The Law Officers of the Crown v De Kock
Royal Court
15th March 2016

JUDGMENT
57/2016

Defence application to exclude material

IN THE ROYAL COURT OF GUERNSEY

Between **THE LAW OFFICERS OF THE CROWN** **Prosecution**

-v-

DANIEL HERCULES DE KOCK **Defendant**

Defence Application to Exclude Material

Before: Richard James McMahon Esq., Deputy Bailiff

Hearing dates: 8th and 10th March 2016

Judgment handed down: 15th March 2016

Advocate for the Prosecution: **Advocate R J Calderwood**
Advocate for the Defendant: **Advocate C M Fooks**

Cases and materials referred to in the Judgment:-

The Prevention of Corruption (Bailiwick of Guernsey) Law, 2003
The Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003
Law Officers of the Crown v Correia (unreported, 17 August 2015)
Blackstone's Criminal Practice 2016
The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999
The Police and Criminal Evidence Act 1984
R v Welcher [2007] EWCA Crim 480
R v Twaites (1990) 92 Cr App R 106
The Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002
R v Barry (1991) 95 Cr App R 384
Archbold: Criminal Pleading, Evidence and Practice

Introduction

1. On behalf of the Defendant, who faces an indictment containing a single count of corruption, contrary to section 1 of the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003, as amended, Advocate Fooks has raised a number of issues that need to be addressed prior to trial in this matter. This judgment deals with an Application originally made on 18 January 2016 pursuant to section 76 and/or 78 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003 ("PPACE") and/or the inherent jurisdiction in respect of the record of an interview that took place on 10 June 2014 between the Defendant and his then colleagues at SG Hambros Private Bank ("the Bank"). That Application was slightly re-cast in an Application dated 29 February 2016, in which it was formally asserted that the interview record amounts to a confession for the purpose of PPACE, that the Bank personnel conducting

the interview failed to afford the Defendant the protections that should have been made available pursuant to PPACE and generally that it would be unfair and prejudicial to the Defendant to admit into evidence this record of interview. The secondary element of the Application is that, if excluded, there should be no reference to the employment interview during the trial, whether in written form or in oral evidence or in submissions.

2. During the course of earlier submissions, despite opposition from Advocate Calderwood on behalf of the Law Officers of the Crown, I was persuaded that there should be a *voir dire*, and that this question of the admissibility of the interview record should be dealt with prior to the trial rather than immediately before the prosecution sought to adduce these pieces of evidence. Taking the admissibility of evidence as a preliminary issue is consistent with what happened in, eg, *Law Officers of the Crown v Correia* (unreported, 17 August 2015). The question is, in my view, of sufficient importance and has a potential impact on the manner in which the trial will proceed, that there was realistically no option but to address it before the prosecution opens its case at trial. In reaching that conclusion, I had regard to the summary of the considerations where there are objections to the prosecution's evidence set out in *Blackstone's Criminal Practice 2016* (at para. D16.41 *et seq.*). I considered it appropriate to accede to the Defendant's request to have a *voir dire* at which both parties could call witnesses.

3. The various steps required for the Defendant to reach the position where the Application could be heard were far from straightforward. Advocate Fooks, who represents the Defendant, has complained that she has been left to make much of the running where, having made representations that the record of the employment interview amounted to a confession, she felt the onus should then have been on the prosecution to establish admissibility. Throughout the process, I have considered carefully how best to manage the hearing that eventually took place on 8 and 10 March 2016. I remain of the view that the Defendant has been afforded a full opportunity to address the matters raised by the Application and that, insofar as the burden shifts to the prosecution to demonstrate admissibility, that shift has been fully taken into account. In short, the procedure adopted, in my view, has been fair to the Defendant.

4. In the event, oral evidence has only been heard from one witness, Camilla Le Maitre, who at the material time in 2014 was Deputy Group Head of Human Resources at the Bank. The remainder of the evidence has been by way of written materials. Those materials include statements from a number of witnesses who are due to give evidence at the trial as well as from certain persons who will not. In addition, Advocate Fooks has put together a bundle of other documents. Advocate Calderwood has not objected to this course of action. I have approached the matter on the basis that the documents have been placed before me from which I can piece together what happened at what times in the run-up to the employment interview and its aftermath. Further, whilst Ms Le Maitre attended in response to a witness summons issued on the application of the Defendant (and also in response to a summons for the Bank to produce certain documents to the Court), when she gave evidence she was not regarded as being a witness called by either party because Advocate Fooks was concerned that if Ms Le Maitre were to be a witness for the Defendant this would present problems if the questioning might be viewed as inappropriate for a party's own witness. At one stage, Advocate Fooks had indicated she had no questions for Ms Le Maitre and it was Advocate Calderwood who requested that she be made available for him to ask some questions. Out of an abundance of caution, and as a result of the pragmatic approach adopted by Advocate Calderwood, these concerns were overcome in the manner I have just described. Further, it turned out that Advocate Fooks had more questions to ask of Ms Le Maitre than did Advocate Calderwood. In the absence of hearing from other witnesses, including the Defendant, I have been left to weave Ms Le Maitre's oral evidence into the information that can be derived from the documents.

The facts

5. The allegation against the Defendant is that, on or about 4 June 2013, as an agent for his then employer (the Bank), he corruptly accepted or obtained for himself a Jaguar motor car from Sam Alaia as an inducement to, or reward for, doing an act in relation to the Bank's affairs, namely facilitating the application of Mr Alaia for a loan from the Bank. From shortly before that time, Guernsey's law enforcement authorities (by which collective description I am referring to the Police and the Guernsey Border Agency) were taking an interest in Mr Alaia's affairs. In his second witness statement dated 19 February 2016, Paul Yabsley, who in 2013 worked in the Financial Intelligence Service, has confirmed that there was a ports alert in place in relation to Mr Alaia in May 2013. The following findings of fact made for the purposes of this Application are drawn from the written materials and the oral evidence of Ms Le Maitre.

6. Thomas Smart's statement of 21 June 2014 explains that he was on duty as a Customs Officer at Guernsey Airport on 2 May 2013 when he spoke with Mr Alaia and two other males. He was also on duty on 4 June 2013 at the Passenger Terminal at the White Rock when he stopped and spoke to Mr Alaia and another male. On that occasion, Mr Alaia explained to him that they had only been in Guernsey for the day to drop off a yellow Jaguar motor car that had been imported as part of a re-mortgage deal with the Bank. Mr Alaia had in his possession documentation in relation to the mortgage deal but confirmed that it had not yet been signed.

7. On 5 June 2013, Mr Yabsley spoke to Tracy Bisson, the Head of Channel Island Compliance, Anti-Money Laundering and Financial Crime at the Bank, who is also its MLRO. He expressed his interest in Mr Alaia and told Ms Bisson that when Mr Alaia had been stopped the previous day he had explained about the agreement or arrangement in principle with the Bank. However, Mr Yabsley did not know what involvement Mr De Kock had with Mr Alaia. Mr Yabsley also explained that the Jaguar "*was going to be given to Niel De Kock*", but that Mr Yabsley did not know whether Mr De Kock was arranging to buy it, although, as he put it in his first statement dated 30 October 2015, he suspected that the car been gifted to the Defendant as a reward for the finance arrangement. Ms Bisson enquired as to whether Mr Yabsley wanted them to find out, but Mr Yabsley said there was no need to do so then, to which Ms Bisson responded that Mr Yabsley should let them know and he said he would do so in due course.

8. Sean Bougourd, the Defendant's line manager at the Bank, was advised in June 2013 by Ms Bisson about her contact with law enforcement. The two of them met to consider whether there were any concerns about the Defendant, eg, noticeable changes in his lifestyle. Given the stance of law enforcement, the Bank was acutely aware of the importance of not falling foul of the prohibition on tipping off. Accordingly, there was agreement within the Bank that they would monitor the position for developments.

9. On 24 July 2013, Mr Yabsley made enquiries of Ms Bisson, informing her of his suspicion over the gifting of the Jaguar to the Defendant by Mr Alaia, as a result of which he was going to request certain documents from the Bank. On 26 July 2013, Ms Bisson sent an e-mail to Mr Yabsley informing him that certain documents had been uploaded on to Themis and asking if he could advise her if he had been able to establish if the car had in fact been gifted to the Defendant. Mr Yabsley's immediate response was that this was still a work in progress and that he would keep her abreast of the situation.

10. Ms Le Maitre, who had been employed by the States of Guernsey as a Customs Officer for 13 years prior to leaving that employment 11 years ago, was uncertain exactly when she became aware that there was an issue about the Jaguar motor car, but it is apparent that it must have been before 3 October 2013. That conclusion follows from a message she sent timed at 9.45 am that day to Ms Bisson, in which she wrote "*Nice yellow E Type Jaguar sitting in the*

garage this morning!!!! Shall I take a photo for you?", to which Ms Bisson enquired as to whether there was a story to go with it. Ms Le Maitre responded that she had not spoken to the Defendant about it, adding that Mr Bougourd was not best pleased at the car sitting there. She enquired whether the Police needed to know. Ms Bisson indicated she would speak to Mr Yabsley. Ms Le Maitre further explained to the Court that she was aware that Ms Bisson had an arrangement to exchange information with the authorities, which is why they needed to be aware of the presence of the car at the Bank.

