Neutral Citation Number: [2007] EWCA Civ 972

Case No: A2/2006/2198

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE GRAY
Hq04X01682

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 10 2007

Before :

THE RT HON. LORD JUSTICE WARD
THE RT HON. LORD JUSTICE SEDLEY
and
THE RT HON. LORD JUSTICE HOOPER

- -

Between :

Michael Charman	**Respondent**
- and -	
(1) Orion Group Publishing Group Ltd	
(2) Orion Books Ltd	
(3) Graeme McLagan	**Appellants**

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- -

Adrienne Page QC, Matthew Nicklin and Adam Speker (instructed by Wiggin LLP) for the appellants
Hugh Tomlinson QC and Lucy Moorman (instructed by Simons Muirhead & Burton) for the respondent

Hearing date: 19th, 20th, 28th and 29th March 2007

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Approved Judgment

Lord Justice Ward:

Introduction

1. The subject matter of this appeal is a libel action being tried in stages by Gray J. without a jury. The claimant is Mr Michael Charman, a former detective constable in the Metropolitan Police force. He claims that he has been defamed in a book called "*Bent Coppers*" written by Mr Graeme McLagan and published in hardback by the Orion Publishing Group Ltd and in paperback by Orion Books Ltd.

2. On 17th June 2005 Gray J ordered that the action be tried by judge alone. On 14th October 2005 he ruled at the first stage of the trial on the defamatory meaning conveyed by the book. He held that the book did not mean to the ordinary reasonable reader that Mr Charman had been guilty of corruption as Mr Charman contended it meant nor that there were only reasonable grounds to investigate whether he had abused his position as police officer by receiving corrupt payments or even that there were reasonable grounds to suspect him of so doing as contended for by the defendants. Instead the judge held that the defamatory meaning was slightly above *Chase* level 2 (*Chase v Newsgroup Newspapers Ltd* [2002] EWCA Civ. 1772; [2003] EMLR 218), because he considered that the phrase "reasonable grounds" was "inadequate to convey the degree of suspicion to the readers." He held that the ordinary reasonable reader of the books taking them as a whole, whether in the hardback edition or in the paperback edition, would understand them to mean:

> "that there are *cogent* grounds to suspect that Mr Charman abused his position as a police officer by colluding with Brennan in the commission of substantial fraud by Geoffrey Brennan from whom he and Mr Redgrave received corrupt payments totalling £50,000" (emphasis added).

3. The next stage of the trial was to resolve the preliminary issue of qualified privilege, both common law and statutory. On 13th July 2006 Gray J. ordered that the qualified privilege defences be dismissed and his judgment is now reported at [2006] EWHC 1756 (QB), [2007] 1 All E.R. 622. Giving the defendants permission to appeal, Keene L.J. observed that:

> "The case, and the grounds of appeal, raise important issues about the steps required of an author and publisher in order to qualify for a defence of the "Reynolds" type of qualified privilege, when the publication in question is a book and not a newspaper article, where the topic is one of public interest but is also complex, and where the author has made attempts to obtain the claimant's side of the story."

4. To be a little more specific in this introduction, the issues of law, leaving statutory privilege aside, are essentially these:

(1) what is the extent of the privilege claimed for "*reportage*" and how does this fit into the *Reynolds* type of qualified privilege developed by and since *Reynolds v Times Newspapers Ltd* [2001] A.C. 127 ?

(2) What is the proper approach for the Court to take in judging whether the author and the publishers have acted responsibly in communicating the information to the public?

Once the relevant principles of law are identified, then a great deal of factual material will need to be investigated in order to establish, putting it very broadly for the moment, whether the books were published in a fair, balanced and neutral way, without adoption by the appellants and whether the defamatory information was responsibly reported.

Setting the scene: *a précis*

5. Mr Graeme McLagan (I shall henceforth, like the judge, refer to him and others simply by their surnames) is a journalist of many years' standing. He started his career as a reporter on the Newcastle Journal and then worked for the Daily Mail in the 1960s. In 1971 he joined the BBC and later became the Deputy Home Affairs Correspondent for both radio and television. From the late 1970s onwards, he took a special interest in the issue of police corruption. In the early 1980s he reported on the first major enquiry by an outside police force into police corruption within the Metropolitan Police force ("the Met"). He covered the several trials which arose out of it. He reported on abuses in the system of using informants in a *Panorama* television programme in 1982. He reported on the criminal trials of several allegedly corrupt police officers and in 1988 presented another *Panorama* programme about police corruption.

6. The hardback version of *Bent Coppers* was published by the first defendant on 9th June 2003. It is subtitled "The Inside Story of Scotland Yard's Battle Against Police Corruption". On the cover are words attributed to the then Metropolitan Police Commissioner, Sir John Stevens: "This is a story that deserves to be told – warts and all". On the inside of the cover:

> "This is the inside story of the 'Ghost Squad' and how it broke into the secret world of police corruption. … Graeme McLagan's gripping account reveals the ugly underside of London's police force and why teams from America and Australia have now come to Britain to find out how the Met is winning the battle against bent coppers."

7. The book has sixteen chapters giving a chronological account of the periodic and eventually partly successful purges against police corruption carried out within the Met and the South Eastern Regional Crime Squad ("SERCS") from the 1960s onwards. It is 260 pages long.

8. The paperback edition published by the third defendant on 1st April 2004 has 19 chapters, spread over 439 pages but as the judge held at the trial of the preliminary issue on meaning, the paperback version bore the same meaning as the hardback even though there were a substantial number of changes.

9. Charman sought damages for libel in respect of both the hardback and the paperback edition of the book by a claim issued on 4th June 2004, over a year after the publication of the hardback edition.

10. He served in the Met from 1971 until 6th May 2004 when he was required to resign following the finding of an internal disciplinary panel that he had acted in a manner likely to bring discredit to the reputation of the force. He was part of the team investigating the Brink's Mat robbery in about 1983, as was Mr John Redgrave ("Redgrave") who attained the rank of detective inspector and Chris Smith ("Smith") who became a detective sergeant. Whereas Charman and Redgrave established a good friendship, bad blood appears to have fractured the relationship between Charman and Smith.

11. In June 1993 Charman was in the Flying Squad based at Tower Bridge. He became the handler of an informant called Geoffrey Brennan ("Brennan"). Brennan was also passing information to Smith. He was himself a small-time criminal who had got to know "high-calibre criminals." He ran a retail mobile telephone business in Bexleyheath.

12. In the summer of 2003 the police set up an operation called "Nightshade" which was investigating allegations of drug trafficking in Venezuela, the production of amphetamines in Portugal and, ostensibly, money-laundering and/or gun running from the United States to Northern Ireland. This third strand lies at the heart of the present controversy, much of which is, of course, hotly disputed.

13. It is the defendants' case that this third element of Operation Nightshade was a fabrication by Brennan, Charman and Redgrave devised in order to conceal their own involvement in criminal activity. Brennan and a man known as "Tall Ted" Williams conspired to steal £400,000 from two Chinese American businessmen ("the Wangs") by pretending to sell them mobile phones for resale in China. The defendants contend that there were cogent grounds to suspect that, having become aware of this conspiracy, Charman and Redgrave struck a dishonest deal with Brennan that he would pay them £50,000 in return for their protection, were he to be arrested, by pretending that he was giving the police information about a money-laundering operation being run from the United States by the Wangs.

14. The Wangs duly paid Brennan for the mobiles and Brennan claimed that he then paid £10,000 to each of Charman and Redgrave and later handed over the remaining £30,000 in a plastic bag. The Wangs waited in vain in Hong Kong for their mobile phones and in October reported the theft to the Kent police.

15. Brennan was arrested on 12 November 1993. He claimed that everything he had done *vis à vis* the Wangs had been in the full knowledge of Charman and Redgrave and that he had paid them £50,000. It is alleged that the next day Redgrave and Charman met the Bexleyheath officers and told them that if the theft enquiry were pursued, it would put both the informant Brennan and the under cover officers in Operation Nightshade at risk. They asked that the theft enquiries be put on hold. The investigation was then transferred from Bexleyheath to SERCS where Redgrave was serving. DC Maul was put in charge of the theft enquiry but Redgrave continued to intervene during these early months of 1994.

16. In about May 1994 Detective Chief Superintendent Gaspar ("Gaspar") set up a secret anti-corruption "Ghost Squad" for the Met. Brennan was introduced to him by Smith because Brennan was saying that documents revealing him as an informant had fallen into the hands of "Tall Ted" Williams as a result of which his life was in danger.

Gaspar had to make immediate arrangements for Brennan and his family to be put on the police witness protection programme, given new identities and rehoused.

17. Gaspar interviewed Brennan on a number of occasions in the days that followed. Brennan was only prepared to talk off the record. Gaspar wanted the information and so a number of interviews were tape recorded by Gaspar but not under caution. In these tapes ("the Gaspar tapes") Brennan admitted that he had defrauded the Wangs of £400,000, and claimed that Charman knew all about the intended theft but corruptly took his share of the £50,000. Charman's case is that this was a tissue of lies intended to provide Brennan with a defence to the charge of theft for which he had been arrested.

18. Brennan remained under police protection until November 1996 when he was arrested for a second time by DC Maul and on arrest adopted what he had said when interviewed by Gaspar.

19. Then in January 1997 Brennan withdrew his allegation against Charman and Redgrave. Instead he accused Smith, who by this time had retired from the Met, of having incited Brennan to make up the allegations of corruption on the part of Charman and Redgrave because of the bad blood which existed between the three officers.

20. Detective Superintendent John Coles ("Coles") succeeded Gaspar and in an operation known as "Cornwall" executed search warrants at the homes of Charman and Redgrave who were suspended from duty on 4th and 7th February 1997 respectively. They were never to return to duty.

21. This suspension received publicity in the national press and although Charman and Redgrave were not named, they appear to have spoken to the media, denied any wrongdoing and claimed to have been the victims of the Met's zealous anti-corruption campaign.

22. There was then another development. Smith was due to give evidence for the prosecution in the case of a man named Phillips who was being defended by David Bate QC. When Smith was cross-examined by Mr Bate about his relationship with Brennan, he refused to answer questions on the basis that to do so might incriminate him. This led to Smith being investigated as part of Operation Cornwall.

23. A member of the Crown Prosecution Service, Debbie Cahill, was given confidential information about Smith and was suspected of sharing that with Charman and Redgrave. Covert surveillance was being carried out at her home which had been bugged as part of Operation Ambleside. The police broke down the door of her home when they heard discussion about destroying some of the documents and Charman, Redgrave and Cahill were arrested and charged with conspiracy to pervert the course of justice. Those charges were summarily dismissed by the magistrate and an application to prefer a voluntary bill of indictment against them was also dismissed. Eventually Charman and Redgrave were informed that there would be no criminal charges against them over the Brennan allegations.

24. From May 1999 onwards Charman and Redgrave made formal complaints against the Met and in particular against Coles about their arrest, detention and treatment. They

met with a reporter from the Guardian, Mr Gillard, and articles supporting their position and protesting their innocence were published in that paper from March 2000 onwards. They enlisted the help of Redgrave's MP, Mr Andrew McKinlay, and he sprang to their defence. He tabled parliamentary questions, spoke at an adjournment debate in the House of Commons about the alleged mistreatment of the two officers and called upon the Home Secretary to set up an independent judicial enquiry. They were charged on 8th September 2000 with discreditable conduct relating not to the Brennan allegations but to sharing confidential information with Cahill. They were eventually required to resign in May 2004.

25. Brennan finally stood trial before His Honour Judge Barker QC at the Central Criminal Court in January 2001 charged with the theft committed so many years previously. Richard Latham QC was prosecuting and Andrew Trollope QC led for the defence.

26. Before the jury was empanelled Mr Trollope submitted that the prosecution should be stayed as an abuse of process on the ground of delay and unfairness in that at the time of the alleged theft Brennan had been a participating police informant who had performed all acts relevant to the case at the direction of Charman and Redgrave. The principal witness called on behalf of the prosecution in relation to the abuse of process application was Gaspar. He gave a detailed account of the interviews he had conducted with Brennan whilst he was under police protection. Reference was made to possible irregularities in the financial affairs of the two officers: Redgrave was said to have received unexplained income and in the case of Charman an unusual spending pattern was said to have emerged at the time when Brennan claimed to have paid over the £50,000 bribe. There was also an issue as to the admissibility in Brennan's trial of the Gaspar tapes, the defence contending that they should not be introduced in evidence because Brennan had not been cautioned and because he was at the time in such a state of fear that he would have been motivated to say anything in order to obtain protection for himself.

27. The judge ruled that the trial should proceed but that the tapes should not be admitted in evidence, reserving the right to review that in the course of the trial.

28. Brennan duly gave evidence in his own defence. He was vigorously cross-examined by Mr Latham and I shall have to refer to this in due course. He was eventually convicted and sentenced to 3 ½ years' imprisonment. McLagan reported on the trial for BBC radio. Mr Gillard published an article in *The Big Issue* highly critical of the role of the Ghost Squad in relation to Brennan, Charman and Redgrave. As already stated, *Bent Coppers* was published in June 2003 notwithstanding Charman's attempts to prevent publication.

The defamatory material

29. There are references to Charman in seven chapters of the book as well as in the caption to one of the photographs in it. These passages are much too lengthy to be set out in this judgment and I can give but a summary of them.

30. Chapter 3 is entitled "Corruption in Elite Detective Squads". The reader had been told in the previous chapter that Gaspar had received a "startling" phone call which was to give him "an amazing insight into major corruption". That call came, as

already set out, from Smith who told Gaspar that an important police informant (Brennan) had been compromised. Brennan is described as "a big, excitable man given to lies, boast and bluster". Brennan's handlers are identified as Redgrave, described as a SERCS officer, and "a flying squad detective constable called Michael Charman".

31. The book then describes the various meetings between Gaspar and Brennan, how Brennan complained that confidential police records had fallen into the hands of major violent criminals and how he was provided with police protection. The subsequent meetings are described in which Brennan told Gaspar about the corrupt dealings he claimed to have had with Redgrave and Charman including the alleged payments of £10,000 to each of them and a further £30,000 paid over in return for their help if ever he was to be questioned or arrested.

32. As to the involvement of Charman in the plan by Brennan to swindle the Wang brothers under cover of a money-laundering operation, the author comments:

> "Although Gaspar believed him, what Brennan had said amounted to no more than simple allegations of police wrongdoing. Such allegations had no chance of standing up in court without corroboration, even if Brennan agreed to appear as a witness and he was refusing to do that. It would simply be Brennan's word, that of the criminal, against the word of two honest detectives with distinguished records."

A little later there is a brief reference to the fact that Redgrave and Charman "strenuously denied all allegations of wrong-doing".

33. In Chapter 12, entitled "Problems and Difficulties", the reader is reminded of the theft and of the payments Brennan claimed to have made to Redgrave and Charman for protection. It is said that relations between Brennan and the Ghost Squad had soured, culminating in his arrest in November 1996 for that theft. Brennan is recorded as having replied when charged that he acted with the knowledge of the Metropolitan Police as part of police operations. However Coles, who was then in charge of the Brennan case, is said to have wondered whether Brennan manipulated the Complaints Investigation Bureau (CIB) from the start. Coles is said to have known that fraudsters such as Brennan "were capable of constructing elaborate stories to extract money from their victims and they knew roughly how far they could push the law". Having been arrested, Brennan is said to have mounted his counter-attack, contacting the Police Complaints Authority to withdraw his allegations against Redgrave and Charman claiming that he had been put up to blackening the pair by his former handler who had "had it in" for Redgrave and Charman since the 1980s.

34. There follows this paragraph:

> "… Redgrave and Charman were suspended, their homes having been raided three days before. From the outset the pair have denied receiving money from Brennan, or indeed any corruption at all."

Coles was given advice from Treasury Counsel who

> "eventually concluded that without Brennan's co-operation the chances were that a prosecution of Redgrave and Charman would fail."

35. The author then describes the Debbie Cahill incident, Charman's arrest but the collapse of the prosecution when the magistrate "threw the case out".

36. The next mention of Charman and Redgrave is in Chapter 15 entitled "Loose Ends". The reader is reminded of the history and that:

> "Deeply aggrieved at what had happened to them, the three (i.e. Charman, Redgrave and Ms Cahill) then counter-attacked, making official complaints against CIB officers. Redgrave's MP, Andrew McKinlay, raised the case in a 15 minute speech in the House of Commons."

Charman claimed that his arrest, detention and prosecution were unlawful, malicious, unwarranted and amounted to a conspiracy to pervert the course of justice. Charman claimed that his arresting officer had adopted unwarranted and unnecessary tactics causing him humiliation and distress.

37. There are six pages dealing with Brennan's trial at the Old Bailey. The opening paragraph of this section reads:

> "CIB officers hoped that Redgrave and Charman would give evidence for Geoffrey Brennan at his trial in 2001. The pair could have used the proceedings as an opportunity to set the record straight, to deny Brennan's original allegations that he had bunged them £50,000 to cover up his theft of £400,000 from the Chinese-American businessman, Sam Wang. They could also have backed Brennan's later claims that the police operation mounted by the pair into gun-running and money-laundering had been entirely legitimate and not a smokescreen, as was being suggested by the CIB. If the pair had appeared in the witness box, they would have been open to cross-examination by the CIB prosecution team, determined to get at the truth of Brennan's allegations. But it was not to be. Although Redgrave and Charman's names were continually mentioned throughout the trial, the two suspended officers did not appear at the Old Bailey."

Gaspar is said to have "revealed" at the pre-trial hearing that Redgrave had received unexplained income over and above his Metropolitan Police salary and that in Charman's case an unusual spending pattern has started in October 1993, coinciding with the time Brennan had claimed to have paid over the £50,000 bribe.

38. Next there is an account of the cross-examination of Brennan by Richard Latham QC who is said to have put to Brennan that Redgrave and Charman were "dishonest and corrupt". Counsel is recorded as having put to Brennan that the two officers had "come into [his] pay" and that he had given them money. Brennan is said to have

demanded to know why the prosecution was not calling the officers to give evidence, whereupon it is said that:

> "Latham chose his words with care. They were damning: 'I am not going to bring in criminals to give evidence'."

Then comes this paragraph:

> "Although Redgrave and Charman were not on trial, for much of the time it was as if they were in the dock with Brennan. In Latham's closing speech to the jury much play was made of their alleged corruption. He repeated that the prosecution case was that a total of £50,000 had been paid to the two detectives to provide a smokescreen for the theft of Wang's money …"

39. The reader next learns of the unanimous finding of the jury that Brennan was guilty. His defence counsel is said to have told the judge in mitigation that:

> "It was unquestionably the case that Redgrave and Charman were in contact with him at the time of the offence and were aware of what was taking place."

40. The last paragraph of Chapter 15 contains a number of general comments about abuse of the informant system and general acknowledgement throughout the police service that "grasses" are dangerous, being clever, with the ability to hide their treachery, highly manipulative, turning the relationship with their police handlers to their own benefit. Reference is also made to perceived CIB unfairness and the suspension of officers on flimsy grounds. Towards the end of the hardback edition there is a reference to officers who felt "wronged" and to claims that CIB's operations and tactics had resulted in injustices.

The headline findings of the judgment

41. The way the judge dealt with the "amalgam of various species of privilege" was in summary this. (1) He readily accepted that the problem of corruption within a police force was a matter of grave public concern and therefore of legitimate public interest. (2) He rejected the reportage defence because McLagan had partially adopted a serious charge against Charman and failed to report the facts fully, fairly and disinterestedly: his was not a neutral report. He did not achieve the balanced approach he set himself. (3) The defendants failed to show that they were acting responsibly in communicating the information contained in *Bent Coppers* about Charman to the public. McLagan had a duty to subject the material to a degree of critical analysis but failed to do so. He was selective in reporting the Brennan trial giving prominence to matters he ought to have realised were of marginal relevance and generally putting such a spin on the report as to distort it. An analysis of the ten *Reynolds* factors supported the conclusion that this was not responsible journalism. (4) Reporting the adjournment debate in the House of Commons was protected by statutory privilege but as for the court proceedings, the report as a whole was skewed so as to give the readers the false and unfair impression that the issue of Charman's alleged corruption assumed a far greater importance than in fact it had either at the

pre-trial hearings or at the trial itself. The defence of qualified privilege failed accordingly.

The law as determined by the judge

42. There is no challenge as to the way the judge directed himself on statutory privilege under s. 15 of the Defamation Act 1996 adopting as he did the accuracy of the summary in paragraph 15.4 of *Gatley*, 10th edition:

> "Nor need the report be accurate in every detail. If the report be as a whole a substantially fair and accurate account of the proceedings, a few slight inaccuracies will not deprive it of protection, but where the inaccuracies are of a substantial kind, there is no immunity."

The challenge in the appeal is to the manner in which the judge applied that law to the facts.

