) We are told King J agreed with this assessment when the matter was tried in January in that the case against D5 did not survive.

(iii) An analysis of DC Rowland's working papers (which were not before us) showed that she had positively excluded D5 which she had not been able to do for D1.

(iv) When Acumé came to conduct their work, they considered D5 but not D1 who had not been positively excluded.

132) In evidence the Respondent raised his suspicions that the decision to proceed against D5 and not D1 was influenced by a desire to exclude him from further involvement in the case. That would have been an entirely improper reason. However, there is no evidence to support this. As the Respondent concedes it is no more than speculation arising apparently from C4's reported surprise when he heard that the Respondent was now going to represent C5. Accordingly, we have not taken this suggestion into account.

133) Nevertheless, given the context and the Respondent's uncontradicted evidence on other matters we have concluded that we cannot be sure that the Respondent did not have reasonable grounds when making this allegation.

Particular of Offence (iii)

134) The particulars of the three charges at (iii) are closely connected to those in (ii) and, to some extent similar considerations apply. The allegation relates to the instruction of Acumé after DC Maher's replacement DC Rowland failed to identify either D1 or D5.

135) There was no little irony in the instruction of Acumé in that as early as late January 2016 the Respondent had criticised the Crown for not instructing an imagery expert at the outset of their investigation in July 2014. Furthermore, during the s.78 voir dire in front of J1 the SIO DCI Marsh had indicated that she had previous experience of Acumé and had criticised them for the unhelpful scale of probability they had used when presenting their conclusions (albeit she understood they had now changed their approach). See BSB B/433 ff.

136) The Respondent alleged that C4 and his junior acted in bad faith "by instructing a visual imagery expert from a firm called Acumé, knowing that the expert only worked for the police, did not have the required expertise, used a methodology which was not consistent with the accepted methodology in criminal cases and that his evidence was unfair and unreliable."

137) The BSB contend that even if the facts that the Respondent was alleging were true, they could not have provided a reasonable basis for alleging bad faith on the part of counsel. It was obviously reasonable for an expert in the same discipline to look at the defence reports so that they could be properly checked. In the light of the seriousness of the offences alleged, that was a proper step in the public interest.

138) The BSB point out that it was wrong to allege that Acumé had only acted for the police because their CV refers to acting on behalf of other agencies. In fact, the Acumé CVs (Respondents Documents bundle 312-319) do not refer to work for any agencies other than the police. However, Stephen Cole's witness statement does refer to producing work for other government agencies (Respondents Documents bundle 283). The BSB asserts it was also wrong to allege that they did not have relevant expertise in the light of the CV provided in their report and there was no indication that their methodology

was wrong. (DCI Marsh had been referring to problems emanating from their evidence 2 years before.)

139) On behalf of the Respondent it is argued that the prosecution should have realised once DC Rowland was unable to make any identification, that that there was no way in which they could fairly seek a conviction. In so doing the Crown were departing from their duties as ministers of justice. Nevertheless, they chose to go to Acumé whom DCI Marsh had previously been unwilling to instruct and they did this because they had an unhealthy close relationship with them and knew Acumé would not adhere to their obligation to act as independent experts and thought that Acumé would be sympathetic to the prosecution case. This was borne out by the demonstrably false claims Acumé were later to make.

140) Mr Waterman contends that C4 should have been very cautious about the instruction of Acumé who "everyone knew had pariah status."

141) During his evidence before us the Respondent sought to justify this allegation. He told us that there were demonstrably false claims made in the Acumé reports:

(i) Mr Cole described a darker patch on the suspect's sleeve at JP/6 as "heavy dried staining." It was central to his findings that this had matched a heavy dried bloodstain on the jacket itself. The Respondent claimed that not only would it have been impossible to know from the footage that an indistinct slightly darker patch was "dried" or "heavy" or "staining" but, in any event, the blood on D5's jacket would have come from his later contact with his dying brother.