11. Mr Bougourd had noted the presence of the Jaguar parked in the garage that day in the Defendant's space. He was surprised to see it there and discussed matters with Ms Le Maitre. He was aware of this was being raised with the Police to see if there was clearance to speak to the Defendant about the car. This does not appear to have happened immediately because Ms Bisson sent an e-mail to Mr Yabsley on 7 October 2013 asking to speak with him and suggesting that Ms Le Maitre should also participate. The following day, Mr Yabsley informed Ms Bisson that he considered the Bank had grounds to ask the Defendant where the Jaguar came from, suggesting that if the Defendant was able to prove ownership, because "*keepers of these classic cars are meticulous in maintaining documents which prove the provenance of the vehicle*", everything might be above board.

12. Mr Bougourd spoke to the Defendant about the car on 15 November 2013. He subsequently prepared a file note after he had clarified a few details with others on 10 December 2013. Mr Bougourd recalls that he learned from others who had spoken to the Defendant on 3 October 2013 that the Defendant was saying that the car was his and that the car had been brought into the Bank because it was going across to Jersey by ferry that day to be serviced. When Mr Bougourd spoke to the Defendant on 15 November 2013, the Defendant initially maintained that he had owned the car for some time. Because the Bank had been unaware of that, it meant that it was something that potentially needed to be recorded in the Defendant's file with supporting paperwork, so Mr Bougourd gave the Defendant time to reflect. They met again later in the day when the Defendant came clean about not owning the car, explaining that he had initially intended to purchase it from an individual in the UK but had decided not to proceed because the car required a lot of work. The Defendant mentioned that the car belonged to John Langdon. No mention was made of Mr Alaia.

13. On 17 December 2013, Mr Bougourd indicated to Ms Bisson by e-mail that he wished to draw a line under the car matter and to have a close out meeting with the Defendant when he was next available for it. He regarded the incident as having damaged the Defendant's integrity and he proposed that there should be no pay rise for the Defendant and a reduced bonus payment. Ms Bisson indicated she was happy with that approach.

14. Mr Alaia telephoned the Bank on 20 May 2014. He made a complaint about his treatment by the Bank, which extended to a complaint about the Defendant relating to the Jaguar. Mr Alaia said that the Defendant had seen the car on a visit made to Mr Alaia's house. He explained the basis of his complaint to a Bank employee who indicated that someone would get back to him. Mr Alaia telephoned the next day and spoke to a different Bank employee. He relayed broadly the same story. On 22 May 2014, Mr Bougourd telephoned Mr Alaia, who wished to clarify directly what it was Mr Alaia was saying to the Bank. I have seen transcripts of all three of those telephone conversations. Mr Bougourd requested that Mr Alaia set out his position in an e-mail. This was done on 22 May 2014. Mr Alaia also provided a scanned copy of a V5 Form, which is a United Kingdom document relating to the registration of the Jaguar. The copy shows that the vehicle was originally registered to a Michael John Langdon in 1972 and that it appears to bear a signature of that person with the date 4 June 2013 and a signature of the Defendant with the same date, thereby purporting to show the transfer of the registered keeper from Mr Langdon to the Defendant. On 23 May 2014, Mr Bougourd responded to Mr

Alaia confirming that the complaint made by Mr Alaia had been formally recorded and that it included the conduct of the Defendant.

15. Ms Le Maitre became more involved in the wake of Mr Alaia's complaint about the Defendant. (Mr Bougourd was investigating the other aspects of the complaint as well, but these were directed more towards operational banking matters.) Ms Bisson contacted Mr Yabsley by e-mail on the morning of 27 May 2014 indicating that the Bank had been contacted by Mr Alaia about the car and mentioning it was a gift to the Defendant. She had some documentation she wanted to show him. Ms Bisson and Ms Le Maitre also spoke at around that time, most probably just minutes afterwards. Ms Bisson commented that they had been "*semi tied with the Police anyway*" and Ms Le Maitre indicated that she would not be doing her investigation "*until we've had that call*", which I infer means a call with law enforcement. Ms Le Maitre believed Ms Bisson had obligations to notify the Police, regarding this as potentially being a reputational risk to the Bank if it was not seen to be addressing the situation. She had had no conversations herself with law enforcement before she commenced her investigation after Mr Alaia had made his complaint.

16. A meeting was held at the Bank on 29 May 2014. Ms Bisson, Mr Bougourd, Ms Le Maitre and Mr Yabsley attended. Ms Le Maitre recalls Mr Yabsley explaining to them, as she recorded in her notes, that there appeared to be clear intent of the Defendant taking receipt of the gift in exchange for doing something.

17. On 30 May 2014, Mr Bougourd and Ms Le Maitre met with the Defendant at the Bank. They explained to him that an issue had arisen about the Jaguar and that an allegation had now been made. The Defendant denied that the Jaguar had been a gift. There were other discussions about the car and the investigatory process that would follow. The Defendant was to be suspended whilst the investigation was undertaken. This was in accordance with the Bank's Disciplinary Policy. The Defendant expressed that he was concerned at how bad things looked for him and enquired whether he needed legal advice. Ms Le Maitre stressed to the Defendant that the investigatory process was following the Bank's Disciplinary Policy, a copy of which was provided to him under cover of a formal letter dated 30 May 2014, and that no decision about whether there would be disciplinary action had yet been taken and would not be taken until the investigatory stage was complete.

18. The letter handed to the Defendant by Ms Le Maitre on 30 May 2014, which was signed by the Chief Executive Officer of the Bank, stated:

> "*It is alleged by Mr Alaia that you:*
>
> - *Accepted the gift of an E- Type Jaguar motorcar (the "**Car**") from Mr Alaia in return for arranging loans for Mr Alaia from the Bank.*
> - *Told Mr Alaia to correspond with you via you [sic] personal email address rather than you [sic] work email address*
>
> *The Bank is also concerned that:*
>
> - *You have given explanations previously in relation to the Car which may not be consistent with the information which Mr Alaia has now provided. The Bank is concerned that you may have sought to mislead it as to the true provenance of the Car.*
> - *If what Mr Alaia has said is true, you have failed to declare the Car as a gift as required by Bank policy.*"

This letter further explained about the disciplinary investigation meeting in this way:

"*I am also writing to tell you that you will be required to attend an investigatory meeting, the exact date and time of this meeting will be confirmed to you in writing in due course.*

It should be stressed that this is a fact finding exercise only and no disciplinary action will be taken at this meeting.

If it is considered necessary, a disciplinary hearing will be convened subsequently so that you may hear the evidence against you and be given an opportunity to state your case before any decision is taken."

19. The Bank's Disciplinary Policy explains, in what I regard as fairly standard terms, the different levels of outcome and the steps involved in each. Where dismissal is contemplated, whether as a result of failure to improve following previous warnings or where the matter is regarded as potentially gross misconduct making the continued employment of the employee impossible, there will be a full investigation prior to a disciplinary hearing. It provides:

> "*The amount of investigation required will depend on the nature of the allegations and will vary from case to case. It may involve interviewing and taking statements from the employee and any witnesses, and / or reviewing relevant documents. Human Resources may appoint an Investigating Officer to carry out the investigation.*
>
> *Investigative interviews are solely for the purpose of fact-finding and no decision on disciplinary action will be taken until after a disciplinary hearing has been held. The employee will not have the right to bring a companion to an investigative interview.*"

That final sentence has to be read in the context of a further explanatory passage in the Policy:

> "*An employee may be accompanied throughout all stages by a work colleague or trade union representative who may address the hearing in order to put the employee's case, sum up that case and respond on the employee's behalf to any view expressed at the hearing and confer with the employee during the hearing."*

20. Ms Le Maitre explained that the Bank's policy, on advice received, was that there was no requirement to afford an employee the opportunity to be accompanied by a legally-qualified person, so the Bank's Disciplinary Policy extended the right to be accompanied only to a friend or union representative. When she met with the Defendant on 30 May 2014, Ms Le Maitre could not say what the Bank might then share with law enforcement. She was focused on her investigation under the Disciplinary Policy and was engaged on a fact-finding exercise. She did not believe that she would have known that a Production Order might in due course be served on the Bank.

21. On 1 June 2014, the Defendant sent Ms Le Maitre an e-mail indicating that he preferred "*just to get this over ASAP*" and so was ready to attend the investigatory interview whenever he was needed. The next day, he forwarded to Ms Le Maitre various e-mails from his personal e-mail account, largely relating to his dealings with Joe Castellino at Le Riche Automobile Restorers (CI) Ltd, which was the company to which the Jaguar was sent in October 2013. Before receiving these Ms Le Maitre had spoken to Mr Castellino earlier on 2 June 2014. She recorded his answers to her list of questions relating to how his company came to receive the Jaguar, on whose instructions that happened and what then took place in relation to selling the car, and remitting the net proceeds of sale. Mr Castellino clarified that the net proceeds of sale were paid into Mr Alaia's wife's account. Mr Castellino subsequently sent to Ms Le Maitre an e-mail he had received from Mr Alaia on 10 February 2014 providing details of the account to which those proceeds should be paid. Ms Le Maitre informed Ms Bisson later in the day on 2 June 2014 that she had spoken to the garage about the car and enquired as to whether Ms

Bisson had received an update from anywhere else, to which the response was that there had been nothing from Mr Yabsley.