43. He dealt with the law on reportage and the *Reynolds* defence as follows:

> "107. It is common ground that the matters set out by Lord Nicholls in *Reynolds* at 205 represent important criteria for deciding the availability of privilege. But, as Lord Nicholls made clear, they are non-exhaustive and so not of themselves necessarily determinative in every case. Moreover, as counsel agreed, those tests require modification in the present case because the publication sued on is a book rather than a newspaper containing the perishable commodity which is news. Also allowance needs to be made for the fact that the author of a book has more time for checking than a journalist who has to meet a deadline. Furthermore there have been a number of authorities since *Reynolds* which need to be taken into account.
>
> 108. I will attempt to summarise what seem to me to be the principles which can be derived from the cases which were cited in argument:
>
> i) qualified privilege is designed to strike an appropriate balance between the ECHR Article 10 right to freedom of expression and the right of an individual to protect his reputation which is an aspect of private life which is protected by Article 8: *Bonnick v. Morris* [2003] 1 AC 300 per Lord Nicholls at [23] and *Compana and Mazare v Romania* [2005] 41 EHRR 200 at [91];
>
> ii) neither of those rights is pre-eminent or has "presumptive priority": there is a clear public interest in the promotion of free and vigorous press to keep the public informed and journalists should be permitted a good deal of latitude in how they present the material; but reputation is an integral and important part of the dignity of the individual, the

protection of which is conducive to the public good. In some cases the reputations of other individuals than the claimant may be engaged: *Reynolds* at 210, 230 and 238; *Loutchansky v Times Newspapers (No's 2-5)* at [36]; *In re S (a child)* [2005] 1 AC 593 per Lord Steyn at [17]; *Bonnick v Morris* at [23]; *Galloway v. Telegraph Group* [2006] EWCA Civ 17 at [80, 83] and *Bladet Tromso and Stensaas v Norway* [1997] 23 EHRR CD40;

iii) in order to determine whether publication was in the public interest, it is first necessary carefully to analyse the information which has been provided to the public and to pose and answer the question whether the public had a right to know or a legitimate interest in knowing the facts alleged, even if they cannot be shown to be true: *Loutchansky v Times Newspapers (No's 2- 5)* at [39]; *Jameel v Wall Street Journal* [2005] EMLR 377 at [86-7] and *Galloway v Telegraph Group* at [37];

iv) the question identified at (iii) above should be answered by reference to the information which was known to the publisher at the time of publication: *Loutchansky v Times Newspapers (No's 2-5).*

v) the touchstone being that of the public interest *and* responsible journalism, it is then necessary to ask whether in the particular circumstances of the case the publisher has demonstrated that he was acting responsibly in communicating the information to the public. For that exercise the starting point is to consider such of the factors set out by Lord Nicholls in *Reynolds* at [208] as are applicable: see also *Galloway v Telegraph Group* at [37];

vi) the requirements of responsible journalism will vary according to the particular circumstances. Depending on the circumstances, factors other than those identified by Lord Nicholls may come into play. It is necessary to always to bear in mind that the publication is defamatory and cannot be shown to be true. The standard of conduct by which the responsibility of the journalism is judged must be applied in a practical, fact-sensitive and elastic manner: *Loutchansky v Times Newspapers (No's 2-5)* at [38]; *Jameel v Wall Street Journal* at [87] and *Bonnick v Morris* at [24];

vii) one such circumstance is where the publication consists of what has been described as "reportage", that is, where the publisher has neutrally and disinterestedly reported in an even-handed way unattributed [sic – this is accepted to be a typographical error as the judge clearly meant ‘attributed’] allegations which are of legitimate and topical interest to the readers of the publication but has not adopted those

allegations as being true or otherwise embellished them: *Al-Fagih v HH Saudi Research & Publishing* [2002] EMLR 215 at [6], [29]; *Galloway v Telegraph Group* [2005] EMLR 7 at [130] and in the CA at [28] and *Roberts v Gable* [2006] EWHC 1025 (QB); and

viii) in the case of reportage there may well be no duty on the publisher to verify the information, provided that the publication did not include background information which was defamatory of the claimant and provided further that any comment by the publisher about the information was confined to honest comment about the information made without malice: *Al-Fagih v HH Saudi Research and Marketing* at [50] and [39-43] and *Galloway v Telegraph Group* at [50-51].

Common law privilege

109. Before I endeavour to apply the principles set out above to the facts of the present case, there are a number of general observations which need to be made. The first is that I readily accept that the problem of corruption within a police force is a matter of grave public concern. Particular case histories, of which Brennan is one, are equally of legitimate public interest. This was common ground between the parties.

110. Part of the underlying purpose of the House of Lords in Reynolds in effecting a change to the common law defence of qualified privilege was to reflect the concern felt in some quarters that a greater degree of freedom of publication was required in regard to the reporting of matters of public interest in circumstances where the defendant publisher was unable to prove the truth of what he intended to publish. The House of Lords adopted as a new criterion of privilege the test of responsible journalism. It is well known that hitherto the defence of privilege based on responsible journalism has failed more often than it has succeeded. I accept that the Court must be on its guard not to set an unrealistically high standard of journalism or authorship. I bear in mind what Lord Nicholls said in *Reynolds* at p202:

"The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse".

111. An unusual feature of the present case is that McLagan laid great stress both in his witness statement and in his oral evidence upon the fact that *Bent Coppers* is, as he put it, a balanced and non-partisan account of the public dispute between CIB on the one hand and Charman and Redgrave on the other, based on material in the public domain. I will shortly

> have to decide if those claims are made out. It seems to me, however, that before I address those issues I should first consider whether, as McLagan claims, the passages of which Charman complains constitute "reportage" in the sense in which that term is used in *Al-Fagih* and later cases. If those passages do constitute reportage, the requirements of responsible journalism are or may be significantly relaxed.
>
> 112. In *Al-Fagih* Simon Brown LJ described reportage as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper". The Court held that in such a situation the public was entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other."

44. It is interesting to note the brief reasons the judge gave for refusing permission to appeal. He said:

> "In the light of *Bonnick*, I accept that the issue of responsible journalism falls to be determined by reference to the meaning subjectively intended by the defendant. However, in the present case I had to decide whether the book was "reportage". That question turned largely on whether the defendant adopted the allegations against the claimant: see paras 112-118 of the judgment. I do not think that there is a real prospect of success for an argument that I misdirected myself."

45. We have to consider first, whether the judge fully and correctly directed himself as to (1) the nature of, and the ambit of the reportage defence, and (2) the proper test to apply in judging whether the journalism is responsible. Secondly, having established the proper principles, I must see whether they were correctly applied.

Reportage

The judge's findings in paragraphs 112 to 118

46. The judge dealt with this defence as follows. He rejected Miss Page Q.C.'s argument on the defendants' behalf that because he had found that the passages complained of bore the meaning that there were cogent grounds to suspect Charman was guilty of corruption (as opposed to the meaning that he *was* guilty) it must follow that McLagan had not adopted Brennan's allegations as being true. He held that:

> "115. … an imputation that there were cogent grounds to suspect a police officer of corruption comes somewhere between a *Chase* level one and two meaning. Such an imputation may not amount to an unequivocal adoption of the charge of corruption but it does not to my mind constitute neutral reportage. It is partial adoption of a serious charge."

47. Although the present case was far removed from one where politicians and other public figures were reported to have been making allegations and cross-allegations against one another in the course of an ongoing dispute which was of itself of inherent public interest, "in a loose sense it could be said that there were two opposite sides to the debate" on "the controversial issue of corruption within the Met" about which there had been "extensive publicity … over the years". Whether the books "fully, fairly and disinterestedly" reported the facts underlying the Brennan allegations and Charman's response to them raised the question of whether the books were "in their context balanced", to which question he said he would return when considering "whether Mclagan's journalism achieved the requisite standard of responsibility". One significant respect in which the books lacked balance resulted from McLagan's willingness to draw inferences adverse to Charman from material which, as he should have appreciated, was weak. A balanced approach required McLagan to mention aspects of Brennan's story which cast doubt upon his credibility. The judge did not regard the account of the facts set out in each of the books to be "neutral" because:

> "117. … I think that the reader would take away from the passages of the book which deal with the Brennan affair that it was more probable than not that Charman was guilty of corruption."

For those reasons the judge was unable to accept that the passages in the books constituted reportage. He added in 118, "for what it is worth, … the prospective reader is not led to believe that the account in *Bent Coppers* is going to be neutral reportage" because "in the sub-title of the book and its flyleaf … the reader is told he is going to get "the inside story"." Later in the judgment he summarised his conclusions as follows:

> "131. The reasons why I have rejected the suggestion that the passages in question were reportage are firstly, that to an extent it appears to me that McLagan adopted the allegation of corruption against Charman and, secondly, that the relevant facts are not presented in the full, fair and disinterested fashion which is required of reportage. Very similar reasons led me to reject McLagan's claim to have written a "balanced" account of the Brennan allegations directed at Charman and Redgrave."

My commentary on reportage

48. As for the law on reportage, the nature of the defence and its place within the *Reynolds* doctrine of qualified privilege was recently examined in *Roberts v Gable* [2007] EWCA Civ 721. The critical point of that analysis is that the defence will be established where, judging the thrust of the report as a whole, the effect of the report is not to adopt the truth of what is being said, but to record the fact that the statements which were defamatory were made. The judge's task is akin to the way in which at common law hearsay evidence used to be admitted or excluded. The protection is lost if the journalist adopts what has been said and makes it his own or if he fails to report the story in a fair, disinterested, neutral way. To justify the attack on the claimant's reputation the publication must always meet the standards of responsible journalism as that concept has developed in *Reynolds*, the burden being on the defendants. In that way the balance between Article 10 and Article 8 is maintained.

Roberts v Gable was a good example of reportage in that the defendant newspaper simply republished allegation and counter-allegation of two politically opposed factions within the British National Party, each side accusing the other of theft of money collected at their "Grand Rally … to promote the BNP campaign for the London Mayoral and G.L.A. elections in 2004".

49. Applying those considerations to this case, one sees at once why this case is miles removed from the confines of reportage properly understood. A defining characteristic of reportage is missing in that this book was not written to report *the fact* that allegations of corruption were made against Charman and *the fact* that he denied them and in turn accused the investigating officers of plotting against him. The whole effect of this book is, as its sub-title makes plain, to tell the "inside story of Scotland Yard's battle against police corruption" and the tale includes Charman's alleged corruption. McLagan was making a story, his story, of that corruption. This book, read as a whole, is a far cry from McLagan's simply reporting Brennan's account of corruption and Charman's refutation of it and counter-charge of his malicious mistreatment by other officers in the Ghost Squad. This was a piece of investigative journalism where McLagan was acting as the bloodhound sniffing out bits of the story from here and there, from published material and unpublished material, not as the watchdog barking to wake us up to the story already out there. As the judge found, he drew upon much more than the reports already in the public domain. He was not just reporting published material. The Gaspar tape transcript was provided by a confidential source. So was the Chaplin report. Information about alleged "forged entries" on informant logs written by Charman were provided by police sources as was information about surveillance tapes. The information about Coles being unhappy about the decision not to prosecute came from a private conversation. The fact is, and McLagan admitted it in cross-examination, this was the "inside story", the story of corruption in the Met which McLagan set out to tell in "*Bent Coppers*". That was the whole point of the book. Looking at the book as whole, it was hardly a neutral, disinterested report, even if the excerpts reported were factually accurate.

50. In suggesting, as she seemed to do, that no more was needed to establish the defence than that the report was attributed, was neutral and was in the public interest, Miss Page pitched her case far too widely. No matter how overwhelming the public interest, it is not reportage simply to report with perfect accuracy and in the most neutral way the defamatory allegations A has uttered of B. As Lord Reid said in *Lewis v Daily Telegraph Ltd* [1964] A.C. 234, 236:

> "Repeating someone else's libellous statement is just as bad as making the statement directly."

Adopting the analogy of rules for admitting hearsay evidence, the effect of repeating the allegation is to make the article a report *of the truth of* the defamatory material as opposed to its being a report only of *the fact* that it was said. It will depend on the context whether the material is published to report the fact that it was said or to report what was said as a fact. That point of characterisation of the material is enough to doom this part of the appeal. Whether or not it could ever give rise to *Reynolds* privilege is, of course, a different question altogether and I deal with that later.

51. A great deal of the argument before us was devoted to the inter-relation between the single meaning found for the book and the question of adoption/neutrality. It will be recalled that the judge rejected Miss Page's argument that because the book bore the meaning of cogent grounds to suspect corruption (as opposed to meaning that he *was guilty* (the judge's emphasis) of corruption), it must follow that McLagan had not adopted the allegations as being true. He found that although the imputation might not have amounted to an unequivocal adoption of corruption, it was the partial adoption of a serious charge.

52. It was common ground between the parties, relying on *Galloway v Telegraph Group Ltd* [2006] EWCA Civ 17, [2006] E.M.L.R. 221, that it is appropriate to start with the objective meaning of the publication. One must, however, see that in the context of that case. There the court posed the question whether the statements in the Baghdad documents were adopted and embellished and in answering that question the Court of Appeal considered it important to form a view as to whether the judge's conclusions about the meaning of what was published were correct. The enquiry was whether the "sting" of the coverage was not simply that Mr Galloway was obtaining money from Saddam's regime but that he was doing so for the purposes not only of political campaigning (or use in the Mariam Appeal) but of lining his own pockets so that the coverage imputed venality and greed. The court's conclusion was:

> "58. … It seems to us that the judge was right to hold that the headlines and articles complained of went further than simply stating that Mr Galloway was taking money from the oil-for-food programme for his political and charitable purposes but meant that he was taking money for personal gain and that that allegation was seriously defamatory of Mr Galloway. …
>
> 59. It appears to us that the newspaper was not merely reporting what the Baghdad documents said but that, as the judge held, it both adopted and embellished them. It was alleging that Mr Galloway took money from the Iraqi oil-for-food programme for personal gain. That was not a mere repeat of the documents, which in our view did not, or did not clearly, make such an allegation. We agree with the judge that, although there were some references to allegations, the thrust of the coverage was that *The Daily Telegraph* was saying that Mr Galloway took money to line his own pockets. In all the circumstances we answer the question whether the newspaper adopted and embellished the statements in the Baghdad documents in the affirmative."

This translates into a finding that the *Daily Telegraph* was not simply repeating and reporting the information recovered from Baghdad but adding further information which did not appear in those documents. The essential comparison was between the information contained in the source documents and the information contained in the newspaper report. Of course it is correct that one can only decide a question of adoption by comparing the source material with the way in which it was imparted but meaning the technical sense of the single objective meaning of the publication is hardly at the heart of that comparison.

53. Thus in my judgment it is not particularly helpful to attempt to resolve the adoption/neutrality question by reference to the rules relating to the single objective meaning of the defamatory publication. It presents too many difficulties. If any comparison is properly to be made, then like must be compared with like, the meaning of the book with the meaning of the source material. By his judgment on meaning given in October 2005 the judge had established the single objective meaning of the pages and pages of book, but to ascertain a single meaning of the copious source material revealed in the investigation would be burdensome if not impossible given the range of information available to McLagan in writing the story. It is not a task which should be undertaken.

54. In any event, meaning (in the sense of the single objective meaning) cannot determine whether the allegations have been adopted. It may well be that meaning can be affected by adoption, but not the other way round. If J, the journalist, simply reports that S, the source, says that C, the claimant, is corrupt, then the objective meaning of the source allegation and the report is the same, guilt. However, the fact that in so far as J simply repeated the allegation and, to the extent that he did may be said to have adopted it, that cannot determine the real question whether he had made the allegation his own. If, for example, J adds to his report, "and I agree", then the meaning remains the same, but adoption is clear from the added words. So meaning alone has not determined the question of adoption. What if J adds to his report, "X says C is not guilty, Y says he does not know and Z says it might be true"? Here the objective meaning of S's statement is at *Chase* level 1 but J's report is probably, say, at *Chase* level 2. But that difference cannot determine whether J has adopted S's report. As a matter of textual analysis, J was maintaining a position of neutrality and did not adopt S's words as his own. If J reports that S says C is corrupt and adds, "so there are reasonable grounds to suspect him" the meanings are different but one can find this time, again as a matter of textual analysis, at least the partial adoption of the allegation. One is not, however, driven to that conclusion by the difference in meaning but by the language used in making the report.

55. My view is, therefore, that one should not get embroiled in meaning to answer the question of whether the journalist has adopted the allegations so as to make them his own. I draw support for this from the opinion of Lord Nicholls in *Bonnick v Morris* [2002] UKPC 30, [2003] 1 AC 300. Although this is an opinion of the Privy Council, it seems to me to be more than persuasive given that it was written by Lord Nicholls with other members of the Board including Lords Hoffman, Hope and Scott, all of whom later sat in *Jameel v Wall Street Journal Europe SPRL (No.3)* [2006] UKHL 44; [2007] 1 AC 359. Reference was made to it in *Jameel* without dissent, see the mentions by Lord Bingham (32), Lord Hoffmann (53 and 56) and Lord Scott (136). *Bonnick* is more relevant to *Reynolds* privilege in general, but paragraphs 20 to 22 are apposite here:

> "20. … Language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration. Should the law take this into account when applying the objective standard of responsible journalism? Or

> should the law simply apply the objective standard of responsible journalism to the single meaning the law attributes to the offending words, regardless of how reasonable it would be for a journalist or editor to read the words in a different, non-defamatory sense?
>
> 21. At first sight there might seem to be some legal logic in applying the latter approach. The "single meaning" rule adopted in the law of defamation is in one sense highly artificial, given the range of meanings the impugned words sometimes bear: see the familiar exposition by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171-172. The law attributes to the words only one meaning, although different readers are likely to read the words in different senses. In that respect the rule is artificial. Nevertheless given the ambiguity of language, the rule does represent a fair and workable method for deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reasonable reader would give the words is unexceptional.
>
> 22. At first sight it might seem appropriate to apply the same principle when considering whether *Reynolds* privilege affords a defence. This might appear to have the merit of consistency. But that would be to apply the "single meaning" principle for a purpose for which it was not designed and for which it is not suitable. It is one matter to apply this principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct."

56. Those objections apply with equal force here. The single meaning principle is highly artificial and should not be imported to decide the quite different question of whether or not the allegations had been adopted. The issue is whether or not, looking at the article as a whole, the author made the allegations his own. This question is intimately bound up with other facets or other ways of looking at the same fundamental question in the same enquiry. Did he make the allegations his own by espousing or concurring in the charges in the source material or was it a piece of neutral, disinterested, impartial reporting? Was it a full, fair and accurate report or was it embellished or distorted? Has the author engaged in comment, description or elaboration of his own, as opposed to permissibly adding colour to the published account? Having regard to material additions to and omissions from the source material, can the resultant piece of journalism still fairly be said simply to be a report of the source material or has the author taken it over and transformed it? These questions which the ordinary reader, not one with particular knowledge, still less the trained lawyer, must answer. If one can treat them in that common sense way, as "jury questions" if you like to demystify them, then one is able to avoid the

artificiality of the single meaning rule and the true elements of the reportage defence will be addressed.

57. Here I am in no doubt at all that an ordinary reader would appreciate at once that McLagan was not simply reporting published material but mixing that material with other information his enquiries had revealed so as to write as the product of his own considerable researches an inside story of corruption in the Met. This was never a case of reportage as the defence must now be understood and so I turn to the real question of whether or not it was a work of responsible journalism.

Responsible journalism

The judge's findings in outline

58. He said that it would by no means necessarily follow from a rejection of McLagan's claim that the book constituted a balanced account that his claim to privilege based on the responsible journalism had to fail.

> "119. A publication does not have to be balanced in order to qualify as responsible journalism."

He directed himself that:

> "120. … "Balanced" in this context must mean balanced in relation to Charman and the allegations levelled against him."

He felt that McLagan's own view that Charman was "probably guilty of the alleged corruption "subliminally" affected the way in which he presented his account to the reader. McLagan was endeavouring to "steer a middle course". He failed because he did not mention "certain noteworthy aspects of the Brennan story". So the judge concluded:

> "125. Finally, in connection with the question of balance, I am bound to say that McLagan is in my view open to criticism for the manner in which he reported in *Bent Coppers* the pre-trial hearings in Brennan's criminal case and the trial which followed. … it is my conclusion that McLagan did not achieve the balanced approach which he set himself."

59. Turning from "balance" to "responsible journalism" the judge held:

> "130. … a responsible journalist should evaluate with some care the material on which that imputation [that there were cogent grounds for suspecting a police officer to be guilty of corruption] is based. Such a journalist should in my view subject the material to a degree of critical analysis.
>
> Although there were passages where the reader was told that Redgrave and Charman strenuously denied all allegations of wrongdoing, there were no references in the book to the discrediting of officer Smith.

> "137. In my opinion McLagan is open to criticism for failing to inform his readers that, far from being "reliable", Smith was profoundly tainted by his answers during cross-examination in the Phillips trial [when he refused to answer questions about his relationship with and his 'moonlighting' for Brennan]."

60. As for his reporting the account of Brennan's trial the judge said:

> "142. I bear in mind that, whilst he is a highly experienced journalist with considerable experience of court reporting, McLagan is not a lawyer and is therefore not to be taken to be familiar with the practices and procedures of criminal trials."

Nevertheless the judge found that he was in error in saying that it was an unusual move for the enquiry into Wang's allegations of theft to have been taken over by SERCS.

61. As for the reported "new important disclosures of evidence" by Gaspar that Redgrave had received unexplained income and Charman had started an unusual spending pattern in October 1993 coinciding with the time Brennan had claimed to have made the corrupt payments, the judge said:

> "145. The criticism which I make of this passage is that it treats matters which McLagan ought to have realised were of marginal relevance and which he knew had taken up no more than a few minutes of court time as if they formed a major part of the hearing. The references to "unexplained income" and "an unusual spending pattern" are damning. No balancing reference is made to other evidence given at the pre-trial hearing which tended to exonerate Charman."

62. As for the passage in the book:

> "Although Redgrave and Charman's names were continually mentioned throughout the trial, the two suspended officers did not appear at the Old Bailey",

the judge said:

> "147. As McLagan ought to have appreciated, there was in fact no possibility of Charman or Redgrave giving evidence at Brennan's trial. The issue for the jury was whether Brennan had stolen money from the Wangs. It was no part of the prosecution case to say that Brennan's allegations of corruption against Charman and Redgrave were true. Besides, those allegations had been withdrawn. I do not think it is accurate to say that the names of Redgrave and Charman were "continually mentioned throughout the trial". They were referred to on two days after the trial had been running (with interruptions) for a month."

63. As for McLagan's account of Brennan's cross-examination including prosecuting counsel's "damning" words chosen "with care", namely, "I am not going to bring in criminals to give evidence", the judge said:

> "150. … McLagan's quotations are accurate. There nevertheless appears to me to be considerable force in the criticism made by Mr Tomlinson that McLagan should have made clear that the alleged criminality of Charman and Redgrave had no bearing on the issues which the jury had to decide. I accept that at the end of the passage which I have quoted McLagan informs readers that in his closing speech Trollope told the jury that there was no evidence the officers had been paid money. McLagan does not mention the fact that Latham accepted that there was no direct evidence that corrupt payments were made to the officers. A more serious omission is the failure to refer to the judge's advice to the jury in his summing up to ignore suggestions made that any money was taken by Charman or Redgrave to assist Brennan. He told the jury that they ought to put that out of their minds. In the context of the trial as a whole it is difficult to understand how, as McLagan claims, for much of the time it was as if Charman and Redgrave were in the dock with Brennan."

64. The judge concluded:

> "151. I have taken some time with the account in *Bent Coppers* of the Brennan trial because it marks the culmination of McLagan's account of one of the major characters in the book. One of the questions which I have to decide is whether this is a fair account of what took place at Brennan's trial. For the reasons which I have given, I have concluded that it is not."

65. The judge then returned to the ten matters to be taken into account when deciding the issue of responsible journalism as identified by Lord Nicholls in *Reynolds* and I shall comment on this in due time. The judge's conclusion was that the defendants had not acted responsibly in communicating the information contained in *Bent Coppers* about Charman to the public.