(ii) Several of the claimed photographic similarities between the jacket of the suspect and the CCTV footage of (D5) at the hospital were wrong or exaggerated in the report.

142) The Respondent told us that he had informed C4 of his concerns about the propriety and independence of Acumé. He had met C4 in a robing room before 1st November and shown him extravagant and inappropriate claims made either on the Acumé website or a social media account such as Twitter or Facebook. In particular, the material included a puff that was wholly inappropriate for an expert about the sizeable number of years imprisonment given to defendants when Acumé had acted for the police.

143) The Respondent told us that C4 had had experience of Acumé in another case. We are not in a position to evaluate that.

144) The Respondent also seeks to rely upon Mr Cole's replacement Mr Napier's subsequent concession on oath before King J that he was not a visual imagery expert and should never have accepted instructions.

145) In reaching our conclusion on whether there may have been reasonable grounds to make allegation (iii) at the time, once again context is all-important. In the light of our finding that the Respondent may have had reasonable grounds to allege bad faith in respect of the decision to continue to prosecute D5 but not D1, we must consider the decision to instruct Acumé against that background. We have already noted the Respondent's evidence that DC Rowland had excluded D5 but not D1 and yet the position of D1 was not considered by Acumé.

146) Whilst we agree with Mr Counsell that we must be careful not to place too much weight upon the ultimate fate of the Acumé evidence as we are looking at the time when the Respondent made the allegations, it is an inescapable fact that some of the Respondents' serious concerns about Acumé's methodology and expertise were borne out by events.

147) Bringing all these threads together, we are firmly of the view that the BSB has not made us sure that the Respondent did not have a proper evidentiary basis for making this allegation.

CPS particulars (i) to (iv)

148) Finally, in respect of the allegations set out in particulars (i) to (iv), we come to consider whether the BSB has established that any of the particulars in the allegations are made against the CPS without reasonable grounds.

149) We have taken into account the particular role of the CPS and the likelihood that they would have been closer to the investigative process and instruction of experts than counsel are likely to have been. We have also considered whether any of the conduct giving arise to allegations of bad faith may have been the result of initiatives by prosecution counsel without the involvement of the CPS. In our view none of the conduct underpinning these allegations falls in that category. Prosecution counsel was acting with the CPS in respect of the decisions we have been scrutinising.

150) It follows that we can deal with the allegations against the CPS compendiously. For the reasons we have set out in respect of all 4 particulars when considering the position of prosecution counsel, we accept that the Respondent may have had reasonable grounds to include the CPS. For the avoidance of doubt, that includes allegation (i) where we have already found that the BSB has not established its case in respect of Counsel 1 and 3.

Professional misconduct

<u>CORE DUTIES</u>

151) In view of our finding that the BSB have established that the Respondent did not have reasonable grounds for his allegation against Counsel 2 in respect of Particular (i), we must consider whether that constitutes a breach of the three core duties alleged in the three charges and, if so, whether such breach or breaches amounted to professional misconduct, which both sides accept must be serious before it can be so called.

152) The three charges relate to three different Core Duties, although the particulars in respect of all three are the same. It appeared at one stage that there was a difference between the parties as to whether a breach of rC7.3 could result in a finding of professional misconduct contrary to Core Duties 3 and 5. Core Duty 3 is a failure to act with integrity; Core Duty 5 is acting in a manner likely to diminish the trust and confidence which the public places in a barrister or the profession.

153) In the event, however, the difference was very small, if it existed at all. The relevant edition of the Code of Conduct is version 2.1, which covered the period from September 2015 - December 2016. Mr Waterman, on behalf of the Respondent, suggested in a note dated 5 August, 2020 that rC7.3 was linked to rC3.2, both "as a matter of their subject-matter and by their express terms and the terms of the guidance about them in the Code of Conduct" to Core Duty 1, and not to Core Duties 3 or 5. By contrast, he suggested, the section in the Conduct rules which is concerned with Core Duty 3 is a separate section (Section C.2 entitled "behaving ethically"). He said that the Respondent is not charged with breaches of any of the rules under that section.