22. On 2 June 2014, Mr Bougourd telephoned Mr Alaia in order to obtain further clarification about the car. Again, a full transcript of the conversation has been provided. It appears that, before that conversation took place, Mr Bougourd had received from an associate of Mr Alaia an e-mail exchange on 30 May 2013 with the Defendant attaching a picture of an E-type Jaguar, to which the Defendant responded "*It's absolutely gorgeous !! How exciting. See you Sunday - cant wait.*" (I appreciate that Advocate Fooks intends to challenge the admissibility of this message for the purposes of the trial, but it has been placed before me for the purposes of the *voir dire* and so I consider I can properly treat this as evidence adduced by the Defendant at this stage and weigh the significance of it in the balance of the tests I have to apply and to which I will turn in due course.) Also on 2 June 2014, an update of the progress of law enforcement's enquiries was uploaded to Themis, recording that there appeared to have been the commission of offences under the 2003 Law by Mr Alaia and the Defendant.

23. On 3 June 2014, Ms Bisson sent an e-mail to Mr Yabsley querying whether he had had the chance to look into the car ownership and the proceeds of sale yet and informing him that the Defendant had forwarded various e-mails to them and that Ms Le Maitre had spoken to the garage. Mr Yabsley explained that his enquiries in Jersey had to be undertaken through formal channels and he asked how Ms Le Maitre had got on and what the -mails from the Defendant showed. Ms Bisson replied: "*It would appear that when Niel initially contacted the garage they were led to believe that the car belonged to him. Once the work had been completed and subsequent to the Bank requesting clarification of where the car had come from the garage were then informed that they [sic] car belonged to Mr Alaia. The car has been sold and the proceeds less the garage's commission and costs of work undertaken have been remitted to Mr Alaia's wife's account.*" Mr Yabsley replied on 4 June 2014 that his enquiries in Jersey will delve deeper "*and we will see where we go from there*".

24. On 3 June 2014, Ms Le Maitre spoke to Mr Castellino again about the car.

25. On 4 June 2014, Ms Le Maitre met with Colin Penney as part of her investigation. The meeting lasted 30 minutes and Mr Penney signed a type-written record made from Ms Le Maitre's notes of that meeting as being accurate. That meeting was not recorded. The note relates solely to when Mr Penney had seen the Jaguar in the Bank's garage and discussed it with the Defendant. Later that day, Ms Le Maitre met with Mark Trenchard. Mr Trenchard was already aware that Mr Alaia had contacted the Bank. Mr Trenchard had met Mr Alaia with the Defendant on 4 June 2013 and, as a result of certain matters raised, had reported the meeting to the Compliance Department the following day. It was also the first time he had heard mention of the Jaguar, but he did not know quite what the position was, ie, whether it was a gift, a loan or for potential purchase. He was aware that the Defendant had visited Mr Alaia's house. The remainder of the 35-minute meeting was taken up with discussions about the banking relationship with Mr Alaia. The written record prepared by Ms Le Maitre of this meeting was countersigned by Mr Trenchard on 5 June 2014. Still later that day, Ms Le Maitre met with Ashley Dye for 17 minutes and in the same manner prepared a record from her notes which Mr Dye signed as being accurate on 9 June 2014. Mr Dye had no knowledge of the Jaguar, but had met Mr Alaia and another person with the Defendant.

26. On 4 June 2014, the Defendant contacted Ms Le Maitre asking if they could meet on 6 June 2014. During the course of 5 June 2014, they firmed up arrangements to meet at a location outside the Bank on the morning of 6 June 2014. Ms Le Maitre subsequently prepared a file note setting out what was discussed. The Defendant was concerned about the impact this process was having on his family and how the opinion about him of others at the Bank was being destroyed. He is recorded as saying that he would not jeopardise 10 years of hard work

and that he does everything by the book. Ms Le Maitre reminded the Defendant that he needed to send her all the e-mails relating to this matter as soon as possible. The Defendant forwarded more e-mails on 8 June 2014. These also dealt with communications with Mr Castellino. By a letter dated 6 June 2014, Ms Le Maitre invited the Defendant to an investigatory meeting on 10 June 2014, the purpose of which was to obtain a statement from him in relation to the allegations listed, which included breach of the Bank's gifts policy. The letter clarified that "*This is a fact-finding exercise only and no disciplinary action will be taken at this meeting.*"

27. On 4 June 2014, Mr Bougourd telephoned Mr Alaia again. There is a further transcript of that conversation, but the information being supplied by Mr Alaia goes over the same ground as previously. Mr Bougourd indicates at the end that Mr Alaia will receive a formal response to his complaint in due course.

28. On 6 June 2014, Mr Yabsley asked Ms Bisson in an e-mail whether the Bank was intending to make a disclosure about "*this incident*", which appears to be a reference to the information unearthed from the enquiries made with the Jersey garage. On 9 June 2014, Ms Bisson replied: "*We are still conducting our investigation, once completed I will be in a position to advise you whether or not we will be disclosing.*" Also on 6 June 2014, Mr Yabsley asked in an e-mail that Ms Bisson should ensure that the recordings of the conversations with Mr Alaia were retained and, on 9 June 2014, Ms Bisson confirmed that they would be kept in a separate file. Ms Le Maitre, though, was not asked to preserve what she was generating at that time through her investigation. On 9 June 2014, an updated case summary was prepared. One of the suggested action points was to obtain statements, documentary and audio evidence from the Bank.

29. In preparation for the investigatory interview with the Defendant, Ms Le Maitre started to compile a list of questions. At lunchtime on 9 June 2914, she informed Mr Bougourd that she was up to 27 questions. At the end of the day, she supplied Mr Bougourd with a list of 30 numbered questions (some with multiple elements) inviting him to amend them, delete them or add to them as he saw fit. She confirmed that no one had asked her to ask any particular questions.

30. On the morning of 10 June 2014, Mr Yabsley sent an e-mail to Ms Bisson asking if she were free to see him that day, further suggesting that the MD or some other senior person might also attend. Ms Bisson's response was that she and the Chief Executive Officer, Mike Allen, were away, but that Ms Le Maitre and Mr Bougourd were seeing the Defendant that morning, so it may make sense to have a chat with them afterwards, to which Mr Yabsley replied that that would be advantageous. Ms Le Maitre responded to Mr Yabsley at around midday that their interview with the Defendant had completed and enquired when it would be convenient to meet. Mr Yabsley suggested 2 pm.

31. Ms Le Maitre and Mr Bougourd conducted their investigatory interview with the Defendant at 9.40 am on 10 June 2014. That interview was recorded and a 27-page transcript has been prepared. It lasted a little over two hours. Ms Le Maitre explained that she had prior experience, when matters proceeded to the Employment and Discrimination Tribunal, from which she understood the importance of keeping an accurate record. She was aware that this interview was not a simple and straightforward one, which is why she chose to conduct it by recording it. It was not recorded with the intention of handing it over to law enforcement and she is unaware of whether anyone else handed the recording over prior to the service of the Production Order. I will turn to the substance of the interview later.

32. Ms Le Maitre met with Mr Yabsley that afternoon. There is no record of what was discussed, but some indication can be derived from a discussion that took place later that afternoon. In

relation to this, Ms Le Maitre explained that nothing was recorded because not a lot was discussed. The time spent in the lift (which is something mentioned elsewhere) was probably only about 15 seconds and during that conversation there was insufficient time to discuss the car.

33. There was a telephone conference between Ms Le Maitre, Ms Bisson (who was the person not in the office at the time), Mr Bougourd and Mr Allen starting at 5.11 pm on 10 June 2014. There is a lengthy transcript of their discussions. Ms Le Maitre referred to the meeting with Mr Yabsley, who had provided an update. Later, Mr Bougourd mentioned that Mr Yabsley had said the Bank should continue its internal process. When Ms Le Maitre raised the fact that a new officer, Mark Radford, would be coming to the Bank on the following Monday, Ms Bisson commented that "*It's much better to be continually working with them.*" Ms Le Maitre knew from Mr Yabsley's wish to see them that day or no later than the following day that there was some urgency. Ms Le Maitre also confirmed her understanding that the Police would interview the Defendant and that it would be under caution. Ms Le Maitre also relayed that there had been an "off the record" conversation that took place in the lift. Ms Le Maitre expressed the view that she thought there was one piece of evidence now that would give law enforcement the way in. Mr Bougourd commented that "*the only way they will know about this alleged bribe is 'cause we told them about it because of the complaint from Alaia*".

34. On 11 June 2014, Ms Le Maitre forwarded to the Defendant a letter requesting him to attend a second investigatory interview the following afternoon. A further ground of complaint had been added relating to him possibly having behaved in a manner prejudicial to the good name of the Bank. Although the letter did not say so, the purpose of this meeting was to explore another matter rather than take forward the investigation relating to the Jaguar, which was treated as having been concluded.

35. On the morning of 12 June 2014, the Defendant met with Ms Le Maitre away from the Bank and indicated that he would not be attending the second investigatory meeting because he was not going on with the process. He was resigning. That evening he sent an e-mail to Ms Le Maitre thanking her for her time and kindness over the past two weeks, describing her as "*a good friend*".

36. On 12 June 2014, Mr Bougourd sent an e-mail to Mr Alaia with the final outcome of his complaint, indicating that the Bank's investigations into the Defendant's conduct would continue. Mr Bougourd regarded the complaint as having been closed.