My commentary on responsible journalism

An analysis of recent developments in the law

66. When setting out his commendably careful and thorough statement of legal principle (see paragraph 43 above), Gray J. did not have the advantage of their Lordships' opinions in *Jameel v Wall Street Journal Europe SPRL (No. 3)* [2006] UKHL 44, [2007] E.M.L.R. 14. *Jameel* has made an important contribution to this developing jurisprudence for it reiterates the *Reynolds* principles but also clarifies their application. Had Gray J. had the benefit of it, he would, I do not doubt, have approach his task differently. The salient features of *Jameel*, some of which are of significance in this appeal, are these.

(1) Whether or not the matter was properly in the public interest and whether or not the standard of responsible journalism has been met has to be considered in the context of the article as whole. I see this from these passages. Lord Hoffmann said:

> "48. … I think that one should consider the article as a whole and not isolate the defamatory statement.
>
> …
>
> 51. If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article."

Lord Hope said:

> "107. … Context is important too when the standard [of responsible journalism] is applied to each piece of information that the journalist wishes to publish. The question whether it has been satisfied will be assessed by looking to the story as a whole, not to each piece of information separated from its context.
>
> 108. … I do not believe that [Lord Nicholls] was intending … to indicate that the public's right to know each piece of information in any given article should be assessed, piece by piece, without regard to the whole context. On the contrary, each piece of information will take its colour and its informative value from the context in which it is placed. A piece of information that, taken on its own, would be gratuitous can change its character entirely when its place in the article read as a whole is evaluated. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public."

(2) Taking steps to verify the information is given added emphasis. Lord Bingham said:

> "32. … The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency (238), "[n]o public interest is served by publishing or communicating misinformation". But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication."

Baroness Hale said:

> "149. … the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. But one would normally expect that the source or sources were ones which the publisher had good reason to think reliable, that the publisher himself believed the information to be true, and that he had done what he could to check it. We are frequently told that "fact checking" has gone out of fashion with the media. But a publisher who is to avoid the risk of liability if the information cannot later be proved to be true would be well-advised to do it. Part of this is, of course, taking reasonable steps to contact the people named for their comments."

(3) If the public interest is engaged, the report is privileged if it satisfies the test of responsible journalism. The House had, in *Reynolds*, refused to follow the Australian and South African approach in considering the reasonableness of the conduct in publishing the information: see page 199. The House preferred the "elasticity" of a test of responsible journalism. Lord Hoffmann expressed himself in these terms:

> "53. If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible *and fair*" [emphasis added by me]. "As Lord Nicholls said in *Bonnick v Morris* [2003] 1 A.C. 300 at 309:
>
> > "Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which *a fair balance*" [again the emphasis is added] "is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege."
>
> 54. Lord Nicholls was speaking in the context of a publication in a newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information. But I shall for convenience continue to describe this as "responsible journalism"."

This may seem to add the element of fairness to the test. It can, however, be said that fairness is clearly implicit in what Lord Nicholls has always been saying. Lord Steyn in *Reynolds* at p. 213 was content to accept as the governing principle that "the

occasion must be one in respect of which it can *fairly*" [my emphasis] "be said that it is in the public interest that information should be published."

(4) As for Lord Nicholl's ten factors to be taken into account, Lord Bingham said:

> "33. Lord Nicholls (at 205) listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege."

Lord Hoffmann viewed them in this way:

> "56. In *Reynolds*, Lord Nicholls gave his well-known non-exhaustive list of ten matters which should in suitable cases be taken into account. They are not tests which the publication has to pass. In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is how [the judge] treated them. The defence, he said, can be sustained only after "the closest and most rigorous scrutiny" by the application of what he called "Lord Nicholls' ten tests". But that, in my opinion, is not what Lord Nicholls meant. As he said in *Bonnick* (at 309) the standard of conduct required of the newspaper must be applied in a practical and flexible manner. It must have regard to practical realities."

(5) In assessing the responsibility of the article, weight must be given to the professional judgment of the journalist. This is a very important point to emphasise in our appeal. Lord Bingham said:

> "33. … Lord Nicholls recognised (at 202-203), inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner."

Lord Hoffmann expressed it thus:

> "51. … But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have

> been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting."

In the opinion of Lord Hope:

> "108. The standard of responsible journalism respects the fact that it is the article as a whole that the journalist presents to the public. Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor.
>
> 109. … The cardinal principle that must be observed is that any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual. It must not be excessive or disproportionate. Mr Robertson's test which introduces the criterion of "high quality journalism", especially if it is applied to each particular piece of information that is published, would contravene that principle."

In Lord Scott's opinion:

> "140. … In deciding whether or not the criterion of responsible journalism had been met, the court should apply the standard of conduct expected of the journalist "in a *practical* and flexible manner" (emphasis added)."

(6) The test is not intended to present an onerous obstacle to the media in the discharge of their function. This is another important point to note. As Lord Hope said:

> "105. … common law does not seek to set a higher standard than that of responsible journalism.
>
> …
>
> 107. Any test which seeks to set a general standard which must be achieved by all journalists is bound to involve a degree of uncertainty, as Lord Nicholls recognised in *Reynolds* at 202D-E. But, like him, I think that the extent of this uncertainty ought not to be exaggerated. "Responsible journalism" is a standard which everyone in the media and elsewhere can

> recognise. The duty-interest test based on the public's right to know, which lies at the heart of the matter, maintains the essential element of objectivity. Was there an interest or duty to publish the information and a corresponding interest or duty to receive it, having regard to its particular subject matter? This provides the context within which, in any given case, the issue will be assessed."

(7) *Reynolds* must been seen as the House's attempt "to redress the balance [between Article 8 and Article 10 of the ECHR] in favour of greater freedom for the Press to publish stories of genuine public interest", per Lord Hoffmann, (38). Lord Bingham's criticism of the Court of Appeal was that its "ruling subverts the liberalising intention of the *Reynolds* decision", (35), concluding that, "It might be thought that this was the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect." Baroness Hale of Richmond was of the view that, "We need more such serious journalism in this country and our defamation law should encourage rather than discourage it", (150). Lord Hoffmann, (38), was concerned "that *Reynolds* has had little impact upon the way the law is applied at first instance." These are sombre words of warning. I sense at once which way the wind from the House of Lords is blowing and I must trim my sails accordingly.

67. Turning away from *Jameel*, it is necessary to consider *Bonnick* in the context of responsible journalism. Having been cited without any disapproval in *Jameel* and it seems perfectly plain to me that we should treat it as not merely persuasive but as authoritative.

68. One must appreciate the facts in that case. An article was published giving an account of litigation, referring to unusual aspects of the contracts there involved and making allegations of irregularities. Mr Bonnick was the managing director of the company concerned and he defended his position to the *Sunday Gleaner* emphasising that the contracts had properly been put out to tender, evaluated and awarded according to the rules and that the auditors were present on all occasions. He indicated he would sue anyone who suggested otherwise. Despite being told by the plaintiff that there had been no connection between the termination of his employment and the contracts, the journalist had made no enquiries about the reason for his dismissal and made no reference in the article to his explanation for it. The article then stated that Mr Bonnick's services as managing director were terminated shortly after the second contract was agreed. He asserted several defamatory meanings, namely, that his services had been terminated because of his impropriety, that he caused the company to enter into the contract irregularly and in breach of normal procedures and that he was insane, stupid or incompetent. The trial judge found that the words would be understood by the ordinary reader to mean that Mr Bonnick was dismissed as a result of the irregularities. In the Court of Appeal one of their Lordships held that the article was not defamatory at all. The second judge of appeal agreed with the trial judge on the defamatory meaning and the third judge expressed no view about it. The Privy Council upheld the trial judge. I have already cited paragraphs 20 to 22 at paragraph 55 above. Dealing with responsible journalism the Privy Council advised:

> "24. To be meaningful this standard of conduct must be applied in a practical and flexible manner. The court must have regard to practical realities. Their Lordships consider it would be to introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the "single meaning" of the words. Rather, a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views. Their Lordships note that in the present case the selfsame question has resulted in a division of view between members of the Court of Appeal. If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.
>
> 25. This should not be pressed too far. Where questions of defamation may arise ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is "willing to wound, and yet afraid to strike". In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question. Questions of degree arise here. The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances.
>
> …
>
> 27. … The defamatory meaning of the words used was not so glaringly obvious that any responsible journalist would be bound to realise this was how the words would be understood by ordinary, reasonable readers. The failure to make further enquiry, and the omission of Mr Bonnick's explanation of his dismissal, although unfortunate, have to be evaluated, and their compatibility with responsible journalism considered, against this background."

69. I have looked again at the Strasbourg jurisprudence. The consistent trend is very supportive of the right of free expression. It is necessary only to cast an eye over the Strasbourg decisions since *Jameel* was argued. *White v Sweden* [2007] EMLR 1 concerned the publication of a series of articles in which the murder of Olaf Palme, the Swedish Prime Minister, was ascribed to White based mainly on reports made by others, in particular a former senior official of the South African security police. In

striking the balance, the court was satisfied that the public interest in publishing the information in question outweighed the applicant's right to protection of his reputation. In *Verlagsgruppe News GmbH v Austria* (Application Number 76918/01, 14th December 2006), the impugned statements had already been widely disseminated in another newspaper and as the court said, the applicant company quoted this letter "in the context of its reportage about the then pending defamation proceedings". The court recalled that:

> "33. … a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press's role of providing information on current events, opinions and ideas (see *Thoma v Luxembourg* …). The court finds that in the present case the article remained within the limits of acceptable comment on court proceedings."

I remind myself of the oft-cited passage in *Thoma v Luxembourg* (2003) 36 EHRR 21 at [45]:

> "The press plays an essential part in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". Article 10 protects not only the substance of the ideas and information expressed *but also the form in which they are conveyed* [emphasis added]."

To give added emphasis to that point, which is point (6) in my analysis of *Jameel*, I can also refer to *Selisto v Finland* (2006) 42 EHRR 8 where the court said:

> "59. … The methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the court, any more than it is for the national courts, to substitute its views for those of the press as to what techniques of reporting should be reported by a journalist … Reading the articles as a whole, the court cannot find that this statement was excessive or misleading."

Commentary on responsible journalism

70. Let me first dispose of the *Bonnick* point about which there was some argument. The judge had said:

> "130. It seems to me that where, as I have found, the imputation conveyed to readers in relation to Charman was that

> cogent grounds exist for suspecting that in his capacity as a police officer he had been guilty of corruption, a responsible journalist should evaluate with some care the material on which that imputation is based. Such a journalist should in my view subject the material to a degree of critical analysis."

I agree he should take proper care: that is the essence of responsible journalism. The *Bonnick* point is, however, that:

> "the journalist should not be penalised for making a wrong decision on meaning on which reasonable people might take different views." [24].

It was conceded in paragraph 12.2 of Charman's skeleton argument that:

> "Readers would have understood the words to bear a range of meanings from "grounds to investigate" to "guilt" – all of which are defamatory."

This was, therefore, not a case where:

> "The defamatory meaning of the words used was not so glaringly obvious that any responsible journalist would be bound to realise this was how the words would be understood by ordinary, reasonable readers," [27].

Consequently McLagan's assertion that he did not intend to convey the imputation the words were held to bear was a relevant fact to take into account. Since it is a question of degree [25], it seems to me that his belief must be of some weight in assessing the responsibility of his conduct overall even if it cannot exculpate him given the seriousness of the imputation and the fact that:

> "a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question," [25].

71. I turn, therefore, to the crucial question: did McLagan act with proper professional responsibility? As I have pointed out the judge did not have the benefit of *Jameel*. He would not have appreciated how far the courts have gone in releasing the shackles on the freedom of expression afforded to the media in matters of public interest. "Serious journalism" is to be encouraged, said Baroness Hale.

72. Secondly, and importantly, the emphasis is on considering the article as a whole as opposed to the spotlight focussing on isolated individual pieces of information. The criticism that can, therefore, be made of the judgment is that whereas the judge set out to consider whether McLagan struck a fair balance "in relation to Charman and the allegations levelled against him", he did not consider the Charman story in the context of the whole story of the book about *Bent Coppers*. Charman was one story within the larger story of corruption or alleged corruption within the Met. Even within the confines of the Charman story, the reputation of others was affected by the way that, in mounting his defence, Charman did not flinch from accusing the investigating

officers of corrupt practice directed against him and Redgrave. In failing to look at the bigger picture, the judge erred.

73. Looking more closely at the judge's conclusions on balance, he held that "a balanced approach required McLagan to mention certain noteworthy aspects of the Brennan story", among others, "the very real reasons for doubting Brennan's credibility". This does not seem to me to be a fair criticism. The book described Brennan as one "given to lies and bluster" and, as the judge himself found in his meaning judgment:

> "Readers would in my view hesitate before accepting the truth of an allegation of corruption on the part of a police officer emanating from such a man."

74. In arriving at a judgment on balance the judge ought to have regard not only to what was said, but also to what was not said. I consider that the judge erred in not weighing the several matters which McLagan deliberately omitted to mention in the book in his pursuit of a fair balance such as, for example, the extraordinary fact that Charman and Redgrave declined to answer any police questions about Brennan's allegations against them. Surely innocent police officers should have nothing to fear from an unfounded complaint from a common criminal? They resorted instead to persuading the press to put their side of the story and Mr McKinlay M.P. to make a Parliamentary statement about the predicament in which they said they found themselves. As a further example of the omissions of adverse information, there was no mention of Charman's alleged fabrication of informant logs made in relation to aspects of Operation Nightshade.

75. This analysis highlights another difficulty for the judge. *Jameel* emphasises how important it is that weight be given to the professional judgment of the journalist. Where opinions may reasonably differ over the details which are needed to convey the general message, then deference has to be paid to the editorial decisions of the author, journalist or editor. True it may be that the journalist has to subject the material, as the judge held, to "critical analysis". But it is *his* assessment of that evaluation which is important, not the judge's own evaluation of the material conducted with the benefit of hindsight and with the sharp eye of a trained lawyer. I do not see in this judgment any sufficient allowance made for McLagan's honesty, his expertise in the subject, his careful research, and his painstaking evaluation of a mass of material. Bringing the strands of criticism together,

> "Weight will be given to the judgment of the editor in making the assessment, as it is the article as a whole that provides the context within which he performs his function as editor," per Lord Hope (108),

and Gray J. erred in not taking that into account or sufficiently into account.

76. To move from the general to the particular. The judge was critical of McLagan's failure to inform his readers that far from being "reliable" Smith was profoundly tainted by his answers during cross-examination in the Phillips trial. I do not agree. To have explored in depth whether or not Smith was "moonlighting" for Brennan would not dissolve the suspicion that he was and that he was doing so corruptly. That it was possible that Brennan had corrupted Smith would not make it *less* likely that he

had also corrupted Charman. In my view blackening Smith's reputation would have added weight to the case against Charman.

77. As for the account of Brennan's trial the judge's first criticism related to the fact that the inquiry into Wang's allegations of theft had been taken over by SERCS but the judge considered that there was "nothing unusual or sinister about it". That criticism ignores the fact that evidence was given by Gaspar that the transfer was "curious in itself". Deputy Assistant Commissioner Roy Clark also gave evidence describing the transfer as "something that made me suspicious" and as "strange because the regional crime squad do not reactively investigate crime. They work entirely proactively."

78. The judge then commented on the fact that references to "unexplained income" and "an unusual spending pattern" for Charman were damning and observed that no balancing reference was made to other evidence which tended to exonerate Charman. This was said in the context of McLagan being criticised for treating matters of marginal relevance as if they formed a major part of the hearing. These were, however, certainly not matters of marginal relevance. They were central to the case against Charman and were matters put in the public domain in open court. McLagan did take steps to verify this "damning evidence" because he asked for and was allowed to read the financial report on which the cross-examination was based.

79. The judge's next criticism in paragraph 147 of the judgment was that McLagan ought to have appreciated that there was in fact no possibility of Charman or Redgrave giving evidence at Brennan's trial. I disagree. If Brennan was to stick to his story that he was not guilty of theft and that all was part of the operation in which he was acting as the informer, then, if that had been true, one would have expected Charman and Redgrave to support him.

80. Finally the judge accepted the criticism made by Mr Tomlinson that McLagan should have made clear that the alleged criminality of Charman and Redgrave had no bearing on the issues the jury in the Brennan trial had to decide. The judge drew attention to McLagan's failure to mention that Latham had accepted there was no direct evidence that corrupt payments had been made to the officers. He (Gray J.) considered that a more serious omission was the failure to refer to the trial judge's advice to the jury in his summing up to ignore suggestions that any money was taken by Charman or Redgrave to assist Brennan. So McLagan was criticised for observing that for much of the time it was as if Charman and Redgrave were in the dock with Brennan.

81. As it appears to me, the issue for the jury was whether or not the relationship between Brennan and the two officers was a proper one or an improper one. It was Brennan who made it an issue because it was his defence to the charge of theft that he was acting innocently with the officers' full knowledge and approval. If it seemed as if they were on trial and in the dock with him, they were in the same boat as Brennan because he put them there. He so allied his defence with their honesty that they three of them were bound to stand or fall together. The prosecution challenged Brennan's veracity through rigorous, even vigorous, cross-examination as the prosecution was entitled and in the circumstances bound to do. It was perfectly proper in a cross-examination as to credit to suggest money was paid to Redgrave and Charman without being able to place evidence before the jury to support the allegation. The alleged criminality of the officers in accepting corrupt payments had the most material bearing on the issue before the jury because if the jury disbelieved Brennan and his

story of being the innocent informer, then his defence was in ruins. The jury could have decided that whether or not there was direct evidence of any corrupt payments having been made. The role of Charman and Redgrave remained a pivotal part of the defence and McLagan was in my judgement entitled to concentrate on them.

82. I am reinforced in these conclusions having since read in draft a copy of the judgment of Hooper L.J. I agree with his close analysis of the Brennan trial and the way a responsible journalist could report it.

Conclusions

83. Although I have considerable sympathy for him since he did not have the benefit of *Jameel* at the time he wrote his judgment, I am satisfied that the judge erred in his approach. I am, moreover, satisfied that I have enough material before me to deal with this defence of *Reynolds* privilege. I have already expressed views about the professional responsibility of McLagan's conduct and I now turn to the ten matters identified by Lord Nicholls in *Reynolds*.

(1) "The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true."

Even though the passages bear the meaning of cogent grounds for suspicion rather than guilt of corruption, the charges are nonetheless, as the judge held, very serious for senior serving officers of the Met.

(2) "The nature of the information, and the extent to which the subject-matter is a matter of public concern."

The public interest in this story has always been common ground, and rightly so. The police are here to protect us and we demand and expect that they will carry out their duties without corruption and so, where there is corruption, it must be exposed and where there is a justified suspicion of corruption it deserves to be discussed.

(3) "The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories."

Much of the story comes, of course, from Brennan as revealed in the Gaspar tapes. Brennan was a flawed character as was made obvious. McLagan did not, however, rest on his account alone, he made great efforts to tap his police sources for all the light they could shed on the problem. This was, after all, the story of the Ghost Squad.

(4) "The steps taken to verify the information."

In his judgment the judge said that McLagan did not claim to have verified the information about Charman and that there were no means whereby he could have done so. He held,

> "In my view McLagan ought to have carried out an evaluation and analysis of the material available to him."

Indeed he ought to have done. But in my judgment it is plain that he did so. True it is he could not verify the truth of Brennan's allegations because only three people were involved in the corruption and the payment of £50,000 by Brennan to the officers. It was one man's word against another's. What McLagan did do, and what the judge gives him no or too little credit for doing was the further research he carried out, the interviews he held with the investigating officers and the judgment he made as to their credibility and the inferences which could properly be drawn from the material as a whole. It is not easy to see what more he could have done.

(5) "The status of the information. The allegation may have already been the subject of an investigation which commands respect."

"The status of the information" was no doubt introduced in *Reynolds* because of the importance that it had in the Court of Appeal in that case. At p. 167, the Court of Appeal said:

> "We make reference to "status" bearing in mind the use of that expression in some of the more recent authorities to denote the degree to which information on a matter of public concern may (because of its character and known provenance) command respect."

To the extent that matters were investigated at the Central Criminal Court, as they were, they must command respect. The judge held it was "unwise on McLagan's part to have placed reliance on the opinions expressed privately to him by individual officers such as Coles", but these were the investigating officers and their opinions cannot be discounted even making allowance for the counter-attack launched against them by Charman. The status of their information is certainly high enough to warrant writing a story which gives rise to no more serious an allegation than that there were cogent grounds to suspect Charman.

(6) "The urgency of the matter. News is often a perishable commodity."

This factor does not arise in this case as the judge correctly held. I see no reason at all for confining responsible journalism to newspapers and magazines. It must be extended to the authors and publishers of books. Mr Tomlinson did not attempt to suggest otherwise. As Lord Hoffmann said in *Jameel*, [54], the *Reynolds* defence is available "to anyone who publishes material of public interest *in any medium*", the emphasis being added by me. I agree, however, with Mr Tomlinson's submission that because the authors and publishers are not under the same pressure of time before the presses begin to roll, greater care will be expected of them to ensure they act properly.

(7) "Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary."

The judge accepted that approaches to obtain Charman's side of the story were rebuffed. The judge concluded that McLagan was entitled to assume that Charman would have remained uncooperative if allegations to be published in the book had been put directly to him, rather than through his brother-in-law, Millar who was co-ordinating the Charman campaign to publicise their side of the story.

(8) "Whether the article contained the gist of the claimant's side of the story."

The judge accepted that the book did contain Charman and Redgrave's side of the story. Curiously the judge appears to criticise McLagan for not having sought comment as to the "positive case" which was going to be made against him in the book. This seems inconsistent with his earlier correct finding that Charman would have remained uncooperative if he had been approached.

(9) "The tone of the [book] and [author] can raise queries or call for an investigation. It need not adopt allegations as statements of fact."

The judge relied on his earlier finding of partial adoption of the Brennan allegations as true but that does not really deal with the tone of the book. In my judgment the tone of this book is exactly what one would expect of an objective investigative journalist. The "inside story" of Charman and Redgrave was essentially factual in context and unsensational in tone. Even the "damning" words of prosecuting counsel Richard Latham Q.C. chosen "with care" do not more than add permissible colour to the book. Reading it as a whole the author expresses no personal judgment but leaves it to the reader to form his or her own impression of the two officers concerned. That seems to me to be a hallmark of responsible journalism.

(10) "The circumstances of the publication, including its timing."

There is nothing in this point.

84. What seems to me to be lacking after the judge's analysis of those ten factors is some assessment of whether a fair balance was being held between the freedom of expression and the reputations of the individuals, bearing in mind that the court should suffer no greater limitation of press freedom than is necessary to hold that balance. Lord Nicholls concluded:

> "The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know … Any lingering doubts should be resolved in favour of publication."