154) Mr Counsell, on behalf of the BSB, submitted that if we found the Particulars, or any of them, proved it was open to us to find that there was a breach of all of the three Core Duties alleged. He took us through the structure of the handbook and submitted that the ambit of rule rC7 is not restricted to any particular Core Duty. He said that just because there is a link between rC3.2 and rC7, it does not mean that the prohibition in rC7.3 is also linked only to Core Duty 1. He suggested that if there was a breach of rule C7, it would be nonsense to say that it was not capable of breaching Core Duty 3. He referred to the guidance at gC14 and particularly at gC16, which relates rule C3 to Core Duty 5. He made the general point that a breach of duty to the court (Core duty 1) does not mean that a barrister is acting with integrity. It could be both. There is an overlap between different sections of the Handbook.

155) He referred us also to SRA v Wingate and another (2018) 1WLR 3969 where Rupert Jackson LJ said at paragraph 100, "integrity connotes adherence to the ethical standards of one's own profession. That involves more than mere honesty. To take one example, a solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse." Mr Counsell said that a breach of rule 7 must apply to Core Duties 3 and 5 as well as to Core Duty 1.

156) Mr Waterman accepted, in his reply, having heard Mr Counsell, that rule 7 can attach to other Core Duties. Although he said it is principally intended to "feed into" Core Duty 1. He said one should look very carefully to see whether rule 7 gave rise to a breach of Core Duty 3.

157) Our view, having heard the submissions, is that a breach of rule 7 can cause there to be a breach of Core Duties 1,3 and 5. We accept Mr Counsell's argument about the proper construction of the Code of Conduct and we accept also that it would be a nonsense if the Tribunal was precluded from finding a breach of Core Duty 3 or 5 if it had found that a barrister had made serious allegations when he did not have reasonable grounds for making them. We are satisfied therefore that the failure to comply with rC7.3 in the respect we have found did constitute a breach of all three Core Duties.

PROFESSIONAL MISCONDUCT

158) The final stage of our consideration is to decide whether the breach that we have found proved, was, in this case, sufficiently serious to amount to professional misconduct. Mr Waterman said that we would need to be sure that there was serious reprehensible conduct and fault is relevant. He suggested there were three potential categories of breaches, namely intentional, reckless and negligent breaches. He accepted that gross negligence could be sufficiently serious misconduct if it fell far below the standards required such that it made the breach culpable but it does not follow that if there were no reasonable grounds for making an allegation that misconduct necessarily follows. Mr Counsell agreed that any breach needed to be serious to amount to professional misconduct and that gross professional negligence can fall within it. He also accepted that a barrister's state of mind could be a factor in assessing the seriousness of what he did.

159) In the event we have to decide whether the allegation which we have found proved as a breach of rC7.3 was the result of negligence, gross negligence, recklessness or deliberate intention and then to make an assessment of whether the breach was sufficiently serious to amount to professional negligence.

160) We accept that the Respondent thought that there were reasonable grounds for the allegation he made, and he was genuine in his belief, although we think he was wrong about that for the reasons we have given. Ultimately, it was a matter for his judgment and we accept that he would have been influenced in October and November 2016 by the general history of the prosecution failures in this case which had occurred. We think it amounted to a misjudgement by the Respondent as to the reasonableness of the grounds upon which he made his allegation. It was rather more than a momentary error. He was persistent in making the allegation. However, on the facts of this case we do not think that his misjudgement amounted to gross negligence and we do not think, in the context of all that had gone before that it was sufficiently serious to amount to professional misconduct.

CONCLUSION

161) It follows that we do not find professional misconduct proved on any of the 3 charges.

ANCILLARY MATTERS

162) We will consider any ancillary matters at a date in September 2020, to be fixed.

HH PETER ROOK QC

KATHRYN KING

JOHN FOY QC
21st August 2020