37. On the morning of 13 June 2014, Ms Le Maitre informed Mr Yabsley that the Defendant had verbally resigned the day before. When Mr Yabsley enquired if Ms Le Maitre knew what the Defendant was to do next, she replied that she did not know. That afternoon, Mr Yabsley contacted Ms Bisson in advance of the meeting scheduled for the following Monday to introduce Mark Radford, adding that "*Hopefully by that time you may be in a position to advise us how we are to proceed in gaining the evidence held, i.e. on a voluntary basis or through a production order.*" Ms Bisson swiftly replied that a production order would be needed but that the Bank had commenced the process of collating the data.

38. On the morning of 18 June 2014, the Defendant was arrested at his home. He was subsequently interviewed that day at the Police Station under caution and then bailed. He was further interviewed on 23 October 2014. At the first interview on 18 June 2014, the Defendant was asked if he wanted to have a lawyer present and declined. The second interview that day proceeded on the same basis. On 23 October 2014, Advocate Brehaut was in attendance at each interview.

39. On 11 September 2014, a Production Order was made on the application of DC Wright pursuant to section 45 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999. I understand it was complied with by the Bank the following day.

40. I have set out these findings of fact as a means of determining the Defendant's Application. I stress that these are not findings that have any bearing as to whether the offence the Defendant is alleged to have committed is made out or not. I should also stress, for the avoidance of any doubt, particularly in the Defendant's mind, that a finding of guilt is solely within the province of the Jurats and that the current exercise is focused only on whether the material on which the prosecution wishes to rely at the trial can properly be admitted or whether, as Advocate Fooks contends on his behalf, it should be excluded.

The record of interview

41. The impression I have formed from reading the transcript of the interview is that it proceeded largely as a conversation between the three persons present. Mr Bougourd played a more prominent role in seeking clarification about certain matters than did Ms Le Maitre. That said, Ms Le Maitre tended to have a more direct style of questioning, whereas Mr Bougourd was at times more discursive and appeared to be more understanding of the situation in which the Defendant found himself.

42. The interview was opened by Ms Le Maitre explaining the purpose and the process. She stated that she had explained that "*for ease we were going to record the conversation. We will then produce Minutes of that meeting which you will have the opportunity to read, amend if you feel they need amending and sign.*" Before she or Mr Bougourd turned to their list of questions, the Defendant offered to give "*a bit of background on the whole relationship with these guys*", which enabled Ms Le Maitre to ask the first very general question on her list about the relationship with Mr Alaia. Accordingly, with no real prompting from Ms Le Maitre or Mr Bougourd, the Defendant quite extensively explained the background to the banking relationship with Mr Alaia. Within that general explanation, and without being asked about it, the Defendant mentioned that the car was raised during a telephone conversation shortly before Mr Alaia was planning to visit Guernsey: "*He said he's got this car to sell, would I mind helping him with this specific car and I said no obviously not. He said it was coming over with the boat. I said no problem, I will come and meet him at the Harbour and we will have a chat*".

43. Ms Le Maitre in due course brought the Defendant back to the issue of the car and posed the second question on her list, asking the Defendant to run through everything he knew about the car. The Defendant then provided a lengthy response about the Jaguar (at pages 5 to 8 of the transcript) during which he admits that the car was left with him by Mr Alaia, along with the paperwork relating to it, and that the Defendant took it to his house and parked it there. He was thinking about buying it from him. There was a form that Mr Alaia said the Defendant had to complete, but there was no indication that the car belonged to Mr Alaia because the documentation had some other person's name on it. He was concerned about insurance and so arranged to have a very limited classic car insurance policy in his name. He got in touch with the garage in Jersey to obtain a valuation and later contacted Mr Alaia and told him he was no longer interested in buying the car himself and it was at that point that Mr Alaia appeared to him to offer him the car on different terms, mentioning that if finances were a problem, they could work something out. The Defendant had explained to Mr Alaia that it would be no different if he were to acquire the car at an undervalue from if he were to be given the difference in price directly; it was simply something that he could not do. He said "*It was not a big deal, you were talking about a £25,000 car so it was not like it was something major.*" When asked if he knew what had come of the car, he replied that he had checked the website of the Jersey garage and noticed it was shown as having been sold, but he knew no more details. During questioning about the finer details of what happened, the Defendant explained

that he had not realised the ramifications of a simple thing like bringing a car to Guernsey, with the requirement for the new owner to register it. He also confirmed that he had visited Mr Alaia's house, having been taken there by one of Mr Alaia's associates with whom the Bank had also had a relationship that had been ended. As a result of his explanations, he had provided answers to a good number of the questions on Ms Le Maitre's list.

44. The next issue on the list involved the Defendant being asked about his conversation with Mr Bougourd on 15 November 2013. He confirmed that he had initially lied to Mr Bougourd because he had been caught off guard and that, when he reflected on what he had said, within approximately half an hour he returned and spoke again to Mr Bougourd. When asked why Mr Alaia's name was not mentioned, the Defendant explained that he was unsure what was happening so he had referred to the name on the documentation relating to the car. It was following that meeting that the Defendant had contacted the Jersey garage and Mr Alaia. When asked directly whether Mr Alaia had at any time indicated the car could be considered as a gift, the Defendant repeated what he had told Mr Alaia in their conversation about him purchasing the car at a discounted value being regarded as a gift and contrary to the Bank's policy.

45. Moving to the next area on the list of questions, the Defendant was asked about what was said when Joe Castellino visited to value the car. The Defendant commented on the completion of the V5 Form: "*In this file of documents were the certificate that Sam made me fill in if I wanted to buy or sell it and there were insurance documents for the classic car ... There was no indication that it was Sam's car, I didn't think it was stolen, there was no transfer documents, there were no cheques in there, no receipts in there, it was literally the MOT certificate, it didn't have any insurance, there was no insurance documents and I guess that is why I started doing the initial enquiries just for my own.*"

46. When asked by Mr Bougourd about how the Defendant felt these matters impacted on his judgment, the Defendant's reply included: "*I have an innate ability to smell fraud and corruption and you just develop a skill and you know and you learn to manage that process ...*". When asked "*Did he ever or did he, or any other person involved in the relationship, ever offer you a gift or a facilitating payment?*", the Defendant replied "*No. Sean even if they did it would be crazy for me to risk my whole life.*" The Defendant further explained, in relation to gifts, that he was on a zero: "*I basically do not take anything.*"

47. The interview then moved on to a different topic, in respect of which two of Ms Le Maitre's list of questions sought answers and which would have been the focus of the second investigatory interview had it taken place, before concluding with some questioning about the Defendant's financial circumstances. At the end, Ms Le Maitre explained to the Defendant: "*Sean and I will discuss this and we will look at all the material we have gathered and basically it now rests with us to decide whether we feel that there is either another need for a further meeting and whether there's any need for any disciplinary action or whether the matter can be resolved and put to bed.*" During the course of the interview, Ms Le Maitre and Mr Bougourd had fairly comprehensively covered the 30 questions on the list.

Bank staff as investigators

48. Although Advocate Calderwood made his submissions in a logical order and did not take the issue originally raised by Advocate Fooks as the reason for seeking a *voir dire* first, in order to place the evidence I have just rehearsed into its proper context, I will deal initially with the submissions on whether Ms Le Maitre and/or Mr Bougourd should be regarded as having been charged with the duty of investigating offences. I do so because, although not a complete answer to the issues raised by the Application, this question has a significant impact on how to deal with the fairness of what happened.

49. Under section 74 of PPACE, in the context of the Codes of Practice issued under that Law:

> "*(8) Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of such a code.*
>
> *(9) A failure on the part - ...*
>
> *(b) of any person other than a police officer who is charged with the duty of investigating offences or charging offenders to have regard to any relevant provision of such a code in the discharge of that duty,*
>
> *shall not of itself render him liable to any criminal or civil proceedings.*"

These subsections have been derived from like provision in section 67 of the Police and Criminal Evidence Act 1984. As confirmed in para. D1.3 of *Blackstone's Criminal Practice 2016*, "*Whether a person is charged with such a duty is a question of fact in each case.*" Advocate Fooks has relied in particular on *R v Welcher* [2007] EWCA Crim 480 and *R v Twaites* (1990) 92 Cr App R 106. Both of these cases involved questioning of employees.

50. In *Twaites*, the manageress of a betting shop was interviewed under caution about allegations of fraud. The interview took place at a police station with a solicitor present. She answered questions, but made no admission. When interviewed the next day, she declined to answer any questions in respect of the offences being investigated. She was released on bail. A few days later, she was interviewed by two investigators employed by the betting company for which she worked. No record was kept of that interview and she was not cautioned. She later made a statement admitting to an offence of an unsuccessful attempt to defraud. Some form of caution was given before she made that written confession. She attended a disciplinary interview and was dismissed. At trial the prosecution sought to rely on her written confession. The judge ruled that it was not unfair to include the evidence. The defendant manageress and her co-accused were convicted only of the offence to which that confession related. The trial judge certified the following question for the Court of Appeal: "*Where a suspect has been arrested, interviewed and placed on bail by the police pending further enquiries, do the provisions of the Police and Evidence Act 1984 apply to commercial investigators who are aware of the police investigation and who conduct an internal disciplinary enquiry on behalf of the suspect's employers when the results of their enquiry may subsequently be used in criminal proceedings?*" Because the trial judge had not been referred to section 67(9), which is the equivalent to Guernsey's section 74(8), there is an obvious difference between the cases. I have considered the issues surrounding the admissibility of the admissions in the statement, which were set out in detail at pages 110 and 111. In respect of section 67(9), the English Court of Appeal stated (at page 114):

> "*This subsection in our view applies the relevant Codes of Practice to commercial investigators if, but only if, and so far as the investigators are charged with the duty of investigating offences. No formal enquiry was made with regard to this, though Donovan and Jackson seemed to behave as if they were so engaged once the scope of their enquiries reached the point of taking the statement which could be used by the prosecution. If the judge had, after considering the effect of section 67(9), reached the conclusion that the Codes of Practice did apply at least to part of the interviews, then he may well have come to the conclusion that breaches of the code had been established which called for a ruling that the statement was inadmissible and his ruling under section 78 might also have been other than it was. In failing to consider section 67(9) we consider that the judge misdirected himself and that the verdicts in respect of each appellant are therefore unsafe and unsatisfactory and must be*

quashed. We have sympathy with the judge since he was never referred to this section of the Act.