This theme was emphasised in *Jameel* as I pointed out in paragraphs 66(6) and (7). Gray J. would not have been aware of their Lordships' rebuke of the lower courts for their failure to appreciate how "liberalising" an opinion *Reynolds* was intended to be. Given that Charman and Redgrave had themselves put the attack on their character in the public domain by their press announcements and by the statement made on their behalf in Parliament, the balance of fairness falls in my judgment heavily in favour of the case against them being put to the public.

85. Having given the matter most careful consideration, I am totally satisfied that this was a piece of responsible journalism. As Lord Bingham said in *Jameel* (35):

> "It might be thought that this was the sort of neutral investigative journalism which *Reynolds* privilege exists to protect."

Statutory privilege

86. In the light of the above conclusions, it is unnecessary to go further and consider this defence. At its heart lies the question of whether the book as whole gives a substantially fair and accurate account of the court proceedings and the Parliamentary debate. It will be noted that fairness and accuracy play their part in considering reportage and, especially as emphasised by Lord Hoffmann, in the general question of responsible journalism. Fairness is the common thread that links all three aspects of privilege in this context. The question of fairness should be judged alike in each instance. I am satisfied that the book gives a fair portrayal of the trial and to that extent this defence of privilege should also prevail.

The result

87. The appeal must be allowed. The passages in *Bent Coppers* of which Charman makes complaint are protected by qualified privilege.

Lord Justice Sedley:

88. In agreement with the other members of the court, I consider that this appeal should be allowed. Like them, I do not think the case can possibly rank as a reportage case. Apart from anything else the book is much too wide-ranging to come within a class designed only to protect the factual reporting in the public interest of a dispute containing defamatory matter. I will return briefly to reportage below. But *Bent Coppers* is in my judgment an exercise of entirely responsible journalism and as such is entitled, to the protection of the law against what would otherwise be the consequences of its defamatory imputation against the claimant.

89. Hooper LJ in his judgment explains why the author's carefully documented account of the complicated and murky events which are the subject matter of *Bent Coppers* could legitimately throw up the suggestion that there were cogent grounds to suspect that the claimant had colluded for reward with a professional criminal's fraud. It may well be that no explanation of this detail and clarity was proffered to Gray J; but it may equally be that Gray J's critique of the author's journalistic balance would still have driven him to the same conclusion.

90. In my judgment, however, an otherwise sound defence of responsible journalism is not, or at least not necessarily, undermined by a presentation which could arguably have been less unfavourable to the claimant than it was. Such an approach risks embarking upon the kind of retrospective editorial function which is not the court's rôle. A point can of course come at which, without necessarily being able to be branded irresponsible, a defamatory account loses its balance and with it the protection of qualified privilege; but for the reasons given by both Ward LJ and Hooper LJ, the grounds on which the judge considered this point to have been reached in the present case do not stand up to scrutiny once the true character and import of the Brennan trial is appreciated. Balance, it should be appreciated, does not mean giving equal weight or credence to intrinsically unequal things – for example a telling accusation and an evasive reply. Such balance may be a sufficient answer for the purposes of a responsible journalism defence, but it is not a necessary one. A more selective or evaluative account is quite capable of staying within the bounds of responsible journalism.

91. The reportage doctrine developed in *Al Fagih* cannot logically be confined to the reporting of reciprocal allegations. A unilateral libel, reported disinterestedly, will be equally protected. Although no reference was made in the case to the classic decision of the Second Circuit Court of Appeals in *Edwards v National Audubon Society Inc* 556 F. 2d 113 (1977), *Al Fagih* reflects this now classic limb of First Amendment jurisprudence. But the present case bears no substantive resemblance to either of those cases, nor to the case recently decided by this court of *Roberts v Gable*. These were all cases of a self-contained account of a dispute, libellous in its content but reported without adoption or more than marginal embellishment. It is the very dependence of a reportage defence on the bald retailing of libels which makes it forensically problematical to fall back upon an alternative defence of responsible journalism. Pleaders may need to decide which it is to be.

Lord Justice Hooper:

92. On 9 June 2003 a book entitled Bent Coppers written by the third defendant, Graeme McLagan ["McLagan"] was published in hardback by the first defendant. Nine months later the respondent, Michael Charman ["Charman"] wrote a letter before action. In the words of the outline submissions of Miss Page QC:

> Charman made no complaint about the hardback and continued to abstain from complaint about it after he knew that a paperback was in production until the very eve of its publication when he instructed his solicitors to write a letter before action dated 22 March 2004, over 9 months after publication of the hardback and after the paperback had been printed and distributed.

93. On 1 April 2004 the paperback edition was published by the second defendant. Although in the paperback edition changes were made, those changes, we were told, are not of significance for the purposes of this appeal.

94. On 4 June 2004, the claim form in these proceedings was issued, claiming damages for libel.

95. In October 2005 the judge, Gray J, concluded, after a hearing, that the relevant passages in the hardback edition bore the defamatory meaning that:

> "there are cogent grounds to suspect that Mr Charman abused his position as a police officer by colluding with Brennan in the commission of substantial fraud by Geoffrey Brennan from whom he and Mr Redgrave received corrupt payments totalling £50,000".

96. In the judgment the subject matter of this appeal Gray J said:

> 3. The issue which I now have to decide is whether the Defendants, who are respectively the publishers and author of a book entitled *Bent Coppers*, are correct in their contention that

> the publication of the passages from that book of which the Claimant makes complaint is protected by qualified privilege. The Defendants rely on an amalgam of various species of privilege: the privilege accorded to responsible journalism (the so-called *Reynolds* privilege); the statutory privilege which protects fair and accurate reports of parliamentary and judicial proceedings, and the ancillary common law privilege which can attach to matters closely connected with reports of proceedings which enjoy statutory privilege. Unquestionably the most important of these various species of privilege for the purposes of the present case is that which is accorded to the products of responsible journalism.

97. The judge decided the issue against the defendants, now appellants. I propose to concentrate on the part of the judge's decision in which he found that the defence of qualified privilege based on responsible journalism failed. I agree with Ward LJ that the judge was right to find (in paragraph 118 of the judgment) that the defendants could not rely on the so-called defence of reportage. In my view that "defence" was doomed to failure and should never have been advanced.

98. I have to say that, in my view, far too much time was spent during the appeal on law. The law in this area is clear. Apart from referring us to a few minor alleged imperfections, Miss Page accepted that the judge had properly set out the law. Given what in my view was the hopeless reportage issue, the only realistic attack which could be made on the judge's finding was that he was wrong to have rejected the responsible journalism defence. Miss Page largely made that attack in a very detailed schedule.

99. Geoffrey Brennan ["Brennan"] was described by McLagan in his book in the following way (page 41, all references being to the hardback edition):

> He was a big, excitable man given to lies, boast and bluster ... as well as being a fairly small-time criminal he has been an informant for years, especially since the early 1990s, when he had got to know high-calibre criminals and various police officers.

100. Brennan's handlers included Charman and Det Sgt Chris Smith ["Smith"].

101. McLagan had made a substantial witness statement and then was in the witness box for four days, most of which was taken up by cross-examination. The finding was in large measure based on points made during that cross-examination. Notwithstanding that there had been extensive pleadings, many of the points made by Mr Tomlinson QC during that cross-examination had not been foreshadowed in the pleadings. In the words of Miss Page:

> The Reply, both in its original and amended versions, failed to plead or forewarn of many of the detailed points of criticism that were canvassed in a very prolonged cross-examination of McLagan that went on for three days.

102. I take the background facts about the parties from the judgment of Gray J:

> 6. The Claimant ("Charman"), is a former Detective Constable in the Metropolitan Police Force ("the Met"). He was a serving officer from 1971 until 6 May 2004. In June 1993 he was in the Flying Squad, based at Tower Bridge. He became the joint handler of an informant called Geoffrey Brennan ("Brennan"). Another officer in the Met was John Redgrave ("Redgrave") who attained the rank of Detective Inspector. Unlike Charman, Redgrave was a member of the South Eastern Regional Crime Squad ("SERCS") but he and Charman had worked together on the Brink's Mat enquiry and investigation from about 1983. Later, however, they were on different teams.
>
> 7. Charman and Redgrave were required to resign from the Met on 6 May 2004, following the finding of an internal disciplinary panel that they had acted in a manner likely to bring discredit on the reputation of the force.
>
> 8. ...
>
> 9. McLagan is a journalist of many years standing. After starting as a reporter on the *Newcastle Journal*, he moved to London and worked for the *Daily Mail* in the 1960s. In 1971 he joined BBC Radio News as a reporter, becoming Deputy Home Affairs correspondent a few years later and thereafter Home Affairs correspondent for both radio and television. Over the years he covered many major home affairs stories. In 1993 he was appointed head of a new investigations team which covered both television and radio news. He was heavily involved in reporting the Matrix Churchill trial and the subsequent Scott Inquiry.
>
> 10. From the late 1970s onwards McLagan took a special interest in the issue of police corruption. In the early 1980s he reported on the first major inquiry by an outside force into police corruption within the Metropolitan Police. He covered the progress of that inquiry and several trials which arose out of it. A particular problem within the Metropolitan Police at that time was the abuse of the system of informants. McLagan reported on this area of police corruption in a Panorama programme transmitted in 1982. He came to be recognised as the BBC's expert on police corruption. He reported on the criminal trials of several allegedly corrupt police officers. In January 1998 McLagan was the presenter for another Panorama programme about police corruption.

103. To understand the case and this appeal, it is, in my view, necessary to take a step back and concentrate on what I consider to be the more important events. We have been provided with a chronology with two columns showing the “Event (per appellants)” and the “Respondent’s comments”. I shall refer to it as the “chronology” but I shall note the respondent’s comments thereon when applicable. I understand that the trial judge did not have the benefit of the very detailed chronology with which we have been provided. If so, I find that surprising.

104. In June 1993 Charman became Brennan’s handler, taking over from Smith. In October Smith resumed as a handler of Brennan and according to the respondent both handled Brennan from that time until March 1994.

105. At the same time, in the words of Gray J:

> 24. In or about June [1993] an operation called "Nightshade" was set up. Ostensibly it had three strands: (i) drug trafficking in Venezuela; (ii) production of amphetamines in Portugal and (iii) money-laundering and/or gun-running. Brennan provided information to the police in connection with Operation Nightshade. The Defendants' case, hotly contested by Charman, is that the third element of Operation Nightshade was a fabrication by Brennan, Charman and Redgrave devised in order to conceal their own involvement in criminal activity.

106. The Home Secretary was to say in the House of Commons in March 2000 about Operation Nightshade and arms deals that:

> The Commissioner of Police of the Metropolis tells me that no such details were revealed as a result of Operation Nightshade. - [*Official Report*, 16 March 2000; Vol. 346, c. 268W.]

107. As I shall show later in my judgment, Mr McKinlay MP was a vociferous supporter in the House of Commons of Operation Nightshade's attempts to uncover arms dealing involving Sierra Leone. Mr McKinlay attributed the downfall of Redgrave and Charman to a desire on the part of the intelligence services to bring Operation Nightshade's enquiries into arms dealing to an end.

108. In November 1993 Brennan was arrested by a Kent officer, DC Inglis, for theft in September 1993 of £400,000 from an American businessman, named Sam Wang. Brennan was released on bail.

109. Brennan was subsequently convicted of that theft at the Central Criminal Court many years later in April 2001 (HH Judge Barker QC and a jury).

110. Returning to 1994, in the words of the book:

> On 14 June 1994, DCS Roger Gaspar received a dramatic phone call requiring immediate action. It led to armed police protecting a man [Brennan], moving him and his family from their home for their own safety. The caller was the head of the Flying Squad, Bill Griffiths. He said that a reliable Flying Squad officer, Detective Sergeant Chris Smith, had told him that an important police informant had been compromised. Confidential police documents detailing his activities had leaked to the major criminals on whom he was informing. His life was in danger.

111. Detective Chief Superintendent Gaspar ["Gaspar"] had, in May 1994, been given permission to create what the book describes as a "secret ghost squad" to investigate corruption within the Metropolitan Police.

112. According to the book, during the course of the conversation between Gaspar and Bill Griffiths ["Griffiths"], Griffiths had mentioned Redgrave as being involved with Brennan. According to the book, Redgrave's name was on a list of suspect corrupt officers only recently compiled.

113. Two hours after the call, Gaspar met Brennan. According to the book, Brennan told Gaspar that confidential material relating to Brennan's informant status was now in the hands of criminals, that his life was in serious danger and that he had turned to Smith for help. According to the book Gaspar had no reason to disbelieve Brennan's story about the leak of the information "especially as it was corroborated by DS Smith". Gaspar then arranged for elaborate steps to be taken to protect Brennan (safe house, new name etc).

114. According to the book there were many subsequent meetings between Gaspar and Brennan (some or all of which, it appears, Smith attended). Brennan agreed to some of the conversations being taped. Brennan was not cautioned. The book gives an account in some detail of what Brennan told Gaspar on tape. McLagan told Gray J that during Brennan's subsequent trial for theft, McLagan had been lent a copy of the transcripts for some two hours. The judge does not make a finding that McLagan's summary of the Brennan interviews was inaccurate nor does he find that it was not responsible journalism to rely on what he had read and noted during that two hours. The judge's summary of the critical parts of the tape takes up one paragraph of the judgment (paragraph 30).

115. The account of the tapes in the book reads as follows (pages 44-48):

> Brennan recounted how he had been a police informant while running a mobile-phone shop. During the previous summer, with the business in increasing financial difficulties, he had become an informant for Detective Constable Mick Charman, a Flying Squad officer based at the squad's Tower Bridge offices. He was giving him information about a robber who had moved into the drugs trade, importing cocaine from Venezuela [strand (i) of Nightshade]. Brennan said that at the same time he had been contacted by a Texan wanting to buy mobile phones for use on offshore oil rigs. The Texan then introduced him to a Chinese-American, Sam Wang. Thousands of a particular type of Motorola mobile were wanted by Wang for resale in Hong Kong and mainland China, where they were unobtainable because of international licensing agreements. Brennan agreed to provide the phones, although he knew he would never be able to supply more than a handful. Wang flew to London to clinch the deal and met Brennan at an expensive London hotel. Wang was impressed by the presence of Brennan's good friend DC Mark Norton.
>
> On tape, to Gaspar, Brennan related what he said the Texan had told him: 'He said, "You know, you are going to earn a lot of money out of this. We are all going to earn a lot of money out of this." And I thought, no, all I'm going to do is fucking relieve you of the money… It's as simple as that.

Brennan was describing a simple straightforward theft. The jury at the end of Brennan's trial found him guilty of that theft and disbelieved the account which he was to give in evidence and which (as I shall show later) was foreshadowed both by the media and by Mr Redgrave's MP, Mr McKinlay, in the House of Commons.

116. The book continues:

> Brennan went on to describe how he had then met his police handler, DC Charman: 'I said to Mick, if this shapes up, I can relieve these people. It's an opportunity, and these things come up once in your life-time, without anyone getting hurt, if it can be done proper… I said: "Look Mick, I want to relieve them of all of it."
>
> Meanwhile money starting arriving from Wang and his brother in the USA for the mobile phones that Brennan had no intention of supplying. The crooked businessman [Brennan] was to receive more than £400,000 in the coming weeks. He claimed that a plan was hatched with Charman so that police would provide him with cover as he pocketed the money. The police would pretend that Brennan was giving them information about a money-laundering operation being run from the US, and in return for the protection Brennan would pay over cash. (Underlining added)

117. As I shall show below, both the media and Mr McKinlay adopted as true what Brennan was saying was only a pretence.

118. The book continues:

> Brennan alleged he gave a first payment of £10,000 to Charman, who told him he would introduce him to his old friend DI John Redgrave, who was now with SERCS, the South East Regional Crime Squad. The two detectives had worked together on the Brink's-Mat robbery.
>
> "I give Mick £10,000 and at that time I was led to believe that five grand was going to Redgrave to start all this off," said Brennan. "We met John in the car park of the restaurant at South Mimms [a large service station at the junction of the A1 and M25]… He drove up in a metallic Cavalier. He come over and said, "Let's get back in the car." Then we took off like fucking… you don't know who you thought you had up your arse. He was going left, right, left, right, all round them roundabouts. Next thing, we're into the back of a hotel.
>
> According to Brennan's account, the three of them went to a room at the hotel which had been pre-booked by Redgrave. The DI then searched Brennan thoroughly, looking for a microphone or some kind of recording device. He had to take off his shoes and belt for examination, and said that Redgrave even went through his hair. As the search continued, Brennan said he remonstrated with Charman: 'I looked at Mick and Mick went, "Don't worry." I went: "No Mick. What is all this?" Then Redgrave said, "I've got a pension to worry about, and I ain't being fucked. I ain't being fucked by you or

> anybody." I said: "Well, if you're worried about a set-up, you're a friend of Mick's and Mick's given me that you're OK." He said there was no problem. He's trying to defuse the situation, 'cos I'm now up in the air about it. Mick's going, "Calm down, calm down."'
>
> Eventually the situation did calm down, said Brennan, with Redgrave apologising and then giving more details about the money-laundering cover story. Brennan would say he had been approached by some Americans who wanted him to launder money in the UK, and Redgrave would say he had authority for Brennan to act as a participating informant. After agreeing to the scam, Brennan said Redgrave asked him for £10,000, which Brennan got for him from Charman's car. (Underlining added)

119. The underlined passage gives more detail of the cover story which Brennan, on his account, was to use. The book continues:

> Brennan told Gaspar he had agreed to pay the pair a total of £50,000. With two amounts of £10,000 already handed over, he claimed the final payment of £30,000 was made a few days later in south-east London. Redgrave warned him that provided he stayed within Scotland Yard's informant-handling guidelines, telling the officers what he was doing, they could cover anything he wanted. Brennan told them the £30,000 was in his car. Charman went to get it. 'I said, "It's in there,"' said Brennan. "And it was in a green Marks and Spencer Bag, and he opened it up and he went "Lovely". "All right," he said, "I'll be in touch with yer." And that's how I parted with the thirty grand… So they've been paid for their work to cover the job… everything was being covered as long as I stayed in with them guidelines, which I intended to do. I couldn't foresee a problem and nor could they.'
>
> DI Redgrave had told Brennan that he had contacted the FBI, who said it was believed the Texans were into gunrunning and other crimes, including money laundering. Brennan's earlier information to DC Charman about British criminals involved in importing drugs was being acted on in an investigation code-named Operation Nightshade, and Redgrave now expanded this to include the Texans.

120. The last paragraph in this passage is interesting in the light of later events. As I shall show later, according to the media and Mr McKinlay, the Texans were not only into money-laundering but also gunrunning. By the time of Mr McKinlay's speech in 2000, the gunrunning had, so it was being said, become the most important aspect of Operation Nightshade. On the other hand, the view of the Metropolitan Police, as reported in the House of Commons, was that Operation Nightshade had nothing to do with gunrunning (see paragraph 106 above).

121. The book continues:

> With permission, Redgrave activated a special Scotland Yard account in the name of a fake company, Switch On Enterprises. This account had been set up in 1989 with the then Midland Bank for use in covert police operations. Whoever decided on its name must have been enjoying themselves. SO, the first two initial letters, stand for the Scotland Yard unit running the account, Specialist Operations. When the third letter, E, is added, it represents a throwback to the wartime Special Operations Executive. A fake contract was faxed to the US confirming that Switch On Enterprises were Motorola distributors and registered in the British Virgin Islands. The contract referred to SOE supplying six thousand of the special mobiles, and appeared to be aimed at calming any concerns Sam Wang may have had about the deal.
>
> Brennan summed up the position at that stage for Gaspar:
>
> > It was a case that we were going to earn a lot of money. At that time the Americans were talking about a further million or a million and a half. They were talking colossal amounts of money, and it was looking like money laundering. This is why the Switch On account was set up… It wasn't that we're going to relieve them of 470 odd grand [the cost of the mobile phone deal] and that's where it's going to stop. It was going to go on and on, and the payments were just going to go on and on… You must understand that I was doing it with the support of these two officers. I couldn't do nothing wrong… It was their aim to have what we've had, and to cover for me for what I was having, or my part of it… <u>We definitely believed that the FBI had proved that these were crooks and this money was a money-laundering operation from America to turn bad money into good… It was a total utter scam from start to finish.</u>

122. The underlined passage is not easy to follow. Brennan is saying that "we believed" it was a money laundering operation but that also it, presumably the theft, was "a total utter scam". In a part of the judgment of Gray J which looks at the defence of a balanced account of material in the public domain (paragraphs 119 and following) and precedes the reasons why the judge rejected the defence of responsible journalism, the judge criticises McLagan for not saying that Brennan lied to Gaspar when he said that the Wangs were dishonest. That criticism did not appear in the pleaded case but arose out of cross-examination. It could be, of course, that Brennan was led to believe by Charman and Redgrave that the Wangs were dishonest and, as Miss Page points out, the assertion that the Wangs were dishonest was a fact relied on by Redgrave and Charman at the time of Brennan's arrest and during the public debate thereafter.

123. The book continues:

> Gaspar pointed out to Brennan that there would inevitably have come a time when Wang would have realised he had been defrauded. Brennan replied: 'It was a case of how long you

could play it out for… The fanny would go on till eventually Wang would go to Hong Kong and wait for the shipment to arrive and it was never going to fucking arrive. It was as simple as that.'

Once the £400,000 had arrived, Brennan took precautionary steps to avoid being found by the Chinese-American businessman. He quit his mobile-phone shop and moved house, turning up at his solicitor's with a suitcase containing £137,000 in cash to buy a new home. His plans seemed to be working. Wang did go to Hong Kong, but when the phones did not arrive he became increasingly concerned and flew to England to find out what had happened. Eventually, in October 1993, unable to trace Brennan, he reported what had happened to Kent police, in whose county Brennan's mobile-phone shop had been located.

Brennan told Gaspar that he expected help from Redgrave and Charman if he was ever questioned or arrested over the theft of Wang's money:

> I done everything what they told me to do. They knew what the game was and what the plan was. You know, you can't relieve someone of four hundred odd thousand pounds and just walk away from it. I knew there was going to be problems and John [Redgrave] always said to me, 'Don't worry about it.' I said, 'Look, John, what happens when the curtain does come down? What's going to happen?' He said, 'Don't worry about it… if the time comes that you are nicked or pulled in, or it's put to yer, just mention my name. I will get this docket [police file] and I will sit down with these people. If I've got to sit down with the CPS, don't worry. You've done everything by the guidelines. You've not got to worry about this.'

Brennan said he had continued to assist Redgrave in the police money-laundering investigation but he was arrested in November 1993. He told Gaspar that he had asked for Redgrave, but he had been locked up overnight. 'I'm in the fucking shit here… I quite expected the door to open up and just be told, "OK, fair enough, you go." It never worked like that. It just turned into an absolute fucking nightmare.

To what extent Brennan knew of the efforts Redgrave had made behind the scenes when talking to Gaspar is unclear. In fact, police records show that, when arrested, Brennan had asked for help from DS Chris Smith, his original handler and the officer who later introduced him to Gaspar. The records go on to reveal that the arresting Kent officers were later told by Redgrave that Brennan was an informant and that their enquiries were putting him and others at risk. Despite this

> intervention, the Kent police investigation into the alleged mobile fraud continued, however, and a report was sent to the CPS. Still working on the money-laundering investigation, Redgrave again stepped in, telling a CPS official of Brennan's informant status and of a bank account established by the police. The move appeared to have halted the CPS action, but a high-ranking SERCS officer, suspicious about events, instituted another investigation by a police financial specialist. This was still continuing when Gaspar first met Brennan in June 1994.

124. There are a number of important points to be made about Brennan's account to Gaspar as set out in this long passage in the book.

125. First, at Brennan's trial for theft, the prosecution sought to rely on the contents of the tapes as evidence that he had stolen the money and that the officers had agreed to give him a cover story for money. In other words the prosecution took the view that Brennan was telling the truth on the tapes. The judge ruled the evidence inadmissible because of the absence of a caution.

126. Secondly, it is to be noted that Brennan was telling Gaspar that Redgrave had given Brennan a story to "cover" the theft - namely that Brennan had been approached by some Americans to launder money and that Brennan had authority to act as a participating informant (that is, an informant who actually participates in the money laundering scheme whilst giving information). I shall show later how that story is repeated in 2000 by Mr McKinlay in the House of Commons and how close that story is to the story that Brennan was eventually to rely upon at his trial.

127. Thirdly, in so far as the money allegedly handed over by Brennan to the officers, the chronology shows that Brennan did withdraw £10,000 in cash on September 3. The first tranche of money from Wang (£95,000) was due to enter Brennan's bank account that day, but it was returned by the bank and only finally received on 10 September 1993. During the course of Brennan's subsequent trial for theft, Mr Latham QC, prosecuting counsel, put to Brennan in cross-examination that this amount had been paid by him to Charman that day at the Oval, Sidcup [App 5/44/15B – E]. He also put to Brennan in cross-examination that he handed over another £10,000 cash at the Travel Lodge in South Mimms on 17 September 1993 [App 5/62D - 63G]. He also put that two or three days after the South Mimms meeting, Brennan gave Charman and Redgrave a third tranche of money, cash in the sum of £30,000. Brennan, unsurprisingly, denied these allegations.

128. During the course of the Brennan trial evidence was given about what were said to be unusual movements of money. According to the book:

> Gaspar also revealed the results of a secret investigation he had ordered into possible irregularities in the two officers' financial affairs. He said this showed that Redgrave had received unexplained income, over and above his Met police salary. In Charman's case, an unusual spending pattern had started in October 1993, coinciding with the time Brennan had claimed to have paid over the £50,000 bribe.

129. Fourthly the chronology shows what happened at the time of Brennan's arrest. Brennan was arrested on 12 November 1993 and questioned at Welling Police Station in relation to the Wang fraud allegation by DC Inglis of Bexleyheath. He was released next day on bail [App 4/A/12/322B-323G]. This was followed by Redgrave and, the appellants say, Charman meeting Bexleyheath officers who were told that Brennan was a very important informant involved in a current operation; the monies involved in the theft allegations were obtained as a result of criminal activity; that there were covert police accounts set up in the undercover operation; that if the theft inquiry was pursued it would put both the informant and undercover officers at risk; and asking for the inquiries to be put on hold. Redgrave was to produce documentation that demonstrated the necessity for this course of action, but the documentation he produced did not "remotely" corroborate what he was saying [App 4/A/12/326-7 and 337-339 and 341-342]. The respondent does not dispute the accuracy of these entries in the appellants' chronology but comments:

> Put to Inglis that Charman was there and he says he 'believe(s) so'.
>
> McKenzie does not mention Charman being there.
>
> McLagan was not present on this day and no evidence that he was aware of this at the time of publication.

According to the transcript (App 4/A/12/341-342) Redgrave told Det Sgt McKenzie of Bexleyheath police station (the senior officer to DC Inglis) that "Tom and Sam Wang were criminals and the missing cash was from a police account" but the documentation he produced to support this did not "remotely" corroborate what he was saying. According to DC Inglis, Redgrave said that the monies involved in these theft allegations made by the Wangs "had been obtained as a result of criminal activity" (App4/A/12/327).

130. In my view what happened at Bexleyheath is important. To what criminal activity by the Wangs was Redgrave referring? Was this the truth or was it the cover story? If it was the truth why did the documentation not remotely corroborate what was being said by Redgrave? If the FBI had confirmed to Redgrave that those involved in the transfer of money to Brennan were involved in money laundering or worse, why could Redgrave not prove that to the Bexleyheath officers? If Brennan was genuinely informing on the Wangs, would it not be so easy to demonstrate that?

131. At the trial Brennan was to say that on his arrest at Bexleyheath police station he gave three names to his solicitor and DC Inglis: Redgrave, Charman and Smith. He wanted to find out how it was that he was being arrested having at all times acted under police authority. According to Brennan, Redgrave assured him that he would sort the matter out (App 4/A/39/182-184).

132. According to the chronology on 22 February 1994 Redgrave and DS Kelly met Mrs Jennifer Terry of the CPS regarding the Brennan investigation. It was to Mrs Terry that the papers had been sent by the Bexleyheath police, according to the evidence of Det Sgt Maul ("Maul") at the Brennan trial (a detective constable when he took over the investigation).

133. According to the chronology, on 4 March 1994, the investigation into the theft was transferred from Bexleyheath to the South East Regional Crime Squad ("SERCS") and Dept Supt McCullough ("McCullough") told Maul to reinvestigate the theft allegation ("Operation Triangle") and report only to him and Commander Penrose (Trial D1/8/179G; 206).

134. McCullough, it could be said, must have had concerns that those who were apparently investigating Brennan's "information" said to be about money laundering etc should not know about the progress of the investigation into the theft. This was, it will be remembered, three months before Brennan spoke to Gaspar. Notwithstanding McCullough's order, Redgrave, according to the chronology, made immediate representations to Maul and continued to do so, with a view to avoiding a prosecution of Brennan (Trial D1/8/207; App 4/B/8/209-211). The respondent comments on these entries on the chronology as follows:

> Redgrave's explanation set out in [Russell, Jones and Walker's] letter to BBC dated 19.3.02 (R2/11).
>
> Maul explains that Redgrave told him that he wanted to avoid prosecution because of the work Brennan was doing (App4/B/8/211B**).** Maul does not suggest that Redgrave was acting improperly.

135. According to Maul at the Brennan trial, Redgrave was seeking to avoid any prosecution of Brennan because of "the work [Brennan] was doing for the police service" (App 4/8/211).

136. The 19 March 2002 letter from Russell, Jones and Walker to the BBC, to which the respondent refers, is a letter written on behalf of Redgrave to the BBC complaining about a news item in the form of a report from McLagan following the conviction of Brennan in April 2001. According to the letter, in the course of Operation Nightshade, Brennan had informed his handlers that he had been approached by Texan gangsters with Chinese connections to assist in the proceeds of money laundering through the UK. Brennan had also informed his handlers that the Texans had asked Brennan to connect them with arms buyers and Brennan had been used to introduce an undercover police officer posing as an Irish terrorist. Unknown to his handlers he was "simultaneously engaged with the Texans in the fraud which would ultimately result in the theft conviction at the Old Bailey". "Briefly, this consisted in persuading Chinese connections of the Texans named Wang that Brennan could supply large quantities of mobile phones". Brennan received the £400,000 but did not supply the phones. The letter continues:

> Even before Brennan was interviewed at Bexleyheath, <u>his dealings with the Texans had been fully reported on by our client with a view to investigation</u>. But Brennan was still needed as a contact and source of information for Operation Nightshade and the arms investigation. (Underlining added)

137. The letter continues by stating that "for vital operational reasons" Redgrave asked senior management to hand over the theft investigation to an "independent financial investigator", namely Maul.

138. It is important to note that this letter was written after the conviction of Brennan for theft. The letter (so it seems to me) is giving a very different account of what happened from the account which had been given by Mr McKinlay. The underlined passage suggests that the £400,000 theft was known to Redgrave before Brennan's arrest to be a quite separate scam by Brennan on the Wangs using his role as an informant on money laundering by the Wangs and the Texans as a cover. Redgrave had reported this scam for investigation. Even if this is a misreading of the letter, it would seem to follow from the letter (if true) that Redgrave must have known or suspected strongly shortly after Brennan's arrest that Brennan was involved in his own separate scam on the Wangs. If Redgrave and Charman did not know before Brennan's arrest that he had stolen £400,000 it seems likely, to say the least, that they would have known when they learnt the facts of the alleged offence.

139. It is worth comparing this letter with the evidence of the Bexleyheath officers as to what Redgrave was saying to them at the time of Brennan's arrest. At that time the Wangs were being described as criminals and the £400,000 was being said to have been obtained by them in the course of criminal activity. According to the letter the £400,000 had apparently been obtained by Brennan as part of a quite separate and reported scam. If that is true why were the officers not told this? Why were the officers not told that Brennan had deceived his handler when he stole the £400,000? Why were the officers not told that the theft of £400,000 had come as a complete surprise to Redgrave and Charman?

140. We were also referred by Miss Page to a letter dated 30 March 2004 (App 4/C22/p218) sent after the publication of the book by Russell, Jones and Walker (and therefore inadmissible if the defence of responsible journalism is to be determined as at the date of the publication of the hardback) in which it is said that Brennan had informed his handlers that he had been approached by Texan gangsters to assist in the laundering the proceeds of organised crime and to connect them with arms buyers. Unknown to his handlers he had been simultaneously involved in the theft (using the money laundering as cover). At the time of his arrest, Brennan's dealings with the Texans (i.e. the theft so it appears) had been monitored and reported on by Redgrave with a view to investigation, but Brennan was still needed as a contact and source of information for Operation Nightshade and the arms investigation.

141. The letter continues:

> For vital operational reasons, when Mr Redgrave learned of the local police investigation he made representations to his senior management that the investigation into the mobile telephone fraud should be made the responsibility of an experienced independent financial investigator from within SERCS with access to full information about Operation Nightshade. The result was the ensuing investigation by Detective Constable Maul, supervised by Detective Superintendent McCullough.

142. Miss Page compares that with a passage in the book and the judge's finding thereon (to which I return later). In the book McLagan had written (233):

> At the pre-trial hearing, Gaspar made two new important disclosures of evidence coming from his investigation. He said

> he had learned that the separate inquiry into Wang's allegations of theft had been taken over by SERCS, which was an unusual move as that elite group of detectives was not normally involved in such investigations.

The judge decided:

> 144. ... Whilst it is factually correct that the inquiry into Wang's allegations of theft had been taken over by SERCS, there was nothing unusual or sinister about it.

143. According to the chronology in June 2004:

> Maul travelled to the US (preceded by a request from Redgrave to delay the trip because of an operation of which he was in charge that Maul should not compromise by any inquiries [App 4/B/8/210 - 211]. He interviewed Wang Hu (the principal loser) and a man called Hong (who was also involved) and obtained statements from them on 23 June and saw also the banks involved in the money transfer and others involved as alleged criminal associates of Wangs [Trial D1/8/180G-181E]

144. I have not been able to find this reference. (I have to confess I have found navigating the bundles a particularly difficult feature of this case). I am not sure who is alleging that the Wangs had criminal associates. Presumably Redgrave and/or Brennan.

145. On 22 July 1994 Maul, whilst in the United States on the Wang enquiry, was transferred from SERCS to Heathrow. According to the chronology Redgrave in August 1994 "continued to make contact with Maul" [App 4/B/8/212E].

146. According to the chronology, in February 1996 Brennan was repeating to Gaspar his allegations that he had paid money to Redgrave and Charman.

147. On 6 November 1996 Brennan was re-arrested by Maul for the theft from Wang. It is agreed that the records show that, at the time of his arrest, Brennan's solicitor said:

> My name is John Wood. I am an authorised representative of Graham Dobson & Co solicitors. I am required to explain my role here; it is to protect my client's basic and legal rights. I can continue to advise him throughout the interview. He has received legal advice. I have reminded him of his right to silence. ….He further instructs me that he has already been interviewed at some length on tape by CS Gaspar of CID in May 1994 and given a full account of these events. In these circumstances my client has decided, on my advice, that he has nothing more to say … .

148. The respondent (who originally denied in paragraph 36.1 of the Reply that this had been said) accepts that this passage was read out in court. He disputes that McLagan was in court when it was read out or knew about it at the time of publication. Miss Page submits that McLagan knew this and was present in court on 22 February 1996

when the verbatim wording of the solicitor's statement on Brennan's arrest in November 1996 was repeated by Mr Latham in the course of legal submissions (see C3-B/61).

149. This was very important evidence, one might think. Brennan at this stage, on re-arrest, was confirming that he had stolen the money and was saying that he had done so with the connivance of Redgrave and Charman, to whom he had paid money. To the extent that he was asking for Smith at this stage (a matter relied upon by the respondent), this would be understandable against the background of Brennan's acceptance at that stage of the truth of what he had told Gaspar in the presence of Smith.

150. In the book the arrest is described in this way (page 179):

> It culminated in his arrest in November 1996. Although he had admitted on tape to stealing the £400,000, when charged he replied: 'I am not guilty of this offence. At all times I acted with the knowledge of the Metropolitan Police as part of a police operation… Prior to attending here [a police station] I had protection status. That's now changed. My family are in jeopardy.'

151. The book continues:

> Shortly after this declaration, [Brennan] said he approached Charman for help, and told the officer that he and Redgrave had been under CIB investigation for more than two years.

152. On 20 November Brennan did visit Charman at his home.

153. As the book describes, Detective Superintendent Coles ["Coles"] now in charge of the Brennan allegations against Charman and Redgrave had doubts about Brennan (pages179-180).

154. Brennan, knowing that he was to be tried for the theft from Wang, then went on the attack. According to the book (page180):

> ... the clever Brennan, worried after being charged, counter-attacked on two fronts, muddying the situation even further.
>
> First, he contacted the Police Complaints Authority to withdraw his allegations against Redgrave and Charman. He claimed he had been put up to blackening the pair by his old handler, the Flying Squad detective sergeant Chris Smith. He said that Smith had 'had it in' for Redgrave and Charman since the 1980s, when all three had worked on the huge Brink's-Mat robbery inquiry. Smith strongly denied both claims, but Brennan also alleged that Smith and other officers had been moon-lighting for a private security company he was running, and he issued a complaint against Gaspar too. His claims meant there would have to be a fresh inquiry into the whole affair, and that his prosecution for the theft would have to be postponed.

155. As the chronology shows, on 29 January Brennan withdrew his allegations against Charman and Redgrave and made complaints against other officers including Smith in a letter to John Cartwright of the Police Complaints Authority.

156. According to the chronology:

> Brennan refused to pursue, or co-operate with the investigation by Operation Cornwall of his allegations against Smith whilst using the press in 1997 and 1998 publicly to discredit Smith. [App 4/E/12/292 - 298E]

157. The book continues (page 180):

> ... Brennan also set out to cause Scotland Yard maximum embarrassment, aiming to have the case against him dropped altogether. Just days after contacting the Police Complaints Authority he approached the Mirror, which ran a story under the headline 'Bent Coppers Shopped Me To Gangsters'. It said: 'Brennan joined a huge undercover operation to trap American mobsters who wanted to sell Ulster Protestant terrorists an arsenal of machine guns and explosives. Plans were made to switch cash to a secret police bank account while Brennan introduced an undercover cop into the crooked American cartel.' Brennan was quoted as saying: 'I risked my life to help the police with some of the most important cases of recent years. Now I am being thrown to the wolves.'

158. The underlined passage is very similar to what Mr McKinlay was to say in the House of Commons in 2000.

159. This is what McLagan had to say in his witness statement about the story in the Mirror:

> An article was published in The Mirror on 7 February 1997 entitled "*Bent Coppers shopped me to gangsters*" (Defence §5.19). It reported claims to the newspaper by Brennan that he was a police informer who had been betrayed and left to the mercy of villains, including Kenneth Noye, with his Scotland Yard files being leaked to some of London's most dangerous gangsters. It was claimed that the betrayal had taken place during the course of an undercover operation against organised crime involving a plot by Texas-based crooks to launder huge sums of money through Brennan's bank accounts in London and the Channel Islands. The American "*mobsters*" were said to want to sell Ulster Protestant terrorists an arsenal of machine guns and explosives, the purpose of the operation being to trap the criminals involved. It was reported that the activities of a number of detectives, three of high rank, were being investigated, some of whom dealt with informants. It was said that Brennan had complained to the PCA that officers abandoned him after the leak of his informant file.

160. The book continues:

> The day the Mirror published the story, Redgrave and Charman were suspended, their homes having been raided three days before. From the outset the pair have denied receiving money from Brennan, or indeed, any corruption at all. The two also denied involvement with newspapers at that time.

161. Charman and Redgrave were in fact suspended on respectively 4 February and 7 February 1997. Thereafter, as the Home Secretary was to say later in the House of Commons, both Charman and Redgrave immediately reported sick (see paragraph 47 of McLagan W/S).

162. The book did not mention that Redgrave and Charman invoked their right not to answer any questions about the Brennan allegations to the investigators. The book did make it clear that they "strenuously denied all allegations of wrongdoing" "from the outset" (pages 49 and 180).

163. In his witness statement McLagan said (para 48)

> At the time of writing the relevant section of the book I thought the article's publication so soon after the suspensions of Redgrave and Charman was unlikely to be mere coincidence and more likely the product of some collusion between Redgrave, Charman and Brennan.

164. He went on to say that:

> I have subsequently been told by Jeff Edwards, the author of the Mirror article, that Redgrave approached him about a week after the article wanting to explain his side of the story.

165. This information from Edwards came to him after the publication of the book (I believe) and therefore has to be ignored at least when considering the defence of responsible journalism as at the date of the publication of the hardback edition.

166. The book goes on (pages 180-181):

> But Brennan himself approached the Sunday Times, claiming that detectives had pressurised him into incriminating innocent police officers. The resulting story, splashed on 2 March across the newspaper's front page, with a further whole page inside, confused the picture even more. Under the headline 'Yard Loses £½m in Mafia Arms Sting', it related how two Scotland Yard detectives had been suspended over the disappearance of nearly £500,000 from a secret police bank account, set up to stop the American Mafia selling weapons to an Irish terrorist gang. The newspaper said it had seen hundreds of pages of intelligence documents 'at the heart of one of the most sensitive policing operations in recent history'. Although the newspaper did not name Redgrave and Charman, it said they were

> claiming to have been the victims of the Met's zealous anti-corruption campaign. 'They say that everything they did – including placing money, which they believed to have been stolen or earned from drugs sales, into the secret police account in London – was approved by senior officers.

167. In his witness statement McLagan wrote:

> 51. In addition to the statements attributed to the suspended officers, the Sunday Times claimed to have seen hundreds of pages of intelligence documents outlining "*the scandal at the heart of one of the most sensitive policing operations in recent history*". The newspaper purported to be in possession of detailed operational information about Nightshade, including information about meetings involving police officers working undercover. It appeared from the face of the article that the newspaper had a source or sources from within the police who had been closely connected with Nightshade and I thought it very likely that the suspended officers had been involved, directly or indirectly, in this information, along with their side of the story being provided to the Sunday Times, in addition to the involvement of Brennan.
>
> 52. The coverage continued on the inside with the headline "*Deadly Nightshade*" and with the trailer:
>
> > "Scotland Yard mounted one of its most daring undercover investigations to stop the mafia from supplying arms to Irish terrorists. But Operation Nightshade had ended in a corruption inquiry that is shaking the Metropolitan police."
>
> Detailed operational information was given and it was again repeated that the two suspended officers:
>
> > *"say they reported every detail of the way the money was handed to their superiors at the time."*

168. The book then refers to a second Sunday Times article in August 1997 (page 181):

> [Brennan] was the main source for a second Sunday Times story in August which said that Scotland Yard detectives were earning tens of thousands of pounds moonlighting as private eyes, illegally bugging members of the public, and selling highly sensitive police secrets. Brennan was pleased that the newspaper singled out Chris Smith in its front-page story; 'Chris Smith worked for Brennan while a detective sergeant on the Flying Squad. According to Brennan, Smith was paid £100 a day for his help during a three-month spying operation on a private house in Sussex… They placed miniature bugs in holes drilled through a downstairs window and connected them to

> voice-activated tape recorders.' Brennan told the newspaper that Smith had used police equipment during his moonlighting, which had earned him £20,000-30,000. In a later story, Brennan was quoted as having decided to speak out about corruption because he was being unfairly targeted by police officers; 'It's a vendetta. They are trying to silence me by making trumped-up charges. I'm being persecuted because of the information I have…'

169. As to this article McLagan in his witness statement wrote:

> 57. The Sunday Times article, containing this highly damaging story involving Smith, was published just days before Smith, by then retired, was called as a witness at the Old Bailey trial of David James Phillips. Phillips faced charges of armed robbery and Smith had played a part in the surveillance that led to Phillips' arrest. It emerged on cross-examination of Smith by Phillips' defence lawyers, that they had been put in possession of detailed information about Smith moonlighting for Brennan and allegedly accepting money corruptly from him. There was a prolonged attack upon Smith in cross-examination for which I was present in Court (Defence §5.23). It appeared that the Defence had been provided with information that could only have been provided, directly or indirectly, by Brennan, presumably with a motive to discredit Smith, for his own benefit or that of others.

170. McLagan then refers (in paragraph 58) to information which he received (I believe) following publication and continues in paragraph 59 to say that Redgrave was in contact with Martin Short, who attended the Old Bailey hearing in the Phillips case. Short told McLagan that he had been introduced to Redgrave and Charman. He then writes:

> More recently Short has told me that he had four meetings with both Redgrave and Charman around this time.

171. It is not clear to me whether this information came to him before or after publication. In paragraph 37.1 of the Reply the respondent admits that he met the journalists Leppard and Short during the Phillips trial.