We would also add two further observations. First we feel some disquiet that the so-called voluntary statement was accepted by the police and prosecution without any apparent enquiries as to the circumstances in which it was obtained when a few days earlier police interviews conducted over two days in strict compliance with the provisions of the Police and Criminal Evidence Act and the Codes of Practice had not elicited any admissions at all. There is no suggestion in this case that the police in any way connived at or were aware of these circumstances, but we feel that enquiries should have been made as to the circumstances in which the statement was obtained before it became an exhibit in the case and part of the prosecution evidence. Secondly, in the absence of any consideration of section 67(9) we find the question certified to be unanswerable since the answer must depend upon whether or not, by virtue of that subsection, the provisions of the Police and Criminal Evidence Act and the Codes of Practice applied to commercial investigators."

51. In *Welcher*, two conspiracies were tried, one of which was to corrupt and the other to defraud. The appellant was an employee of Mars UK Limited. He received bribes from the directors of another company in return for placing Mars' works orders with that company. In January and February 2002, Mr Carabok, the Chief Engineer at Mars, conducted disciplinary interviews with the appellant concerning allegations of fraudulent receipt of goods and services from that other company and theft from Mars. The appellant denied the allegations and gave explanations. He was dismissed for gross misconduct at the end of February 2002. After a search of his home and those of his co-accused, the appellant was interviewed by the police in 2003 and 2004. His explanations at interview were substantially consistent with those he gave in evidence at trial but inconsistent with those he gave when interviewed by the Chief Engineer. The prosecution sought to introduce the disciplinary interviews into evidence. Those interviews had not been conducted in accordance with the Code of Practice because the appellant had not been cautioned and was not offered or allowed legal advice. There had been no mention of the interviews being used in criminal proceedings. The investigation was in accordance with Mars' disciplinary policy. The trial judge concluded that the Chief Engineer was not covered by section 67(9) of the 1984 Act and, in any event, admission of the evidence would not have such an adverse effect on the proceedings that it ought not to have been admitted (ie, a reference to section 78 of the Act). The outcome of the appeal on this point, together with the submissions on behalf of the prosecution, which Advocate Calderwood has effectively adopted in the present case, are as follows:

"*20. For the prosecution, Mr Farrer QC submits that Mr Carabok's duty was limited to reporting to a Mars disciplinary panel as to whether the appellant should be dismissed from his employment. Unlike the case of Twaites, there had been no earlier police interviews under caution. Mr Carabok's duty was not to investigate offences; it was, on behalf of the company, to investigate the appellant's conduct as an employee. That was a necessary part of the employer/employee relationship. If matters did proceed to a criminal trial, it was not unfair for the jury to know what was said at such interviews.*

21. In my judgment, in the circumstances of this case, the judge was entitled to admit the evidence. Mr Carabok was not under a duty of investigating offences and fairness did not require the exclusion of the interviews. The reason given for the falsity of the explanations in interview was that the appellant was trying to protect his pension. That reason can be, and was, advanced before the jury for their consideration but, true or false, it does not require the exclusion of the evidence. Clarke LJ in Gill [2004] 1 Cr App R 20, when considering the safeguards provided by a Code stated, at paragraph 46, that their principal purpose is to ensure, as far as

possible, that interviewees do not make admissions unless they wish to do so and are aware of the consequences. Clarke LJ added:

> *"We do not think that the principal purpose of the code is to prevent interviewees from telling lies".*

Those interviews were properly admitted."

52. These cases may be regarded as examples of where the line may be drawn as to whether or not a person is charged with the duty of investigating offences. Ultimately, though, it is a question of fact. In that regard, Advocate Fooks has highlighted the long and seamless exchange of information between the Bank and law enforcement from June 2013 through to the interview one year later. She points out that some things were shared with Mr Yablsey that did not really need to be as evidencing the level of mutual cooperation between them. Accordingly, although no one has openly articulated that this was a joint investigation, it bears of the hallmarks of being joint rather than just parallel, as it was described on behalf of the prosecution. Ms Bisson had asked law enforcement to conduct a vehicle check to assist the Bank. At the time of the investigatory interview conducted by the Bank, everyone else involved knew that a Police investigation was underway, but the Defendant did not. As far as the Defendant was concerned, he was responding to questions with a view to persuading his employer that there had been nothing untoward and that the disciplinary process should not be pursued further. He was not warned that the contents of the interview might be shared with law enforcement when, despite Ms Le Maitre's contrary suggestions, that was inevitable. The Defendant sought assurances that matters would be kept quiet and can now feel aggrieved that what he said is being relied on. His earlier enquiry to Ms Le Maitre about whether he needed to obtain legal advice had been brushed aside. After the interview, Mr Yabsley enquired about the result of Ms Le Maitre's enquiries with the garage in Jersey. Mr Yabsley wanted to see the Bank as soon as possible after the interview.

53. In response, Advocate Calderwood suggests it would be truly remarkable to regard the Bank staff as agents for the Police. He considers that rather than being criticised for being thorough in the interview they conducted, Ms Le Maitre and Mr Bougourd should be congratulated for how their investigation of employment-related concerns was dovetailed into the known parallel Police investigation. He submits that if the Bank were accepting the role of agent, the material being generated should have been passed over straightaway rather than the Bank insisting on the service of a production order. Emphasis was placed on the gap between Mr Bougourd drawing a line under his discussions with the Defendant about the car in December 2013 and the making of the complaint in May 2014 by Mr Alaia which then led to the investigation during which the interview occurred. Insofar as it was necessary to do so, Advocate Calderwood sought to distinguish the present case from the situation in ***Twaites*** because there has been no prior police interviewing and he relies heavily on the similarities in ***Welcher***, noting further that in the present case the Defendant has not been giving different explanations to his employer and to the Police.

54. Whilst I do not overlook the degree of co-ordination that occurred between law enforcement and the Bank prior to the interview on 10 June 2014, I have reached the conclusion that the Bank staff have not been shown to fall within section 74(8) of PPACE. Advocate Fooks certainly has a respectable argument that the situation in the present case goes beyond that described in ***Welcher***. The employment interview did not pre-date the Police investigation to such an extent that it could be treated as a distinct process. Instead, I am satisfied that the arrangement Ms Bisson had to keep Mr Yabsley informed of developments was such that the period of inactivity between December 2013 and May 2014 is not as significant as Advocate Calderwood sought to portray it. I find that there was a promise on the part of the Bank through Ms Bisson to continue to update law enforcement about any relevant developments and that the making of Mr Alaia's complaint could just as easily have been sooner than it was,

or even later than it was, and the same processes would have been followed thereafter. In other words, the gap did not break any link that existed between first and subsequent contact with law enforcement. Similarly, although there had been no interview of the Defendant by the Police in the run-up to the employment interview, as had been the case in ***Twaites***, the level of communication between the Bank and Mr Yabsley in late May and early June 2014 is potentially sufficient to ground an argument that section 74(8) is engaged.

55. However, in my judgment, the key word in that subsection is "*duty*". Although there has been shown to be ongoing dialogue, I regard that as having taken place quite properly so that the Bank complied with its duties to report suspicious transactions and to seek appropriate comfort that it was not straying into falling foul of tipping off. Initially, the focus was on the investigation by an English police force into Mr Alaia rather than the focus being on the Defendant. As a result, little if anything could be addressed to the Defendant. For the second part of 2013 and into 2014, the Bank had to exercise caution. The Bank, however, had to respond to the complaint registered by Mr Alaia once it was made in May 2014. That complaint was not focused solely on the Defendant. Instead, it ranged over the steps taken by Bank personnel in relation to other decisions and actions surrounding Mr Alaia's banking relationship with the Bank and then it turned to the allegation of gifting the Jaguar to the Defendant. The purpose of the employment interview, as set out in the letter of 6 June 2014, which in turn built upon the letter of 30 May 2014 under which the Defendant was suspended, went wider than just the car. No evidence has been given that confirms that the Bank was being asked to elicit any particular information from the Defendant. I have taken into account that the Bank, as a regulated entity, has obligations to disclose that would not apply in the same way to some other types of employer. The degree of co-ordination appropriate in such cases is, in my view, something that must be borne in mind and were I to find that section 74(8) is engaged here, it could have a wider impact across the financial services sector. The examples of cases in which section 67(9) of the 1984 Act has been found to apply that are listed in para. D1.3 in *Blackstone's Criminal Practice* do not seem to me to extend that far.