172. A further article was published by the Sunday Times on 1 February 1998. According to the chronology:

> Sunday Times "Yard officers sold secrets to criminals". Second major attack on Smith, on the eve of a trial, unrelated to Brennan or Nightshade, where he was to be a prosecution witness.

In the words of Gray J. (paragraph 36):

> On 1 February 1998 an article appeared in the Sunday Times accusing him of having taken thousands of pounds in bribes from Brennan.

173. The book goes on to report that senior Treasury Counsel, Nigel Sweeney, "eventually concluded" in early 1998 (page 182) that without the co-operation of Brennan there could be no prosecution of Charman and Redgrave.

174. The book then describes an investigation into both them and Debbie Cahill, a CPS employee and friend of Charman. "Coles concluded that Cahill was trying to gather material for Charman [about Smith] with which to discredit the CIB investigation" into Charman and Redgrave (page 182). A sting operation was mounted. All three were arrested on 16 July 1998 at Cahill's home in Essex to which she had invited Charman and Redgrave. Criminal charges against the three of them were subsequently dismissed in May 1999 at the preliminary stage although the information gathered led to successful disciplinary proceedings against Redgrave and Charman.

175. On 4 March 2000 according to the chronology:

> *Guardian*, "Corruption squad under fire", "Officers tell of lives destroyed", "Internal inquiries that would haunt police" and "Stings Flaws undermine CIB's covert operations against officers" [App 3/ 15-17]

176. McLagan summarised the article in his witness statement:

> 65. Gillard and Flynn's front page story in The Guardian of 4 March 2000 contained a major critical review of the Met's achievements (or lack thereof) and methods in tackling corruption, reporting that the CIB was itself the subject of three inquiries because of allegations over the way it operated, allegedly using discredited methods to pursue serving and former police officers. Elsewhere in the coverage of that edition, it appeared that at least two of the three inquiries that were being referred to in the article arose out of CIB's handling of Redgrave and Charman. The article gave a range of statistics for officers suspended, charged and convicted.
>
> 66. The coverage continued on the inside with a big story, occupying most of page 8, headlined "*Corruption in the Met – Officers tell of lives destroyed*". This was a detailed case history of Redgrave and Charman, as two officers who had been targeted by CIB and had their lives destroyed. Redgrave was quoted telling the Guardian:
>
> > "I have been suspended in relation to a complaint that is six years old. This has caused the complete destruction of every aspect of my personal and professional life, friends, financial security, family, marriage, career and reputation…. The building blocks of life have all gone with no hope of recovery."

> Redgrave and Charman were pictured at the top of the page apparently posing together for a photograph to accompany the Guardian's coverage of their story.
>
> 67. Gillard and Flynn reported, as if it were fact, that Brennan, in his capacity as a police informant handled by Charman, had been involved by Texan-based criminals in a money-laundering scam and asked if he could find a buyer for arms worth millions of dollars. He was then authorised to introduce to the Texans two British undercover officers posing as representatives of Protestant terrorists from Northern Ireland. They said that at a delicate stage in the arms negotiations the operation began to fall apart when Brennan in August 1993 was charged with the theft of £400,000, money that had been deposited in his business account by the Texan gang as part of their money-laundering scam. The operation, which had cost millions of pounds, collapsed with no arrests.
>
> 68. They went on to relate that Brennan confessed to the theft in interviews with Gaspar and also claimed to have "*bunged*" Redgrave and Charman £50,000 to turn a blind eye. There was background information about the careers in the Met of Redgrave and Charman. There were quotes from testimonials to the two officers by other police officers, speaking of their dedication and honesty. The article reported that the Guardian had spoken at length to Brennan. The events that followed Brennan telling Charman, that he and Redgrave were under investigation for corruption were described as having "*[rocked] CIB to its core*".
>
> 69. Gillard and Flynn also referred to reports seen by the Guardian that Charman and Redgrave had written to senior officers on learning that they were under investigation for corruptly receiving money from Brennan. Charman and Redgrave were reported telling the Guardian that they had received no response to those reports. Gillard and Flynn also said the Guardian had been provided with correspondence written by lawyers acting for Charman and Redgrave to CIB and the PCA.

177. McLagan then turns to the role of Smith:

> 70. The connection between Smith (the subject of the cross-examination at the Phillips trial as being in a corrupt financial relationship with Brennan) and the Redgrave and Charman affair, was also revealed in the Guardian article. The implication of the account was that Smith had procured Brennan to make false corruption allegations against Redgrave and Charman. Gillard and Flynn reported Brennan saying that Smith, who had been his handler for 20 years, had been "*moonlighting*" for Brennan and that Brennan had been

> "*rehearsed"* by Smith before making the allegations to Gaspar in June 1994 of a £50,000 payment to them. In a passage for which I deduced Charman was the source, it was said that in 1985 Charman and his Inspector at the time had formally reported Smith for being in a corrupt relationship with Brennan. It was suggested that Smith might even have been a covert CIB officer at the relevant time (in the mid-1990's). The implication was that Smith had procured Brennan to make false allegations against Redgrave and Charman to exact revenge against Charman for reporting him in 1985, or as part of an unlawful plot by CIB falsely to implicate Redgrave and Charman in a corruption scandal. (Underlining added)

178. McLagan continues:

> 71. It seemed obvious at the time that much of the information in this article, not just the incident in which Charman is said to have reported Smith in 1985, must have come from and/or been confirmed by Redgrave and Charman; or that it had come from others, authorised by Redgrave and Charman to speak to the Guardian journalists on their behalf or in promotion of their cause. There were references to documents, in particular the reports and correspondence that I have referred to above, that a reader would naturally infer, as did I, had been made available to the journalists by Redgrave and Charman or by others with their authority.
>
> 72. This represented another very prominent item of press coverage of their cause to which both they and Brennan appeared to have contributed. This impression was strongly reinforced by the photograph of Redgrave and Charman that appeared to have been taken of them posing for the purpose of the article.
>
> 73. My impression at the time has since been confirmed by Charman who has conceded this much, in paragraph 11.1(3) of his Reply, that "*he was approached by Gillard and gave his version of events*."
>
> ...
>
> 76. Not only had Redgrave and Charman obviously, on the face of the article, participated in its preparation, along with Brennan ... (Underlining added)

179. It seems to me that a responsible journalist would be entitled to draw the conclusion that the respondent was behind the attack on Smith.

180. It can be seen that the story, apparently being put forward by Charman directly or indirectly, was that Brennan, in his capacity as a police informant handled by Charman, had been involved by Texan-based criminals in a money-laundering scam

and that the £400,000 had been deposited in Brennan's business account by the Texan gang as part of their money-laundering scam. That was what Mr McKinlay was to say later in 2000. The story is suggesting if not saying that Brennan was innocent. There is no reference to Brennan deceiving Charman and Redgrave by carrying out his own independent scam, as the letter of 19 March 2002 says that he had (paragraph 47 above).

181. On 11 March 2000 another article appeared in the Guardian. According to the Guardian:

> One of Operation Nightshade's most promising lines of enquiry concerned an illegal arms deal via Sierra Leone. It was on-going when Brennan claimed to have given Mr Redgrave and Mr Charman 50,000 to turn a blind eye to a theft. He later withdrew the allegation.
>
> ...
>
> Both detectives now hope that a judicial enquiry will uncover whether they were the victims of a plot by the intelligence services to undermine Operation Nightshade and protect its targets, in particular a US-based gang of arms dealers who were never arrested.
>
> ...
>
> Confidential Met and US customs documents seen by the Guardian ... contradict claims by CIB and sections of the Met that the arms deal was not genuine but designed to cover the two officers' corruption" (Underlining added)

182. In his witness statement McLagan underlined the word "Both" in the penultimate paragraph and wrote:

> 82. In the passage above I have emphasised the word "*Both*" because, in his Reply at paragraph 16.1(3), Charman has disassociated himself from the claims made publicly through McKinlay and the Guardian that he and Redgrave believed themselves to be the victims of a plot by the intelligence services. A reader of the Guardian article would not have detected any disassociation of Charman from that claim, and neither did I.
>
> 83. It was my impression at the time, and would have been that of anyone following the case, that Gillard, Flynn and Mckinlay were speaking out publicly about Redgrave and Charman with their authority and, indeed, at their request or with their approval. McKinlay, in particular, would not have taken up the case in the House of Commons unless his constituent wanted him to so do. He would not have acted adversely to or to the embarrassment of his constituent. There was no apparent

> distancing of Charman from McKinlay's Parliamentary activity. On the contrary, the dossier released to me by McKinlay showed that Millar was in communication with McKinlay and that McKinlay had been provided with copies of letters written by and on behalf of Charman, as well as Redgrave, containing their complaints about the investigations against them.

183. In this passage McLagan is implicitly at least drawing comparisons between what was being written in the media and what Mr McKinlay had to say.

184. McLagan goes on to note that Charman's brother in law, Mr G Millar ("Millar"), wrote a letter in August 2000 to the Metropolitan Police. According to McLagan:

> 84. ...Millar emphatically denied that either Redgrave or Charman had any part in any press article published during the period of their suspension until they were advised that no further action was to be taken against them in relation to the Brennan allegations, that is to say, from February 1997 until early December 1999. I read this at the time with some disbelief because of what had been published in the Sunday Times (see paragraphs 49 to 57 above) and the information I had received from Short about his meetings with them around that time (see paragraph 59 above).

185. I would add to that. The similarities with what Mr McKinlay was to say later in the year suggest that Redgrave and Charman did have something to do with these press articles.

186. On 12 March 2000 the News of the World wrote:

> The destruction of the lives and careers of honest detectives John Redgrave and Michael Charman is described as "sickening" by their colleagues.

187. The book describes how Redgrave and Charman, gravely dissatisfied with their treatment at the hands of the Metropolitan Police, sought help from MPs. According to the book (pages 231-232):

> Redgrave and Charman and the other complainants wanted what they called a full, independent investigation into their allegations, conducted by a senior officer from an outside force. Frustrated with the Met's refusal to call in another force and its insistence on carrying out its own investigation, they sought help from MPs, among them Andrew McKinlay, Redgrave's own MP. In the early part of 2000, he tabled a series of parliamentary questions about the cases and the cost of CIB investigations. In July he and other MPs who had expressed interest in anti-corruption work received letters from the Met Commissioner, Sir John Stevens, inviting them to intelligence briefings which would last about two hours and include

> question-and-answer sessions. McKinlay declined what he said was a wholly improper offer, one which, if he had taken it up, he believed would have precluded him from pursuing his constituent's case.
>
> Certainly, in his account of the affair to Parliament in October 2000, McKinlay spent the fifteen minutes allowed him under the adjournment debate slot to attack the Met and, in particular, CIB. Using parliamentary privilege, which meant he could not be sued for defamation, McKinlay said he wanted the debate because he was seeking 'an end to the agony and unfairness of the inordinate suspension of my constituent'.
>
> He continued: 'there has been widespread misfeasance at the highest level in the Metropolitan Police. I again demand a full judicial inquiry into Operation Nightshade [the gunrunning and money-laundering investigation mounted by Redgrave and Charman] and the consequent malevolence and corrupt practice of those who served, and serve, in the CIB against my constituent and other officers. Referring to Redgrave's claim that CIB were not interested in following up his allegations of a police cover-up over the Stephen Lawrence murder investigation, McKinlay said: 'The CIB is riddled with people who want to stop further light being shed on those relationships.' He described the disciplinary charges against Redgrave as 'a nonsense' and claimed that the CIB commander, Andy Hayman, was 'refusing to take the counter-complaint seriously'.
>
> Replying to the onslaught, the Home Office minister, Charles Clarke, declared he supported the way the Met was dealing with corrupt officers. He said he was unable to comment on Redgrave and Charman's particular case, but on the question of delays in the disciplinary procedures he pointed out that when the pair were suspended they immediately reported sick. A disciplinary board had been arranged for early 2001, but because their lawyers were not available then, the hearing had to be put back to 2002.

188. McLagan wrote this in his witness statement about the complaints being made by Charman and Redgrave:

> 61. Following the dismissal of the charges against Charman, Redgrave and Cahill (Defence §5.26), both officers made complaints against the Met in which very strong criticisms were made of Coles (Defence §5.27 – §5.30). I became aware of this later, following the trial of Brennan, when McKinlay released to me a dossier of documents setting out their complaints against and criticisms of the CIB investigation of them (see paragraphs 148 to 159 below). The documents in the

> dossier included those listed in the Defence at §5.27.1 – §5.27.5, namely:
>
> > Letter from Charman dated 24 May 1999 to the Chief Constable (Complaints Dept), Essex Police;
> >
> > Letter from Redgrave of 24 May 1000 to Commander Personnel, 1 Area Headquarters, Westminster Police Station;
> >
> > Letter from Charman's brother-in-law, Millar, of 16 November 1999 to McKinlay, enclosing the above letters together with a letter from Cahill to Essex Constabulary, dated 28 May 1999;
> >
> > Letter from Millar to Deputy Assistant Commissioner Andrew Trotter, dated 30 December 1999; and
> >
> > Letter from Millar to McKinlay of 8 June 2000 enclosing the above, as well as other correspondence involving Trotter, Commander Hayman and Commander James.
>
> 62. McKinlay was evidently authorised by Redgrave and Charman to release these documents to journalists in order to promote their cause and bring to the attention of the press and media their very strong criticisms and complaints against Met CIB officers. I gave considerable coverage to these criticisms and complaints in the book. In the absence of Redgrave and Charman's preparedness to communicate with me themselves, McKinlay's dossier was a valuable resource of balancing material (see paragraphs 148 to 159 below).

189. Mr McKinlay's intervention in the House of Commons is, in my view, an important feature of the case. As Gray J said, it was Charman's brother in law, Millar, who enlisted the assistance of Mr McKinlay. The MP had called on two earlier occasions for an independent enquiry. He then spoke at length on 31 October 2000 during an adjournment debate. I set out much of what he had to say in so far as it relates to this case:

> I am pleased to introduce the debate, which relates primarily to my constituent, Detective Inspector John Redgrave, ...
>
> ...
>
> My constituent has given 30 of his 46 years to the Metropolitan police. He has received numerous commendations for his diligent policing.
>
> ...
>
> Obviously my constituent would have been heading for further promotion, but on 3 February 1997 his world crashed. The CIB broke into his house in the most traumatic circumstances,

causing maximum embarrassment to his children and family. ... I could produce much evidence of the tremendous trauma that my constituent has suffered. ...

In December last year my constituent was cleared, after more than six years of CIB investigation, yet he remains suspended and is still fighting to clear his name. I join him in doing so. I have referred to the depression that he endured. Also suspended was his subordinate Michael Charman, a detective constable. They have had to endure the suspension together. On 17 July 1998, to try to cheer up my constituent, who was suffering considerable psychiatric problems, Michael Charman and his girlfriend invited him to their house in Pitsea for dinner. We now know, because it has been documented, that their house had been bugged by the Complaints Investigation Bureau.

[There then follows an account of what happened that day and of the aftermath]

...

My purpose in securing this debate is to seek an end to the agony and unfairness of the inordinate suspension of my constituent. ...

There has been widespread misfeasance at the highest level in the Metropolitan police. I again demand a full judicial inquiry into Operation Nightshade, with which my constituent was involved, and the consequent malevolence and corrupt practice of those who served and serve in the CIB against my constituent and other officers.

I want to halt Commander Hayman's dilatory and partial handling of my constituent's serious complaints of wrongdoing by John Coles and others in the CIB. I want responsibility for the investigation to be removed from the Police Complaints Authority. Commander Hayman should have investigated my constituent's complaints, but is now demonstrably disqualified from doing so.

...

As I said, my constituent, Redgrave, was suspended on the basis of an allegation by a police informant [Brennan] that he had corruptly bunged my constituent stolen money from Operation Nightshade. My constituent was not advised that the allegation, made in June 1994, had been withdrawn. In fact, the informant withdrew it on 27 January 1997. ...

We now know that there are no grounds for the continued suspension of my constituent or for the bugging probe at

Michael Charman's dinner. I believe that the warrants obtained for access during the raids were probably unlawful. Police procedures were certainly not followed. I hope that the Minister will investigate further. Despite all that, Detective Chief Superintendent John Coles, unprofessionally and with maximum spite and deceit, continues to traduce my constituent by making baseless accusations that he shared a £50,000 bung with another officer. When will it stop?

There is a serious political dimension to Operation Nightshade - an Anglo-American police sting across three continents, costing millions of pounds. It started in June 1993 and a central figure was a registered police informant [Brennan] to whom I have already referred. He was handled by Detective Constable Michael Charman and my constituent was the senior investigating officer.

Operation Nightshade incorporated three elements--a planned cocaine shipment from Venezuela to the UK; a money laundering scam; and, most importantly, an illegal arms deal using Sierra Leone as a trans-shipment point. The British side included Customs and Excise; the south-east regional crime squad; SO10, the undercover outfit in Scotland Yard; and SO13, the anti-terrorism branch. The British worked closely with the Houston branch of United States Customs, the Federal Bureau of Investigation and the Alcohol, Tobacco and Firearms Branch of the US Treasury Department. All were in the loop.

The informant [Brennan] had been approached in 1993 by a Texan-based gang with an offer to sell arms. The Americans were in the car business and boasted high political connections in Texas, where they lived in opulent homes. Roger Crooks was one of the group and it transpires from my questions to the Foreign and Commonwealth Office that he met Peter Penfold, our high commissioner in Sierra Leone in recent times. It was Crooks who supplied the helicopter in the Sandline affair and he also runs the Mama Yoko hotel, the headquarters of the United Nations in Freetown.

The informant [Brennan] was asked whether he could find a buyer for a large quantity of arms worth millions of dollars. The weapons on offer included M16 assault rifles, grenade and rocket launchers, plastic explosives, mines and ammunition. Redgrave was notified and obtained further authorisation from several senior Scotland Yard commanders and their US counterparts to mount a well planned sting operation. The informant [Brennan] then helped to introduce the Texans to a British undercover officer from SO10, posing as a buyer for Northern Ireland Protestant terrorists. The weapons were to be stolen in part from an army base in the United States and shipped to Britain via Sierra Leone. Officers were particularly

interested in finding out how Barratt sniper rifles were getting into Northern Ireland - at the cost of many British soldiers' lives.

The sting operation was going well and undercover officers were gathering evidence against the American gang. After successfully bugging meetings in London and Houston, Redgrave's team and US customs were poised to make arrests. Then something strange happened during the arms negotiations, which ultimately scuppered the operation. The informant was charged with theft of £400,000, which had been deposited in his account by the Texan gang as part of the laundering scam.

To keep Operation Nightshade on track, a financial investigator was appointed by the Metropolitan police to examine the informant's business accounts.

Meanwhile my constituent redoubled his and his colleagues' efforts to complete the sting and make the arrest. By autumn 1994, the American gang had backed off. Operation Nightshade, which cost millions of pounds, faded with no arrests on either side of the Atlantic. I would really like to know exactly how much it cost.

The informant [Brennan] disappeared and the theft charges against him were mysteriously dropped. Three years later, in February 1997, as anti-corruption officers raided my constituent's home, it became clear that he and Charman had not escaped the shadow of Operation Nightshade. Subsequently, the CIB told Redgrave and Charman that the informant had been re-arrested for the alleged theft of money during Operation Nightshade. The anti-corruption squad also accused both detectives of turning a blind eye to the theft in return for £50,000. My constituents were not told that that allegation was subsequently withdrawn, which is disgraceful.

The CIB further claimed that in order to disguise the corrupt payment, Redgrave had duped his senior commanders and simply invented the arms deal. That is clearly untrue, as I have ascertained through parliamentary questions and other parliamentary activities. The protection or non-prosecution of people whom Redgrave and Charman tried to investigate through Operation Nightshade is important to understanding what happened to those two officers. That is especially the case when examining the targets connected with the plan to sell arms to two Met undercover officers posing as buyers for Northern Ireland terrorists. I greatly regret that the SO10 officers were not brought before the Select Committee on Foreign Affairs, but Members are well aware of our uphill struggle for transparency in that matter.

Confidential Met and United States police documents on the progress of their joint operation against the United States-based gang clearly showed that all the law enforcement officers involved believed that they were dealing with real gangsters offering an arms deal in return for millions of pounds.

In Redgrave's report to his superior on 26 May 1994, he said that the current position was that Crooks had placed an order for arms, faxed exportation documents and received the undercover officers' dummy end-user certificate. The report stated that the targets had also seen proof of purchase funds and Crooks had said on tape that the shipment was ready in a container for export within 30 days. Redgrave noted that the next stage would be to return to Houston to arrest the principals. In a memo from United States Customs dated 9 May 1994, special agent Leon Guinn said that the targets in Houston had repeatedly made incriminating statements over the arms deal in numerous telecommunications and in three meetings with undercover officers in London. Guinn continued:

> “Investigation by the SAC - special customs - in Houston has determined that the targets have made specific inquiries with US arms dealers... further, the co-conspirators have been recorded alluding to the undercover officers that some of the material requested by them will be taken from US military installations. Guinn ended by saying that the Government attorney handling the case had expressed a desire to pursue prosecution of suspects and believed conviction to be "very likely". In another south-east regional crime squad police report, Crooks is described as the head of the organisation, a high-profile fraudsman, diamond smuggler and arms dealer known to the American authorities and fully researched by the US Customs.”

In a summary of meetings between one undercover officer and Crooks at the Britannia hotel in London on 20 December 1993, the undercover officer said:

> “Roger again said he had no problem in selling weapons to our organisation but he could only get it out of the United States to, say, Nigeria or Sierra Leone. However, he could put us in contact with the right people who would facilitate its onward shipment to the United Kingdom...Roger again said that we would not have a problem getting it from Sierra Leone as he had all the right contacts, in fact he even had a diplomatic passport for that country - and indeed he has. There are sensitive diplomatic reasons why that aspect of Operation Nightshade has been fudged, which I may make available to the House on another occasion. Crooks and his outfit had high-level contacts in the United States and I believe that political leverage was used. The Operation

> Nightshade papers show that both the United States and British officers wanted to arrest Crooks and his gang by the middle of 1994 and that opportunity was botched. It is not clear whether MI5 was involved. It is of course unanswerable and unaccountable to Parliament."

Crooks later claimed that throughout the arms deal he was acting as an informant. Crooks appeared later in history at the heart of the United States navy's plan to rescue American and British citizens stranded in Sierra Leone, and he is still involved in the Mama Yoko hotel.