56. Although Advocate Fooks has effectively invited me to infer that the Bank was performing the requisite duty, when coupled with all the circumstances surrounding what was going on, albeit that I appreciate that it is a borderline case, I cannot find that the Bank staff were charged by anyone, eg, Mr Yabsley, with the duty of investigating offences. I do not find that Mr Yabsley's keenness to meet with Ms Le Maitre after the interview necessarily means that there was any discussion about what had taken place; indeed, neither of them has said in their evidence that Ms Le Maitre informed Mr Yabsley of the Defendant's answers to the questions put to him at the investigatory interview. I think that more evidence was required before I could have found the necessary creation of any duty of investigation. Something more concrete than the type of suspicion of something going on, which is really how Advocate Fooks has approached matters, starting from the premise that Ms Le Maitre's former employment raises the spectre that this was a joint investigation, is needed. As in ***Welcher***, the duty of Ms Le Maitre and Mr Bougourd was to decide in accordance with the Bank's Disciplinary Policy whether, as a result of the investigatory interview, there needed to be further action taken by interviewing again or proceeding to the next formal stage of that process. I am satisfied by Ms Le Maitre's explanation that she was acting for the Bank only here and not for law enforcement and that her background as a former Customs Officer has no bearing on section 74(8) of PPACE.

57. Having reached the conclusion that section 74(8) of PPACE is not engaged, it means that the obligation to follow the Codes of Practice does not arise in the present case. Accordingly, I do not have to consider which of the safeguards, if any, were applicable to the employment interview and so now affect its fairness. Of course, as I have previously noted, the mere fact that the Bank staff conducting the interview with the Defendant on 10 June 2014 were not within section 74(8) does not mean that the interview record is admissible. All that finding

does is to remove a particular line of Advocate Fooks' submissions about the fairness of what happened by reference to breaches of the Codes of Practice.

Admissibility of interview record

58. Advocate Fooks has queried whether the prosecution is even able to demonstrate that the interview record is admissible. (This was the issue with which Advocate Calderwood began his submissions and it does logically precede the question of whether section 74(8) of PPACE is engaged.) In that regard, Advocate Calderwood has referred to a number of exceptions to the hearsay rule on which he argues the prosecution is able to rely. One of those is that the document is a confession, which is a topic to which I will turn shortly. Another is that the document can be used to demonstrate previous inconsistent statements. But the general basis on which he relies is to argue that it constitutes a business document.

59. Section 2 of the Criminal Evidence and Miscellaneous Provisions (Bailiwick of Guernsey) Law, 2002 provides:

> *"(1) Subject to subsections (3) and (4) a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied -*
>
> *(a) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office, and*
>
> *(b) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with.*
>
> *(2) Subsection (1) applies whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied received it –*
>
> *(a) in the course of a trade, business, profession or other occupation, or*
>
> *(b) as the holder of a paid or unpaid office.*
>
> *(3) Subsection (1) does not render admissible a confession made by an accused person that would not otherwise be admissible.*
>
> *(4) A statement prepared otherwise than in accordance with section 3 of the Criminal Justice (International Co-operation) (Bailiwick of Guernsey) Law, 2001 or under section 9 or 10, for the purposes -*
>
> *(a) of pending or contemplated criminal proceedings, or*
>
> *(b) of a criminal investigation,*

shall not be admissible by virtue of subsection (1) unless –

(i) the requirements of one of the paragraphs of subsection (2) of section 1 are satisfied, or

(ii) the requirements of subsection (3) of that section are satisfied, or

(iii) the person who made the statement cannot reasonably be expected (having regard to the time which has elapsed since he made the statement and to all the circumstances) to have any recollection of the matters dealt with in the statement."

60. Advocate Fooks referred to the explanation contained in para. 16.25 of *Blackstone's Criminal Practice*:

> "*'Business records are made admissible ... because, in the ordinary way, they are compiled by people who are disinterested and, in the ordinary course of events, such statements are likely to be accurate; they are therefore admissible as evidence because prima facie they are reliable' (the Court of Appeal in Horncastle [2010] 2 AC 373, in a judgment endorsed and regarded as complementary to the subsequent decision of the Supreme Court).*"

However, the same paragraph continues:

> "*In Clowes [1992] 3 All ER 440, decided under the CJA 1988, s. 24, transcripts of interviews between the liquidators of companies and persons involved with the companies were held to have been 'received' by the liquidators in the course of their profession and as holders of the office of liquidator.*"

61. I am satisfied that the transcript of the interview, in the hands of the Bank, constitutes one of its business documents. I cannot see that subsection (3) or (4) apply here, so the central question is whether the document was created in the course of business and I find that it was so created. Advocate Fooks submitted that the business of the Bank was banking and that this investigatory interview document had nothing to do with banking. I cannot accept that submission. The interview was conducted for the purpose of a complaint received from a former client of the Bank. It was about the business of the Bank. In any event, the business of the Bank includes the employment of staff to perform services associated with its business. Accordingly, the personnel files of the Bank's staff form part of its business records, provided, of course, that the conditions in section 2 are met.

62. Advocate Fooks suggested that the exception for business documents is designed to cover administrative matters. Whilst that may be a principal use of it, I am persuaded that it is not confined to material to which that description can be applied. The persons contributing to the material recorded in the transcript all supplied information from their personal knowledge. The transcript was created from the audio recording of the investigatory interview. I am satisfied, therefore, that the document is admissible under this provision. However, even if I were wrong to reach that conclusion, I remain of the view that one of the other exceptions to the hearsay rule advanced by Advocate Calderwood applies to render the transcript in principle admissible.

Confession

63. The next issue raised by Advocate Fooks in her challenges to the admissibility of the interview record is that it should be regarded as a confession. The term "*confessions*" is defined in section 91(2) of PPACE as including "*any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise*". Prior to the *voir dire* hearing, Advocate Calderwood had queried whether anything in the employment interview could be regarded as a confession but his position changed to the extent that he conceded that there are passages in it that would satisfying this definition as being adverse to the Defendant. He also acknowledged that a confession could be made to Ms Le Maitre and Mr Bougourd. In my view, he was right to make that concession because I would, in any event, have found that there are passages in the interview record that are confessions.

64. Section 76 of PPACE deals expressly with the admissibility of confessions:

> "*(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.*
>
> *(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –*
>
> *(a) by oppression of the person who made it; or*
>
> *(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,*
>
> *the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.*"

There is no suggestion that subsection (2)(a) is applicable and the submissions have proceeded on the basis of unreliability.

65. Before turning to this test in more detail, I need first to address the submissions of Counsel on the issue of so-called "*mixed statements*". A general summary of the position in England and Wales, which I consider to be equally applicable in Guernsey, is set out in para. 17.93 of *Blackstone's Criminal Practice 2016*:

> "*It is the convention to admit in evidence statements made by an accused when being questioned by the police whether or not they contain admissions (Pearce (1979) 69 Cr App R 365) but such statements are admitted as evidence of reaction and not as evidence of the facts stated (see **F6.36**). The rule is different in relation to a mixed statement, which in part comprises admissions and in part exculpatory or self-serving statements (Hamand (1985) 82 Cr App R 65 at p. 67). An example would be 'I admit I hit him, but he was trying to kill me'. A 'partly adverse statement' is a confession by virtue of the PACE 1984, s. 82(1) (see **F17.1**), and is admissible as such provided that the requirements of s. 76 are complied with. In Finch [2007] 1 WLR 1645, the Court of Appeal identified as suitable for full argument the question whether the presence of an admission in a police interview rendered the entire interview a 'confession', and Hughes LJ said that not everything stated at the time of a partial admission is necessarily part of a 'confession'; a proposition relied upon in Sliogeris*

*[2015] EWCA Crim 22 (see **F17.5)**. Whether a particular statement is truly 'mixed' is, it is submitted, a question of fact, and both temporal and contextual separation will be relevant to whether two or more propositions form part of the same statement. It will be a question for the court in each case to determine whether an excuse or explanation so accompanies an admission as to be part of a mixed statement for the purposes of this rule. In Pearce (1979) 69 Cr App R 365, the principle was said to be that a statement which is not an admission is admissible if it is made 'in the same context as an admission', and the Court of Appeal accepted that the two parts of the mixed statement may occur at different places in 'the same interview or series of interviews'.*

Where an admission is made which is qualified by an explanation or excuse, 'all the authorities agree that it would be unfair to admit the admission without admitting the explanation' Sharp [1988] 1 All ER 65 per Lord Havers at p. 12). In Pearce (1979) 69 Cr App R 365, it was said that to exclude answers at interview which are favourable to the accused, while admitting those which are unfavourable, would be misleading, and a breach of duty on the part of the prosecutor, whose obligation is to present the case fairly to the jury."

66. I am satisfied that the record of the employment interview should be treated as a mixed statement. There are aspects of it that are not relevant to the question of whether the prosecution will be able to prove the elements of the offence under section 1 of the 2003 Law, but there are certain answers given by the Defendant that will do so. There are answers on which Advocate Calderwood will seek to rely to show that the Defendant had previously lied. Such material is clearly adverse to the Defendant, which is why, without openly admitting that he has committed the offence, so that there is no overall concession in the manner sometimes seen, it meets the definition in section 91(2) of PPACE (which mirrors that in section 82(1) of the 1984 Act). The places in which the admissions and the exculpatory statements exist may not always be next to each other, but that is not necessary. As such, the example given by Advocate Calderwood of the Defendant saying "I took possession of the Jaguar but only for the purpose of selling it on" does not appear in that form, although it is the gist of how the entire interview could be regarded. I am, therefore, satisfied that it is appropriate to treat the employment interview as a mixed statement on the facts I have found.

67. The Court's approach to the admissibility of a confession was recently set out in *Law Officers of the Crown v Correia* (*supra*). Referring to *R v Barry* (1991) 95 Cr App R 384, the three questions are (see para. 15): (i) was there anything said or done? (ii) if so, was this likely in the circumstances to render "any confession" unreliable, which may have been made as a consequence? (iii) if so, did the thing said or done actually cause the defendant to make his particular confession? When considering things said and done, this is confined to extraneous matters, ie, it does not apply to anything emanating from the accused himself.

68. In relation to the first limb of this test, Advocate Fooks pointed out that it is more what was not said and done that affects the reliability of what followed rather than what was actually said and done. In her submission, more warning should have been given to the Defendant about what might be done with what he said to the Bank staff. In particular, there was no form of caution at all and the Defendant's question about his need for legal advice was brushed aside at the start of the Bank's investigatory process, leaving him with the impression that he did not have to address that concern of his further. Whilst considering the entirety of para. F17.19 in *Blackstone's Criminal Practice*, I have noted the final sentences: "*In Roberts (2012) 176 JP 33 it was the promise not to involve the police, held out by a shop manager, that gave rise to the inference that anything said in consequence was likely to be unreliable. Nothing in R's subsequent silence (once it became apparent that the police had in fact been summoned) was capable of negating this inference.*"

69. I do not find, however, that there was anything explicitly said or done that made a similar level of promise to the Defendant. Whilst the focus of the proceedings involving the Bank pursuing its Disciplinary Policy was described as a fact-finding exercise and the Defendant was keen that his other colleagues at the Bank should not be aware of what was taking place, I have seen no evidence of anyone saying to the Defendant that everything said was to be treated as strictly confidential to the Bank. Indeed, although I have not heard evidence from the Defendant at the *voir dire* to confirm this, his seniority within the Bank is such that I consider I can properly infer that the Defendant was aware of the obligations on the Bank to disclose suspicions held by it. I have, therefore, considered the contents of the two letters provided to the Defendant before the investigatory interview took place and assessed what level of promise, if any, they held out to the Defendant. I am satisfied that if these documents are viewed objectively, no such promise is made out. However, in the circumstances in which the Defendant found himself at the time, which were known to Ms Le Maitre and so, in my view, can properly be imputed to the Bank, the manner of stressing repeatedly that what was taking place was an internal fact-finding exercise was, I find, such as to encourage the Defendant to be more expansive than he might otherwise have been. The particular circumstance to which I have just referred is that the Defendant and his family were in the final stages of the naturalisation process to become British citizens. This was touched on at the interview itself, but had been squarely raised just in advance by the Defendant informing Ms Le Maitre that the family members were writing their naturalisation examination in early June 2014. The Defendant had made it perfectly clear that he needed to be exceptionally careful not to fall foul of the law, even in relation to matters much less serious than a corruption charge, and I consider that failing to offer any comment, even allowing for the need to avoid tipping off the Defendant, can be regarded as something done for the purposes of this test. Accordingly, because there has been something said or done that could lead to an unreliable confession, I am satisfied that I need to go on to consider the second limb of the test.

70. This involves considering the hypothetical question of whether what happened was likely in the circumstances to induce an unreliable confession, where it is necessary to ignore whether the actual confession was reliable. The English case law in this area is not particular helpful because so much of it involves statements made to the police in response to words or actions of the police. In the highly unusual circumstances of the present case, I have to bear in mind how infrequently it will be that a prosecutor seeks to rely on what is said in an investigatory interview conducted by an employer. Further, I consider it appropriate to factor in that such an interview during which a confession is made (particularly a confession amounting to a mixed statement) is not conducted with the safeguards that would normally be in place when an interview is being conducted under caution. In those particular circumstances, I am persuaded that a person being spoken to may well not address his or her mind fully to the consequences of what is then said. The focus in this situation is likely to be explaining away the allegations faced in the employment context and not perhaps considering carefully whether what is being said gives rise to any criminality. I have noted the passage at F17.13 in *Blackstone's Criminal Practice*:

> "*In Souter [1995] Crim LR 729, a confession was held to be inadmissible where it was made by a soldier who was in a state of extreme emotion and distress to an officer who had been sent to calm him down; other relevant factors were that the conversation between the two had an appearance of confidentiality, and the officer had a very partial recollection of the rest of what had been said. The kind of mental condition which may be taken into account under s. 76(2)(b) is not limited to what might be termed 'impairment of intelligence or social functioning', still less to 'mental impairment' (Walker [1998] Crim LR 211).*"

On the basis that the Defendant found himself in a stressful situation and where I am satisfied from what he wrote to Ms Le Maitre afterwards that he regarded her as a friend and that she had his confidence in a way that someone else might not have, I am satisfied that any confession he may have made to her and Mr Bougourd can be regarded as likely to be unreliable.

71. The third limb of the test requires a causal connection between what was said or done and the making of the confession. This is clear from the use of the words "*in consequence*". Advocate Calderwood drew attention to the guidance at para. F17.26 of *Blackstone's Criminal Practice*:

> "*... it may be helpful to consider decisions at common law such as Rennie [1982] 1 All ER 385, in which Lord Lane CJ held that the judge should avoid any 'refined analysis of the concept of causation' and 'should approach it much as would a jury ... In other words, he should understand the principle and the spirit behind it, and apply his common sense.' See also Tyrer (1989) 90 Cr App R 446 and Barry (1992) 95 Cr App R 384, in which it was accepted that the prosecution may discharge the onus of proof under s. 76(2) by showing that there is no causal link between the confession and things said or done by police officers which might have been conducive to unreliability, and Crampton (1991) 92 Cr App R 369 in which Rennie was cited in support of the position that a confession will not have been caused by anything said or done by an interviewer if a suspect is motivated to confess because he perceives in his own mind that there may be an advantage from doing so.*"

72. It is in relation to this last question under the *Correia* test where I am satisfied that the prosecution has discharged its burden. Whereas Advocate Fooks has quite properly referred to a defendant's absolute right to silence in Guernsey and the consequences of a person losing that shield, it is clear to me that the Defendant was going to say what he said to Ms Le Maitre and Mr Bougourd come what may. He had already opened up to Ms Le Maitre in the discussions they had had in the run-up to the investigatory interview. When he was arrested on 18 June 2014 and interviewed that day, he chose not to avail himself of his right to have a lawyer present. I am satisfied that this means that he was prepared to give his version of events voluntarily to the Police and that accords with the impression I have formed from the full content of the investigatory interview itself, namely that he was quite prepared to offer his answers to the questions posed on 10 June 2014 by his colleagues. When the entire process from start to finish is considered, I am clear that the Defendant was not improperly induced into giving his answers. It was not a case of information needing to be extracted from him but him quite openly volunteering what he said, as was demonstrated by the explanations he offered to Ms Le Maitre in their pre-interview meetings as recorded in her file notes.

73. I find, therefore, that the prosecution has, as required, proved beyond reasonable doubt (and so that I am sure) that each aspect of the investigatory interview that amounts to a confession was not obtained in consequence of anything said or done which was likely, in the circumstances that existed at the time in June 2014 to render each confession (or the entire interview record) unreliable as a result. The interview record is not, in my judgment, liable to be excluded in pursuance of section 76 of PPACE.

74. In reaching the conclusion, I have not overlooked the submission made by Advocate Fooks about "*fruit of the poisoned tree*", a term taken from *Archbold* at para. 15-325. This principle is also dealt with in *Blackstone's Criminal Practice* (at para. F17.25):

> "*Where a breach of the PACE 1984 or a PACE Code has occurred which renders a confession inadmissible under s. 76(2)(b), it may be necessary to consider whether a repetition of the confession at a subsequent, properly conducted interview is also in admissible. In McGovern (1991) 92 Cr App R 228, a subsequent interview was held inadmissible as it had been tainted by the matters which had led to the exclusion of*

an earlier interview, namely breaches of s. 58 and the interviewing provisions of Code C. It was further stated that the very fact that admissions were made at an earlier stage was likely to have an effect on the suspect thereafter, with adverse consequences for the admissibility of any repetition of the confession. In Glaves [1993] Crim LR 685 the Court of Appeal, whilst denying that there must necessarily be a 'continuing blight' on confessions obtained subsequent to a confession which is excluded under s. 76(2), nevertheless held that the breaches in the case (which included giving C, a juvenile, the impression that he was bound to answer questions) were not cured by a change of police officers and a caution, particularly as C had received no legal advice between the two interviews."

75. The first distinction that I consider applicable is that I am asked to rule on the admissibility of the interview on the basis that it constitutes a mixed statement containing elements that fall within the definition of a confession and I am not, at this first stage, considering the admissibility of any of the Police interviews. As I have indicated, I have taken into account what followed to see whether the prosecution has discharged the heavy burden it bears under section 76(2) of PPACE. In the light of my findings about the investigatory interview and how I consider the Defendant approached it, there is no section 76 blight to affect what followed once he was interviewed as a detained person at the police station. The second distinction is that these cases refer to breaches of the 1984 Act or the codes of practice under it. I have concluded that there was no requirement at the investigatory interview to comply with any code of practice under PPACE because section 74(8) was not engaged. To the extent that this is a principle extending beyond PPACE infringements, I am still satisfied that the confessionary aspects of the investigatory interview record are capable of being admitted because there is no original blight under section 76 that can then be carried forward to what happened thereafter.