My constituent has been cleared of corruption, but he remains suspended. He believes that his plight is connected to the targeting of Roger Crooks and British policy, official and deniable, on Sierra Leone. He hoped that a judicial inquiry would uncover whether he and others were the victims of a plot by the intelligence services to undermine Operation Nightshade and to protect its targets.

I remind the House that I received some interesting answers from Home Office and Foreign and Commonwealth Office Ministers and from the Ministry of Defence. Despite extensive evidence of arms deals involving Crooks in Sierra Leone, the Minister of State, Home Office, the hon. Member for Norwich, South (Mr. Clarke), said:

"The Commissioner of Police of the Metropolis tells me that no such details were revealed as a result of Operation Nightshade. - [*Official Report,* 16 March 2000; Vol. 346, c. 268W.] In other words, no details were revealed of arms deals via west Africa. However, in answer to another question, the Minister conceded that Crooks was interviewed by the anti-terrorist branch in London on 24 June 1993 about matters that involved the supply of firearms. - [*Official Report,* 3 April 2000; Vol. 347, c. 379W.]

Answers from the Foreign Office were equally revealing. I was told that Crooks had been known to various members of the High Commission for some time. - [*Official Report,* 16 March 2000; Vol. 346, c. 287W.]

> "He had provided assistance in the evacuation of the United States hotel in Freetown in May 1997. The Foreign Office also confirmed that Crooks had had contact with unnamed Foreign and Commonwealth Office and Ministry of Defence personnel during the past few years - but not about arms or military matters. The Foreign and Commonwealth Office confirmed that Crooks was expelled from Sierra Leone; but he has now been reinstated. The website of the Sierra Leone news agency said that he had been expelled for trying to

> arrange the trafficking of arms between Northern Ireland and Sierra Leone. As we know, he also had discussions with Peter Penfold, our controversial high commissioner in Sierra Leone, who was aware of the Sandline plan to arm a counter-coup to restore Kabbah to power."
>
> ... I apologise for having detained the House, but I think that you will realise that, prima facie, the case stinks. (Underlining added)

190. McLagan had this to say in his witness statement about Mr McKinlay's speech in the House of Commons:

> 95. McKinlay's speech in the House of Commons was a very strongly-worded and critical attack upon CIB, and Coles in particular. It was made on a privileged occasion in Parliament on behalf of Redgrave in a context that required the Home Secretary or his Minister to respond. From the information that he gave in his speech, McKinlay was clearly in close liaison with Gillard and Flynn. I am told that they were at the House of Commons for McKinlay's speech in the company of Redgrave and Charman. As I found out from the dossier that was later provided to me by McKinlay, Millar too was in contact with McKinlay on behalf of Redgrave and Charman.

191. There is much detailed information in what Mr McKinlay had to say and, in my view, what he said requires close analysis. First, however, was McLagan entitled to assume as a responsible journalist that what was being said had come from Charman as well as Redgrave? The answer to that in my view is "Yes" and there is no contrary finding by the Gray J. Nor, I believe, does Mr Tomlinson dispute that.

192. According to Mr McKinlay, of the three elements in Operation Nightshade, the second was a money laundering scam and the third, "most importantly, an illegal arms deal using Sierra Leone as a trans-shipment point" described as "an Anglo-American police sting across three continents, costing millions of pounds". A "Texan-based gang" had approached Brennan in 1993 "with an offer to sell arms". Brennan "was asked whether he could find a buyer for a large quantity of arms worth millions of dollars". "Redgrave was notified by Brennan and obtained further authorisation from several senior Scotland Yard commanders and their US counterparts to mount a well planned sting operation". That involved Brennan introducing "the Texans to a British undercover officer from SO10, posing as a buyer for Northern Ireland Protestant terrorists". "The sting operation was going well and undercover officers were gathering evidence against the American gang. After successfully bugging meetings in London and Houston, Redgrave's team and US customs were poised to make arrests. Then something strange happened during the arms negotiations, which ultimately scuppered the operation. The informant was charged with theft of £400,000, which had been deposited in his account by the Texan gang as part of the laundering scam" (the second element in Operation Nightshade). "Meanwhile my constituent redoubled his and his colleagues' efforts to complete the sting and make the arrest. By autumn 1994, the American gang had backed off. Operation Nightshade, which cost millions of pounds, faded with no arrests on either side of the

> Atlantic." "The CIB ... claimed that in order to disguise the corrupt payment, Redgrave had duped his senior commanders and simply invented the arms deal. That is clearly untrue ... ." Redgrave "believes that his plight is connected to the targeting of Roger Crooks [described as the head of the organisation, a high-profile fraudsman, diamond smuggler and arms dealer] and British policy, official and deniable, on Sierra Leone. He hoped that a judicial inquiry would uncover whether he and others were the victims of a plot by the intelligence services to undermine Operation Nightshade and to protect its targets.

193. On this account there is nothing to suggest that Brennan had done anything wrong. He had not, so it appears, stolen the money but received it from the Texan gang as part of the second element of Operation Nightshade. In other words he had received it with the knowledge of and under the supervision of Redgrave and Charman. He had helped set up a major sting to uncover arms dealings into Northern Ireland. Then he had been arrested for a theft which he had not committed as part of a plan by the intelligence services to scupper Operation Nightshade. This can be compared with the post conviction letter of 19 March 2002 (paragraph 47 above), in which, so it seems to me, the fact that Brennan had committed a theft was known to Redgrave before Brennan's arrest in 1993 and had been reported - or, at the least, was known at about the time of the arrest.

194. Mr McKinlay did not mention Smith's role in those "false" allegations. I am not aware that Charman ever directly adopted Brennan's account of why Smith had persuaded him to make false allegations against Charman and Redgrave. However, McLagan believed (see paragraph 177 above) that the implication of the March 4 2000 Guardian article "was that Smith had procured Brennan to make false allegations against Redgrave and Charman to exact revenge against Charman for reporting him in 1985, or as part of an unlawful plot by CIB falsely to implicate Redgrave and Charman in a corruption scandal".

195. I return to the book. According to the book (page 232), the Metropolitan Police "always had robust answers to the criticisms" made by or on behalf of Redgrave and Charman "but had difficulty responding publicly because of possible prejudice to forthcoming trials or disciplinary proceedings".

196. I turn to the Brennan trial. In his witness statement McLagan writes:

> 110. I followed the Brennan trial very closely. I attended some, but not all, of the pre-trial hearings, making notes of Gaspar's evidence. I also received reports from the Old Bailey news agency, Central News, for days when I was not in attendance. I was given by Andrew Trollope QC, Brennan's Counsel, a copy of his skeleton argument, which was very useful. I was also able to obtain copies of the transcripts of Gaspar's tape recordings with Brennan, which had been referred to in court. These went into great detail about how and where Brennan said he had handed over money to Redgrave and Charman. I also had access to the report on the private finances of Redgrave and Charman by DC Jamie Chaplin, that was mentioned during the pre-trial hearings.

110. Information was also given to me about allegedly false entries said to have been made by Charman in Brennan's informant logs.

...

115. My account in the book of the Brennan trial was based upon my attendances at the Old Bailey and the notes I made; agency reports of the trial, where necessary; the documents referred to in the trial of which I was able to obtain copies or have sight; and my own impressions as an observer from the press bench.

...

118. There was no dispute that the money had passed through his bank account nor that the telephones had never materialised nor that he was having regular meetings with Redgrave and Charman at this time. It was Brennan's defence that he received the money from the Wangs in his capacity as informant working under the direction of honest police officers, Redgrave and Charman, in the course of a bona fide police operation to ensnare serious criminals. ... Richard Latham QC for the Crown was able, on the basis of the Gaspar Tapes, to cross-examine Brennan to the effect that his relationship with Redgrave and Charman was a corrupt relationship, not an honest one. He was able to put to Brennan the two different versions of events: the one on the Gaspar Tapes where he said Redgrave and Charman took money from him and the one in Court where he said they were honest. The names of Redgrave and Charman came up repeatedly during the proceedings and officers I spoke to were waiting with interest to see whether they would be called by Brennan to support his account of an honest and legitimate relationship, but they did not make appearances as witnesses.

119. In his cross-examination of Brennan, Latham put to him the following matters on behalf of the Crown, all of which Brennan denied (Defence §5.48.1 – 5.48.4):

> that a cash withdrawal of £10,000 by Brennan from his bank account on 3 September 1993 was paid over by him to Charman at the Oval, Sidcup, by way of a corrupt payment;
>
> that, on 17 September 1993, by prior arrangement, Brennan met Charman and Redgrave at The Travel Lodge, South Mimms, where Brennan handed over another £10,000 and was told by the officers that they wanted £50,000 to mind Brennan's back with the story that the £400,000 from the Wangs was all suspected money-laundering;

> that two or three days after the South Mimms meeting, Brennan gave Charman and Redgrave a third tranche of money, cash in the sum of £30,000; and
>
> that after Sam Wang made his complaint of theft by Brennan to CID at Bexleyheath police station, the investigation was transferred out of that station to SERCS after representations were made by Redgrave.
>
> ...
>
> 123. In the book, I have made extensive references to the Brennan trial. For these, I relied upon the notes I made while sitting in Court and, for when I was not present, the Old Bailey news agency reports or information given to me by interviewees. I had no access to transcripts, although these have now been obtained for a great deal, but not all, of the trial. ...

197. The book described the trial in this way (pages 232-234) It started with this comment:

> CIB officers hoped that Redgrave and Charman would give evidence for Geoffrey Brennan at his trial in 2001. The pair could have used the proceedings as an opportunity to set the record straight, to deny Brennan's original allegations that he had bunged them £50,000 to cover up his theft of the £400,000 from the Chinese-American businessman, Sam Wang. They could also have backed Brennan's later claims that the police operation mounted by the pair into gunrunning and money laundering had been entirely legitimate, and not a smokescreen, as was being suggested by CIB. If the pair had appeared in the witness box, they would have been open to cross-examination by the CIB prosecution team, determined to get at the truth of Brennan's allegations. But it was not to be. Although Redgrave and Charman's names were continually mentioned throughout the trial, the two suspended officers did not appear at the Old Bailey.

198. The judge held that McLagan should have appreciated that there was no possibility of Charman or Mr Redgrave giving evidence at the Brennan trial. Mr Tomlinson supports that conclusion. I return to that later in my judgment. Sufficient to say at this stage that if Brennan was innocent and had acted in the way described, for example, by Mr McKinlay, one might have expected his handler Charman, and the investigating officer, Redgrave, to "ride to his support". That did not happen.

199. The book continues:

> However, information about their finances emerged at a pre-trial hearing. This was held because Brennan's lawyers wanted to have the case against him thrown out, and if that move failed, to have some of the evidence against him excluded at the full jury trial. A single judge heard the issues, with the main

witness being Roger Gaspar, the ghost squad's original head. He went through all the meetings he had with Brennan. He started with the early ones in which the crooked businessman had described in great detail how he had paid £50,000 to Redgrave and Charman, allegations which he repeated at later meetings with Gaspar, but later withdrew. Even more than a year after their first meeting in June 1994, Gaspar was still sometimes providing expensive armed police protection to Brennan, believing that his life was in danger. One such occasion occurred when Brennan said he wanted to visit his father, who was in hospital after suffering a heart attack. Gaspar contacted the hospital and subsequently went there himself, making arrangements for Brennan to enter and leave by a side entrance. He was given armed protection on the journey to and from the hospital.

At the pre-trial hearing, Gaspar made two new important disclosure of evidence coming from his investigation. He said he had learned that the separate inquiry into Wang's allegations of theft had been taken over by SERCS, which was an unusual move as that élite group of detectives was not normally involved in such investigations. Gaspar also revealed the results of a secret investigation he had ordered into possible irregularities in the two officers' financial affairs. He said this showed that Redgrave had received unexplained income, over and above his Met police salary. In Charman's case, an unusual spending pattern had started in October 1993, coinciding with the time Brennan had claimed to have paid over the £50,000 bribe.

But Gaspar had to admit that he had not cautioned Brennan that any of his confessions could be used against him. That fact alone, according to the defendant's QC, Andrew Trollope, meant that the officer's notes and tape recordings of meetings should not be allowed as evidence at the main trial. But he advanced further arguments which he said made Brennan's accounts to Gaspar unreliable. He said that Brennan had approached the chief superintendent because he was in fear for his life, someone in the Met having leaked information about him to a violent robber. In order to get police protection, Brennan would have been strongly motivated to say anything. He thought it possible, said Trollope, that either Redgrave or Charman, or both of them, had placed him in danger, so he had a motive for implicating them and seeking protection from them. But while there was no hard evidence that they were corrupt, there was strong evidence that Brennan himself had been a participating informant at the time of the theft, and had been acting for the officers as they investigated drugs dealing, money laundering and gunrunning. The QC also argued that the trial should be abandoned because of the length of time since

> the original offence, and because of irregularities in the investigation.
>
> For the prosecution, Richard Latham, QC, said that Gaspar had been presented with a unique situation when dealing with Brennan. The businessman had been compromised by the leak of documents that should have remained in police hands, and he was potentially a valuable informant on police corruption. On the other hand he was admitting to the Wang fraud. Gaspar had opposing duties. He was protecting a compromised informant involved with fraud, but he was also investigating corruption, trying to stamp it out.
>
> The officer in overall charge of the ghost squad and CIB, Deputy Assistant Commission Roy Clark, amplified on the problems to the court. He said the anti-corruption detectives did not know whom they could trust, particularly in the early days. Excessive secrecy had also hindered their effectiveness.
>
> Having heard both sides, the judge, Brian Barker, ruled that the trial should go ahead in front of a jury, but Gaspar's notes and recordings of Brennan's confessions to stealing the £400,000 should not be allowed in evidence.

200. The judge also ruled as inadmissible the apparent adoption of the taped interviews by Brennan at the time of his re-arrest in November.

201. The book continues (pages 235-237):

> Brennan ... went into the witness box, answering questions from his own QC, Andrew Trollope. He stuck to his story that he had been a police informant, giving information first to Charman on drugs dealing and then, as the police inquiry expanded, to Redgrave. He claimed that he believed all the money sent from the United States was part of a money-laundering and gunrunning operation being monitored by Scotland Yard, and that he had done nothing without the prior approval of the two detectives. Redgrave was running the operation. He agreed that later he had met Chief Superintendent Gaspar to obtain protection, but the jury heard no mention from him of his confessions to stealing Wang's money or of giving £50,000 to Redgrave and Charman (an allegation later withdrawn).
>
> From the start of his cross-examination, Richard Latham tore into Brennan, exposing a series of lies on the part of the businessman, who counter-attacked, protesting that the prosecution was going down the same vindictive road as the police had done, having waged a vendetta against him for the previous seven years. Worked into a fury, Brennan asked for a break so he could calm down, but his request was refused. It

was classic knockabout stuff, and Latham's chronological questioning had not even reached the mobile-phone deal. Brennan could take no more – at that stage, anyway. He said he was ill and the court was adjourned for a day. When it reconvened, Latham did not let up. He was on top of every aspect of the case, having been prosecuting counsel in the CIB sting operation that had netted Redgrave and Charman. He knew how far he could go legally over the two detectives, and he knew how far he could go in goading Brennan.

One exchange was particularly fascinating. It came after Brennan had described giving information to Charman. "That officer was going to come into your pay?" asked Latham. "No, he was not," replied Brenna, who then admitted that he had met Charman and Redgrave at South Mimms, the service station where, unknown to the jury, he had originally claimed to have paid money to the two detectives. "They wanted money," said Latham, "and you gave them money." Brennan denied the charge and threw the gauntlet back, demanding to know why the prosecution was not calling the pair to give evidence. In replying, Latham chose his words with care. They were damning: "I am not going to bring in criminals to give evidence." Brennan retorted that they were honest officers who had been doing their job: Don't accuse people when they are not here to defend themselves. Why not charge them with corruption?"

"There are few people around when officers are involved in corruption," replied Latham, going on to warn Brennan: "Be very careful what you say about these two officers."

In later exchanges, Latham described the two as "dishonest" and "corrupt", claiming they wanted £50,000 from Brennan out of the £400,000 and in exchange they would "mind his back" with a cover story about money laundering and arms dealing. Brennan denied it, but his back was to the wall and he knew it. Under pressure, his facial twitch became more pronounced. At times he was twitching virtually non-stop. The cross examination was relentless, until by the end Brennan was on the ropes, red faced and blustering. Some members of the jury were even laughing at a number of his responses.

Although Redgrave and Charman were not on trial, for much of the time it was as if they were in the dock with Brennan. In Latham's closing speech to the jury, much play was made of their alleged corruption. He repeated that the prosecution case was that a total of £50,000 had been paid to the two detectives to provide a smokescreen for the theft of Wang's money, and he attacked the defence team for not producing a single document to support their contention that the £400,000 had been handed back in an operation monitored by the police. If

> honest officers were mounting an official operation with Brennan playing an important part, he said there should have been no difficulty in putting the record straight when the businessman was arrested. Instead, Brennan had refused to answer police questions. For the defence, Andrew Trollope said that although the prosecution was calling Redgrave and Charman criminals, there was no evidence that they were paid a penny piece or were party to any plan to steal the money.
>
> Speaking in mitigation for him, Trollope said that the defendant might not have been alone in carrying out the theft and the events that followed. Although the jury had rejected Brennan's defence, Trollope continued that it was unquestionably the case that Redgrave and Charman were in contact with him at the time of the offence and were aware of what was taking place. While acknowledging that they were not before the court, and that there was no evidence as to their role, he went on to make an apparent reference to the pre-trial hearing evidence that Brennan had originally alleged paying the pair £50,000. Cryptically, he said the judge knew "what the prosecution is about". If it was right that the officers were compliant in what took place, then they bore a heavy responsibility, particularly as Brennan was an informant passing on genuine information. (Underlining added)

202. In the underlined passage Brennan is giving his account. I repeat it:

> He claimed that he believed all the money sent from the United States was part of a money-laundering and gunrunning operation being monitored by Scotland Yard, and that he had done nothing without the prior approval of the two detectives. Redgrave was running the operation.

203. The claim that "all the money sent from the United States was part of a money-laundering and gunrunning operation being monitored by Scotland Yard", a claim which was rejected by the jury, was almost the same claim which Mr McKinlay had put forward in the House of Commons in 2000.

204. I shall try now to bring together a number of strands from this complicated story of truths, half-truths and lies. I do so without considering the conclusions of the judge. I return to those later.

205. That Brennan stole £400,000 from the Wangs seems undeniably true. Indeed it is not disputed. Given that he stole £400,000 it must follow (so it seems to me) that the £400,000 had not been deposited in his account by the Texan gang as part of the laundering scam which was allegedly being investigated by Redgrave and Charman as part of Operation Nightshade. Indeed the jury must have rejected Brennan's attempts to defend himself in this way.

206. It must also follow that Brennan was not being falsely arrested to scupper the ongoing alleged arms investigation.

207. So why did Mr McKinlay (whose assistance was enlisted by Charman's brother in law, Millar) say, as the media had said before him, that:

> The informant was charged with theft of £400,000, which had been deposited in his account by the Texan gang as part of the laundering scam?

208. Why did Mr McKinlay implicitly or explicitly tell the House that Brennan had done nothing wrong and that he had been falsely arrested as part of a plan by the intelligence services to scupper Operation Nightshade? Why did Mr McKinlay tell the House that Brennan had received the money from the Texan gang as part of the second element of Operation Nightshade? It seems unlikely to me that this account was true, although Mr McKinlay would not have known this.

209. As I have said, a responsible journalist would be entitled to conclude, as McLagan did, that Charman was in some way involved with what Mr McKinlay said and was behind at least some of the similar things said by the media.

210. It furthers seems to me that a responsible journalist would be entitled to conclude that the account being given by Mr McKinlay and by the media reflected what Brennan had in 1994 said to Gaspar on tape, namely Charman and Redgrave would pretend that Brennan was giving them information about a money-laundering operation being run from the US as a cover for the theft and would help him in the event of Brennan being arrested. To put it another way: Brennan told Gaspar about an agreed cover up and that was the cover up which was used in 1997 and following Brennan's arrest.

211. What other explanation could there be? I have looked at the 19 March 2002 letter (paragraph 136 above). Notwithstanding that letter, would a responsible journalist conclude that Redgrave and Charman could believe that the £400,000 the subject matter of the theft charge was money coming to Brennan as part of their supervised investigation into money laundering by the Texans? I do not believe so. A responsible journalist would, in my view, be entitled to conclude that there cannot have been two £400,000s.

212. The arrest in 1996 and what happened thereafter may provide a clue. Brennan had admitted the theft to Gaspar but, presumably, had hoped that he would not be prosecuted because of the information he had given about police corruption. Now he was being prosecuted. He could have stayed with the story and hoped to be treated leniently because of the information which he had given. Or he could abandon the story altogether. He chose the latter.

213. Having been convicted, Brennan, through Mr Trollope, did rely on his perilous activities as an informant involved in money laundering and gun running to obtain a reduction in his sentence. However, if the prosecution had accepted that he was an informant who had put his life at risk with money launderers and terrorists, there would have been an obligation so to inform the court. I cannot see any evidence that they did so.

214. Although Miss Page did not analyse the evidence in quite the way that I have done she relied, as Mr McLagan had, on the fact that the account given by the media and Mr McKinlay was the account relied upon by Brennan at his trial.

215. Without considering the conclusions of the judge, which I shall do next, my provisional view is that the defence of responsible journalism should have succeeded. A responsible journalist was well entitled on the material available to McLagan to tell the public that there were cogent grounds to suspect that Charman abused his position as a police officer by colluding in the commission of substantial fraud with Brennan from whom he and Redgrave received corrupt payments totalling £50,000. Brennan tells Gaspar that he committed the theft and that Charman and Redgrave agreed to cover up the theft so that Brennan would not be prosecuted. Although Brennan later retracts the allegations after being charged with the theft, the agreed cover story about which Brennan told Gaspar then featured in the media and in the House of Commons as part of a campaign in which Charman (so a responsible journalist could conclude) was involved to defend his name and attack the Metropolitan Police ("attack being the best form of defence"). As the 19 March letter showed, that cover story was then, so it could properly be argued, abandoned after Brennan had been convicted.

216. There was also some support for Brennan's account: for example the involvement of Redgrave and possibly Charman after the arrest to prevent Brennan being prosecuted and the financial evidence.

217. A responsible journalist could also rely on the fact that the Metropolitan Police denied that any details about gun running were revealed as a result of Operation Nightshade. Such a journalist could also rely on the response made by prosecuting counsel, Mr Latham, to Brennan, describing Charman and Redgrave as "criminals"- not an allegation which can be made lightly by counsel. If, as the Sunday Times reported (paragraph 167 above) the two officers had reported "every detail of the way the money was handled" to their superiors, if what Brennan was doing vis a vis the Wangs had, as was claimed, "been fully reported on ... with a view to investigation" (paragraph 136 above), then it seems very unlikely that prosecuting counsel would have described them as "criminals", and indeed unlikely that they would have been the subject of any prolonged investigation.

218. There is a further important point. Brennan was saying at his trial: What I did was not theft but the receipt of money on the instructions of Charman and Redgrave who were, so they told me, investigating suspected money laundering by the Wangs. In most criminal cases where the defendant runs this kind of defence, the prosecution challenge the involvement of the police or other agency, and submit that the defendant has fabricated his account. This case is very unusual. The prosecution accepted, as they had to, that Charman, as Brennan's handler, and Redgrave through Operation Nightshade were substantially involved with Brennan (both before and after his arrest in November 1993) but it was the prosecution's case that they were involved dishonestly, i.e. they were involved to help Brennan cover up a theft by pretending that he had received the money in the course of a money laundering investigation. Unless the prosecution could prove that either Charman and Redgrave had been misled or that Charman and Redgrave were involved dishonestly, the prosecution case would fail or was likely to fail. It was no part of the prosecution's case that they had been misled - there was no evidence of that (indeed the two officers had refused to answer questions when the Brennan allegations were put to them). That had not been suggested, so it appears, by Charman or Redgrave when Brennan was arrested. If the prosecution thought that they had been misled, then one would expect the prosecution to call them as witnesses. There was evidence that they had acted dishonestly -

evidence which had been ventilated at the pre-trial stage albeit not sufficient, without Brennan's help, to charge them. Furthermore, if Brennan was telling the truth about the innocent involvement of Redgrave and Charman, one would have expected them to give evidence on his behalf. Handlers often help their informants (for example Roy Garner was helped, see page 19 of the book).

219. I turn therefore to the judge's conclusions. The judge had earlier considered the question of balance, adding that a publication does not have to be balanced in order to qualify as responsible journalism. The judge in paragraph 124 set out a number of matters which a balanced approach required him to mention. Most of those matters I have considered or shall consider below. He also criticises McLagan's failure to tell his readers that Brennan, apparently, gave Gaspar the wrong date for when Redgrave became involved in Operation Nightshade. This was another unpleaded criticism made in cross-examination. Miss Page in the Schedule makes a convincing case that the judge was wrong to make this criticism, as she does also of the unpleaded criticism that Brennan gave no adequate explanation to Gaspar of the source of the £30,000 and of the criticism that McLagan did not mention that Brennan told Gaspar that the first person he turned to on his arrest in November 1993 was Smith.

220. The judge started his examination of the defence of responsible journalism in paragraph 129. In paragraph 132 he wrote:

> It would be impractical for me in this judgment to undertake a line by line examination of the substantial passages complained of by Charman. I will therefore confine myself to those which seem to me to matter.

221. The first criticism under the heading of responsible journalism is to be found in paragraph 135. The judge said:

> 135. There is, however, no reference to be found in the book to the discrediting of the officer Smith. He had been described in Chapter 3 as "a reliable Flying Squad officer" [in June 1994 by the head of the Flying Squad]. The reader of *Bent Coppers* is told that he had formerly acted as Brennan's handler and that it was he (Smith) who referred Brennan to Gaspar. At page 42 McLagan writes that Gaspar had no reason to disbelieve Brennan's story "especially as it was corroborated by DS Smith".

222. A look at page 42 makes it clear, so it seems to me, that the corroboration related to the disclosure of his informant status and not to the allegations against Redgrave and Charman. Paragraph 135 continues:

> At page 180 of the hardback edition the reader is told that when Brennan withdrew his allegations against Charman and Redgrave some two-and-a-half years after he was interviewed by Gaspar, he claimed to the Police Complaints Authority that Smith had put Brennan up to blackening the two officers because he had "had it in" for Charman and Redgrave since the 1980s. The reader is told that Smith strongly denied that claim.

> There follows a reference to Smith and other officers "moonlighting" for a private security company which Brennan was running. Smith is said to have received payments from Brennan for his help during a spying operation on a private house in the course of which police equipment was used. At page 182 Smith is recorded as having admitted working for Brennan whilst still employed by the Met.
>
> 136. What the reader is not told about Smith is that (as I have recorded at paragraph 36 above) he had been accused in the columns of the Sunday Times of having taken thousands of pounds in bribes from Brennan.

223. As to this article, McLagan wrote in his witness statement (paragraph 87 above):

> It appeared that the Defence had been provided with information that could only have been provided, directly or indirectly, by Brennan, presumably with a motive to discredit Smith, for his own benefit or that of others.

224. As Mr Tomlinson accepts, the reader was told about these allegations at page 18. Mr Tomlinson describes the judge's error as "merely a slip". In fact the Sunday Times had not referred to bribes but to fees for moonlighting. As Miss Page points out, in any event, the moonlighting had apparently occurred some two years after Brennan had made the allegations to Gaspar about Redgrave and Charman.

225. The judge continued:

> Shortly afterwards Smith was cross-examined by counsel on behalf of the defendant Phillips about his relationship with Brennan. Smith repeatedly refused to answer these questions on the basis that it might incriminate him if he told the truth. He also refused to answer questions about payments made to him by Brennan. As a result Smith became the subject of an investigation by the CIB. McLagan was present in court during that cross-examination and had a transcript of it when he wrote the book. The flavour of the cross-examination can be gauged from the transcript of the present hearing at Day 2 pages 146-158. In his evidence McLagan accepted that it had been a mistake on his part to have written that Smith had admitted "moonlighting" in his evidence. In the witness box he denied having moonlighted but later he admitted having done so. McLagan did not mention this contradiction.
>
> 137. It seems to me that the role of Smith in relation to the Brennan allegations was important. He had been Brennan's handler. The claim was made by Brennan that it was Smith who put him up to making allegations of corruption against Charman and Redgrave. It was to Smith that Brennan turned when he decided to alleged corruption on the part of Charman and Redgrave. In my opinion McLagan is open to criticism for

> failing to inform his readers that, far from being "reliable", Smith was profoundly tainted by his answers during cross-examination in the Phillips trial.

226. Mr Tomlinson in his skeleton argument had this to say about Smith:

> It was common ground that DS Smith played a very important role in the whole "Brennan affair". In particular:
>
> (i) He had been Mr Brennan's "handler" and introduced him to DCS Gaspar, an introduction which led directly to the "Brennan Allegations" being made. He was present during most of the "Gaspar Tape" interviews (Hardback, p.42; Paperback, p.53).
>
> (ii) When Mr Brennan was arrested in November 1993, he immediately asked for DS Smith.
>
> (iii) When Mr Brennan withdrew the Brennan Allegations in January 1997 he said that he had been put up to making them by DS Smith who "had it in" for Redgrave and Charman.
>
> As a result, DS Smith's credibility and the nature of his relationship with Mr Brennan and with Mr Charman were matters to which a responsible author had to give serious consideration when writing the story of the Brennan allegations.

227. I have difficulty with the judge's criticism. The reader had been told that Smith had moonlighted for Brennan whilst a police officer. I accept that the reader could have been told more about Smith, but I have considerable doubt whether there was sufficient reliable material for a responsible journalist to allege not only that Brennan claimed that Smith had put him up to making false allegations, but that Smith had in fact conspired with Brennan to make false allegations against Redgrave and Charman to Gaspar. Miss Page submits that it would have been quite wrong for McLagan to suggest that what happened in the Phillips trial provided corroboration for Brennan's allegation that Smith had conspired with him in June 1994 to make false allegations against Charman and Redgrave. In my view a responsible journalist was not required to state that Smith was profoundly tainted.

228. I do not agree with Mr Tomlinson (Schedule of Judge's criticisms of McLagan's journalism, Box 9) that McLagan's failure to say that Smith was profoundly tainted was "a fact which was of great importance in considering these events" and therefore undermines the defence of responsible journalism. I should add that this is one of the complaints which was to be found in neither the Reply nor the amended Reply, albeit as Mr Tomlinson states, it was raised in the skeleton and in the opening. If it was seen as a fact of such great importance, one might expect to see it in the pleadings.

229. The second criticism of McLagan's journalistic responsibility comes in paragraph 143 and following. The judge cited a paragraph from the book:

> At the pre-trial hearing, Gaspar made two new important disclosures of evidence coming from his investigation. He said he had learned that the separate inquiry into Wang's allegations of theft had been taken over by SERCS, which was an unusual move as that elite group of detectives was not normally involved in such investigations. Gaspar also revealed the results of a secret investigation he had ordered into possible irregularities in the two officers' financial affairs. He said this showed that Redgrave had received unexplained income, over and above his Met police salary. In Charman's case, an unusual spending pattern had started in October 1993, coinciding with the time Brennan had claimed to have paid over the £50,000 bribe.

230. The judge continued:

> That passage appears to me to be open to a number of criticisms. Whilst it is factually correct that the inquiry into Wang's allegations of theft had been taken over by SERCS, there was nothing unusual or sinister [not a word used by McLagan] about it. DC Maul, the SERCS officer who conducted the inquiry, gave evidence at the pre-trial hearing about it. It was not suggested to him that it was in any way unusual for SERCS to have become involved. It is hard to understand why this aspect ranked as an "important new disclosure" by Gaspar.

231. This was another matter not foreshadowed in the pleadings.

232. Redgrave claimed the credit for the investigation being placed with Maul. McLagan's assertion that it would be unusual for SERCS to take over what was, on the face of it, a simple investigation into a theft is not challenged. As Mr Roy Clark ("Clark") said in evidence in the Brennan trial the squad does not reactively investigate crime. In the Brennan trial Gaspar described the moving of the investigation to SERCS as "curious" and that he had considered it another corrupt act. Clark described it as "something that made me suspicious". The bringing of the case into the Regional Crime Squad was a corrupt act for an ulterior motive, he said. Mr Trollope understood the prosecution's case to be that the "investigation was improperly taken over by the Regional Crime Squad". According to McLagan's notes (C3B 7/75) Maul said in evidence that what he was asked to do was very unusual. Maul told McLagan that he thought that he may have been transferred to Heathrow to get him out of the way. Mr Tomlinson points out that Maul told McLagan that the transfer "wasn't so unusual". Mr Tomlinson submits that Maul was a conscientious and honest officer and that therefore there cannot have been an improper motive in the transfer. I do not follow that argument. It does not follow from the fact that Maul is honest that Redgrave's motives in asking for this to happen are also honest. I, for my part, do not see why McLagan's description of the evidence as being an important new disclosure shows that his journalism was no longer responsible.

233. The judge continued:

> 145. The other "important new disclosure" identified by McLagan was the revealing by Gaspar of the results of a secret investigation he had ordered into possible irregularities in the two officers' financial affairs. Gaspar is reported to have said that this showed that Redgrave had received unexplained income, over and above his Met police salary, and that in Charman's case an unusual spending pattern had started in October 1993, coinciding with the time Brennan had claimed to have paid over the £50,000 bribe. In point of fact it was not Gaspar but Clark and [Detective Chief Superintendent] Coles who had mentioned these matters in the course of their cross-examination. The criticism which I make of this passage is that it treats matters which McLagan ought to have realised were of marginal relevance and which he knew had taken up no more than a few minutes of court time as if they formed a major part of the hearing. The references to "unexplained income" and "an unusual spending pattern" are damning. ... (Underlining added)

234. Miss Page identifies the evidence:

> The evidence given was by Clark, not Gaspar - the wrong name was put into their report by the Central News Agency, from which McLagan took this and repeated the error. Clark's evidence is at **App 4/D/11/164D - G**; Coles also referred to the financial evidence and said it "jig sawed exactly" with the Brennan allegation: **App A/D/11/246D-H**

235. Mr Tomlinson attaches significance to the fact that the evidence was given by Clark and not Gaspar. That seems to me of very marginal relevance.

236. Miss Page writes:

> The Judge refers to the references to “unexplained income” and “an unusual spending pattern” as “*damning*”. Why therefore should they have been omitted? This was information given in a public courtroom and reported accurately by McLagan. It was not of *“marginal relevance”* to the book. On the contrary it was highly relevant because it was corroboration independent of Brennan of his corruption allegations. McLagan not only reported accurately what was said in court, but he asked for and was allowed to read the financial report, it having been referred to and summarised in evidence. He therefore took steps to verify that this *“damning”* evidence had been accurately described in court.

237. Mr Tomlinson submits:

> The Judge was right to criticise the highlighting of this evidence (which was mentioned briefly in passing and was of marginal relevance to the Brennan trial). The references were indeed damning and, if McLagan was going to report them as

> "important new disclosures" then he should have made it clear that these "revelations" were not the subject of first hand evidence and were never examined at the pre-trial hearing. The reader is being told that independent corroborative evidence of the Brennan Allegations was presented to the Court when, in fact, what took place is that passing references were made to the financial investigations without further discussion or consideration

238. In my view the judge's criticism, supported by Mr Tomlinson, is without merit. Whether or not what was said about unexplained income was of marginal relevance to the Brennan trial, a responsible journalist must be entitled to report that officers involved in the investigation of Redgrave and Charman had said in open court that evidence of unexplained income at the relevant time had been discovered, evidence which, in the words of Detective Chief Superintendent Coles ("Coles"), appeared on the face of it to corroborate what Brennan was saying.

239. The judge continued his criticism by saying, at the conclusion of this paragraph:

> No balancing reference is made to other evidence given at the pre-trial hearing which tended to exonerate Charman.

240. This is apparently a reference to the covert surveillance of Charman and Redgrave. According to Clark: "I wouldn't say it yielded nothing, it did yield something" (App 4/D/11/148C). According to Coles there were some 1600 or 1700 hours of recording of conversations involving Charman and/or Redgrave and he was not aware of anything of evidential significance having been identified (App 4/D/12/310-311). I accept that it might have been better if McLagan had mentioned this, but the book makes it clear that there was insufficient evidence to charge Charman and Redgrave. The failure to mention it cannot in my view lead to the conclusion that McLagan was not acting as a responsible journalist.

241. I turn to the next criticism:

> 146. McLagan at the foot of page 232 writes that CIB officers hoped that Redgrave and Charman would give evidence for Brennan at his trial. It is said that the pair could have used the proceedings as an opportunity to set the record straight but that, if the pair had appeared in the witness box, they would have been open to cross-examination by the CIB prosecution team, determined to get at the truth of Brennan's allegations. The paragraph ends with these words:
>
> > "Although Redgrave and Charman's names were continually mentioned throughout the trial, the two suspended officers did not appear at the Old Bailey".
>
> 147. As McLagan ought to have appreciated, there was in fact no possibility of Charman or Redgrave giving evidence at Brennan's trial. The issue for the jury was whether Brennan had stolen money from the Wangs. It was no part of the prosecution

> case to say that Brennan's allegations of corruption against Charman and Redgrave were true. Besides, those allegations had been withdrawn. I do not think it is accurate to say that the names of Redgrave and Charman were "continually mentioned throughout the trial". They were referred to on two days after the trial had been running (with interruptions) for a month.

242. The judge says that there was in fact no possibility of Charman or Redgrave giving evidence at Brennan's trial. Why? As I have said, Mr McKinlay was telling the House that Brennan had done nothing wrong, that he had been falsely arrested as part of a plan by the intelligence services to scupper Operation Nightshade and that he had not stolen the money but received it from the Texan gang as part of the second element of Operation Nightshade. He had helped set up a major sting to uncover arms dealings into Northern Ireland. If that was correct, one might well have expected Charman and Redgrave to give evidence at Brennan's trial and in mitigation should he be convicted. Brennan's defence was that everything he had done was with the knowledge and consent of police officers - he had not stolen the money. Their failure to give evidence, a responsible journalist might well conclude, shows that the account given to Mr McKinlay was not the truth.

243. The judge says in this passage:

> It was no part of the prosecution case to say that Brennan's allegations of corruption against Charman and Redgrave were true.

244. That, with respect, misstates the position. With the Gaspar tapes ruled inadmissible because Brennan had not been cautioned, the prosecution's case was and had to be simple - Brennan had stolen the money. When, however, Brennan gave evidence that that he had not stolen the money and that his involvement with the money was at the request of, and under the supervision of, Redgrave and Charman, the prosecution was bound to allege that his involvement with Redgrave and Charman, as Brennan had admitted on tape, was a corrupt one. Brennan had stolen the money and paid Charman and Redgrave for protection. Brennan had certainly met Redgrave and Charman. The prosecutor's hands were tied by the ruling, but he was entitled to put to Brennan the substance of what he had admitted without referring to the actual admissions. This is what happened. Redgrave and Charman were the cornerstone of Brennan's defence. Work has been done to show how often Redgrave and Charman were mentioned. As one would expect they were mentioned when during the prosecution's case Mr Trollope was establishing that Brennan was an informant working with Redgrave and Charman. They were then mentioned by Brennan in chief as he sought to establish his defence and by Mr Latham in cross-examination when seeking to undermine the defence. McLagan's notes of Mr Latham's final speech shows a number of references to them - central to his argument was the proposition that if Charman and Redgrave were honest officers and the whole transaction with the Wangs was being monitored from start to finish and Brennan an important cog in the wheel of a general police operation involving money laundering, there would be no difficulty in setting the record straight when Brennan was arrested in Bexleyheath in November 1993. Mr Latham noted that Redgrave and Charman did intercede at that time and that Redgrave had told the officer that the relevant paperwork would be produced - but it was not (Appellant's bundle 207).

245. Mr Trollope told the jury in closing that the prosecution case depended on proving "to you" that the Wangs were honestly attempting to buy mobile phones and not involved in money laundering, arms dealing or any dishonesty. He submitted to the jury that this was not a straightforward mobile phone deal and that the Wangs were lying and acting dishonestly. It was Brennan's case that Brennan was helping the police to catch the dishonest Wangs. Everything he did was with the knowledge of and consent of Redgrave, his handler Charman (with whom Brennan was "in regular contact") and the Metropolitan Police. Mr Trollope referred to the prosecution's case that Brennan had a corrupt relationship with the "criminals" Redgrave and Charman and that they were parties to the theft. They knew the money was coming into Brennan's account and knew that Brenan was intending to keep it. They allowed him to do so because they had been paid £50,000. Unsurprisingly, Mr Trollope then invited the jury to conclude that these "allegations are totally unsubstantiated". He said that not a single witness had been called to support these allegations; more than one juror may have wondered why Brennan had not called Redgrave and Charman. Mr Trollope was, of course, able to say that because the tapes had been ruled inadmissible.

246. In mitigating on behalf of Brennan, Mr Trollope said "It is unquestionably the case that Detective Inspector Redgrave and Detective Constable Charman were in contact with him throughout the relevant time and were cognisant of what was taking place."

247. It seems clear to me, contrary to the view of the judge and the submissions of Mr Tomlinson, that central to Brennan's case was the allegation that the Wangs were dishonest and that he was helping the Metropolitan Police and particularly Redgrave and Charman to catch the Wangs. Gray J, in my view, underestimated the importance of Redgrave and Charman in the trial. If Brennan could show that he might have been helping them in their investigations, he would be acquitted. The prosecution sought to meet that case by showing during the voir dire and asserting during the trial that the relationship between Brennan and the officers (a relationship which was not disputed by the prosecution) was corrupt.

248. The judge said in paragraph 148

> It would have been apparent to McLagan that the reason for that was that, true or false, the giving of £50,000 to the two officers was irrelevant.

249. I do not agree.

250. In paragraph 150 he said:

> There nevertheless appears to me to be considerable force in the criticism made by Mr Tomlinson that McLagan should have made clear that the alleged criminality of Charman and Redgrave had no bearing on the issues which the jury had to decide. ...
>
> In the context of the trial as a whole it is difficult to understand how, as McLagan claims, for much of the time it was as if Charman and Redgrave were in the dock with Brennan.

251. In my view the judge was quite wrong to accept this criticism.

252. The judge also said in paragraph 150:

> I accept that at the end of the passage which I have quoted McLagan informs readers that in his closing speech Trollope told the jury that there was no evidence the officers had been paid money. McLagan does not mention the fact that Latham accepted that there was no direct evidence that corrupt payments were made to the officers. A more serious omission is the failure to refer to the Judge's advice to the jury in his summing up to ignore suggestions made that any money was taken by Charman or Redgrave to assist Brennan. He told the jury that they ought to put that out of their minds.

253. In my view responsible journalism did not require McLagan to tell his readers that which Mr Latham had said or that which the judge had said in his summing-up about this. The jury had to be told by the judge to ignore the suggestion because the Gaspar tapes had been ruled inadmissible and because Mr Latham's allegations had not been accepted by Brennan. In my view, what is more important in the context of the book as a whole is that leading counsel for the prosecution had made the allegations - allegations which, as I have said, are and cannot be made lightly and which were fully supported by the tapes on which the prosecution had sought unsuccessfully to rely.

254. I turn to another criticism. The judge said:

> He does not claim to have verified the information about Charman and it is his case that there were in fact no means whereby he could have verified the truth or otherwise of the Brennan allegations. In my view McLagan ought to have carried out an evaluation and analysis of the material available to him.

255. I am not certain what the judge is saying McLagan ought to have done. It is of note that the judge said a little later:

> I think, however, that McLagan was entitled to assume that Charman would have remained uncooperative if the allegations to be published in the book had been put directly to him.

256. McLagan also had access to the McKinlay dossier and regarded it as "a valuable source of balancing material" (paragraph 97 above).

257. The judge also said (paragraph 152):

> Whilst I do not accept that the truth or otherwise of the Brennan allegations were investigated at his criminal trial, nor in my opinion did the Crown's case at that trial evidence the truth of Brennan's allegations, I do accept that there had been an investigation by police officers under the leadership of Coles in the form of Operation Cornwall. However, that investigation

> concluded that there was insufficient evidence to charge Charman with any offence arising out of his dealings with Brennan. That being so, it seems to me to have been unwise on McLagan's part to have placed reliance on the opinions expressed privately to him by individual officers such as Coles.

258. In my view a responsible journalist was entitled to rely on the private opinions of individual officers in the light of the whole history including the stance taken by the prosecution at the Brennan trial. Those individual opinions were no longer private when, at the pre-trial stage, Clark said that Redgrave was suspected of being involved in major offences of corruption, a view shared by Gaspar.

259. In conclusion, in my view, the criticisms made by the judge are misplaced. McLagan has demonstrated that he did not depart from the standards required of a responsible journalist. I would allow the appeal.