76. Further, in light of my conclusion on this issue, I do not need to address in detail Advocate Calderwood's submission in relation to *R v Uddin* [2005] EWCA Crim 464 (as also explained at para. 17.6 in *Blackstone's Criminal Practice*): "*Where the part of a mixed statement relied upon by the prosecution also forms part of the defence, it may be easier to set aside errors in the manner by which it was obtained.*" Although I have concluded that the mixed statement is admissible in evidence, it is also fair to note that I take the view that the Bank staff might have been more open with the Defendant and not attempted to adhere rigidly to the Disciplinary Policy, but this is a matter for section 78 of PPACE, to which I will now turn.

Exclusion of unfair evidence

77. The final basis on which Advocate Fooks challenges the admissibility of the interview record is its unfairness. Section 78(1) of PPACE provides:

> "*In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.*"

In many respects, it is necessary to re-visit every aspect of what happened up to, during and after the investigatory interview in order to assess the fairness of admitting the interview record and, just because I have rejected the other submissions made by Advocate Fooks, it does not mean that I can now ignore what she had to say about sections 74(8) and 76. She suggested that the Court is the gatekeeper of fairness and I regard that as being an accurate description of its function.

78. There broad explanation of the effect of section 78 of the 1984 Act in *Blackstone's Criminal Practice*, and again these principles apply equally in Guernsey, is at paras. F2.10 and F2.11:

> "*Section 78(1) is generally regarded as conferring a discretionary power, but strictly speaking it does not involve an exercise of discretion because if a court decides that admission of the evidence in question would have such an adverse effect on the fairness of the proceedings that it ought not to admit it, it cannot logically exercise a discretion to admit it (per Auld LJ in Chalkley [1998] QB 848 at p. 874). ...*
>
> *Section 78(1) may be used to attempt to exclude any evidence on which the prosecution proposes to rely ... Thus in the case of (a) any admissible evidence which is likely to have a prejudicial effect out of proportion to its probative value, and (b) admissions, confessions and other evidence obtained from the accused after the commission of the offence by improper or unfair means, and which might operate unfairly against the accused (Sang [1980] AC 402), the court may now exclude either under its powers at common law or pursuant to s. 78.*"

79. In considering this aspect of the Application, I have given careful and anxious thought to everything that led to the holding of the investigatory interview. I do not propose to repeat everything I have already covered in this judgment here, but rather propose to highlight certain aspects only. It is the overall impression of what might be unfair that matters. I have, in particular, taken into account that the Defendant had no knowledge that there was an ongoing criminal investigation extending to him and potentially no knowledge that it was Mr Alaia's conduct that was originally of great interest to law enforcement. As such, he was volunteering information without knowing the ultimate use to which it might be put. Although he has not explicitly said so, because he was not called by Advocate Fooks to give evidence at the *voir dire*, I am prepared to proceed on the basis that he believed the Bank was simply following its disciplinary processes rather than anything else. He had placed his trust in Ms Le Maitre and did not consider taking legal advice at this stage. To that extent, he did not foresee or perhaps even appreciate that he could have chosen to remain silent. The fact that he did not do so potentially assists him, though, in asserting that he has had nothing to hide throughout. Further, I have had to weigh in the balance that much of what he said when interviewed offers explanations that are broadly consistent with what he then said to the Police. Whether this is how his defence will be pursued at the trial is currently unknown because there is no obligation on a defendant to indicate his defence in advance.

80. I regard the fact that Ms Le Maitre wished to follow the Bank's Disciplinary Policy as being something that may be treated as having misled the Defendant. As a mantra that I find myself rehearsing in other contexts, but which is equally applicable here, a policy does not amount to a binding position from which no movement is permitted. A policy is not the law. A policy is a starting point rather than an end point. Those applying any policy should be prepared, where it is appropriate to do so, to be more flexible and adapt appropriately to the situation in which they find themselves. There is a general principle of dealing with people fairly that must always be borne in mind. The mere fact that the Bank's Disciplinary Policy does not make provision for an employee to be accompanied at any stage of its process by a lawyer is not in itself an answer to an enquiry as to whether the employee should consider taking legal advice. As a human resources professional, Ms Le Maitre on behalf of the Bank owed a duty of care to the Defendant. In this regard, although recognising now that it is with a degree of hindsight, I consider that the level of knowledge Ms Le Maitre had after the meeting with Mr Yabsley a few days earlier was such that she should probably have been more forthcoming, but without tipping the Defendant off, than she was. It would have been simple enough, for example, to have reminded him that he could not be accompanied to the interview by a lawyer (or indeed anyone else) but also to have suggested to him that if he had any concerns about the process being followed he was entirely free to take his own legal advice. That the Defendant

continued at that stage without consulting a lawyer at all is, in my view, sufficient to bring into question the fairness of what then happened at the Bank.

81. It is not, though, a complete answer to the question I have to resolve. It is just one factor to take into account in the overall assessment of fairness. Against this shortcoming, accompanied by the general criticism Advocate Fooks has made about the Defendant being the only person involved from the Bank side of things who did not have a full picture of what was going on, I have to consider the way that the Defendant has, as I have mentioned, been forthcoming about his relationship with Mr Alaia and what happened with the Jaguar. I have to factor in that his comments about the car began when he brought it into the Bank garage in October 2013. As soon as he was seen in possession of the car, and there has been a degree of inevitability in this regard following him bringing it into the Bank, he would be asked about it. An E-type Jaguar is the type of vehicle where the interest of others is inevitable. I infer from all these circumstances that the Defendant must have realised this. Having taken that step of bringing the Jaguar into work, even if it was only en route to the ferry, whatever he then said to people like Mr Bougourd about it, the Defendant must also have realised that he was more likely than not to be asked about it by his employer. It is an unusual vehicle to have and is sufficiently valuable to raise issues in the minds of those at the Bank about lifestyle. Had the Defendant had anything to hide, I imagine that he could have avoided parking the car at the Bank. This is a factor I have to weigh in the balance. Accordingly, when this was raised some months later following Mr Alaia's complaint, the Defendant chose to answer what was put to him. In doing so, a good amount of what he had to say can, I think, be regarded as being of assistance to him. Before I can decide whether those aspects of what he said produce such an adverse effect that it justifies the exclusion of the interview record, I have to consider the potential benefit of admitting everything the Defendant has said about the car.

82. As a result, I have not been persuaded by Advocate Fooks that the circumstances produce such an adverse effect as to justify exclusion of the interview the prosecution proposes to adduce. The starting point in my analysis is that there have been no breaches of PPACE, which was the original basis on which the fairness of the manner under which the evidence was obtained was challenged. Indeed, I suspect that Advocate Fooks has relied heavily on the submissions on section 74(8), where what would have been significant and substantial breaches might well have produced a different outcome had I found the obligation to follow PPACE Codes applied. However, as soon as the breaches of PPACE were ruled out, the case for exclusion of the interview record has been reduced. Whilst there is strictly no such breach because the statutory compliance requirement did not arise, I recognise that the way the Bank dealt with the Defendant could have been better. The Defendant might have been more guarded if he had taken legal advice before the investigatory interview. Equally, though, he may have said what he said anyway. Given his position during the interviews on the day he was arrested and his willingness to ignore his Advocate's advice when she was in attendance the following month, I certainly cannot discount that possibility. Indeed, from what I have read in the materials placed before me, I consider there to have been a strong likelihood that the Defendant would have recounted events as fully as he did. In those circumstances, I cannot find that the evidence has been obtained in such a way that it should not now be admitted.

83. I have reached that conclusion on the basis of submissions that have challenged the whole interview record. There may be some passages in the record that would, if viewed in isolation, be more prejudicial than probative. Those arguments can, if the Defendant so wishes, be advanced on his behalf by Advocate Fooks under another different application that is yet to be argued and determined. I can also understand why it is that Advocate Fooks has brought these matters to the attention of the Court ahead of the trial, even though it has meant that the trial dates fixed have had to be vacated and this matter will now hang over the Defendant for even longer. None of the submissions made, culminating in this general challenge pursuant to section 78 of PPACE, is a hopeless argument. Each has some underlying merit. In some respects, the way matters developed from June 2013 to June 2014 is unusual. However, when

the overall fairness of the evidence obtained is considered, I am satisfied that there has been nothing underhand that has resulted in the manipulation of the Defendant to an extent that the admission of the interview record would be unfair to him.

Conclusion

84. For the reasons I have given, the Defendant's Application is dismissed. Whilst each of the grounds on which Advocate Fooks has sought to challenge admissibility has some merit, on closer analysis of the facts and the applicable legal tests, and on the evidence placed before me, I have concluded that each fails. However, the question of the admissibility of certain aspects of the interview record can be pursued by Advocate Fooks if she wishes within the further and wider application she has made about hearsay evidence. In any event, if the evidence given at trial turns out to develop matters that I have been dealing with as a result of the evidence given at the *voir dire*, it is possible that there will be a need to re-visit one or more of the bases on which this Application has been pursued. This is because it is always necessary to consider throughout the trial process whether the Defendant is being afforded a fair trial. At this stage, though, I consider that the prosecution's proposal to adduce the entire interview record including the confession elements is well-founded, which is why I have rejected the Application.