Neutral citation [2018] EWHC 190 (Admin)

Case No:CO/2337/2017

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

The Court House
Oxford Row
Leeds LS1 3BG

Before :

His Honour Judge Saffman sitting as a Judge of the High Court

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Between :

THE QUEEN on the application of STEVEN O'CONNOR — **Claimant**

- and –

(1) THE POLICE APPEALS TRIBUNAL

-and- — **Defendants**

THE CHIEF CONSTABLE OF WEST YORKSHIRE — **Interested Party**

Miss Helen Malcolm QC and Mr Stephen Crossley instructed by Mandip Kumar, Precedence Law for the Claimant
Mr Elliot Gold instructed by Hilda Day, Legal Services, West Yorkshire Police for the Interested Party
The Defendant was not represented and did not appear

Hearing date: 1 and 2 February 2018
Date draft circulated to the Parties 14 February 2018
Date handed down 13 March 2018

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

JUDGMENT

Introduction

1. The claimant was formerly a Detective Constable employed by the Interested Party (IP). He appeared at a misconduct hearing before a Police Misconduct Panel (the Panel) on 8 and 9 November 2016 to answer allegations that on 6 occasions between mid 2014 and mid/late 2015 he had improperly accessed the West Yorkshire Police computer systems by searching and reviewing the nominal record of his son, Thomas O'Connor, a person known to the police. Access to that computer is permitted only for a policing purpose. The allegation was that there was no policing purpose in respect of any of the accesses about which complaint was made.

2. The claimant did not deny interrogating the police computer on the dates alleged but argued that he had done so for a policing purpose. The Panel's decision dated 9 November 2016 made clear that they did not accept that the access to the computer on any occasion had been for a policing purpose and thus it found the allegations proved. Furthermore, the Panel concluded that these interrogations of the computer without a policing purpose amounted to gross misconduct. The Panel concluded that dismissal without notice was the appropriate outcome.

3. Even though the Panel accepted that there had been no malicious motive for the offending interrogations and no criminal proceedings or investigations were compromised, they were concerned that these improper accesses had carried the risk of compromising criminal proceedings. They also expressed the view that, as a general principle, it was important, for the maintenance of public confidence in the integrity of police computer systems and the information held on them, that improper access to the computers was treated with the utmost seriousness. They concluded that "*any police officer's role involves the use of the force computer system and access to information and intelligence. There would inevitably be practical problems with (the claimant's) future deployment within the police service.*"

4. Pursuant to Rule 4 of the *Police Appeals Tribunals Rules* 2012 (the 2012 Rules), a police officer against whom there has been a finding of misconduct or gross misconduct at a misconduct hearing may appeal to a Police Appeals Tribunal on one or more of the grounds set out in Rule 4(4). Those grounds are as follows:

   (a) *that the finding or disciplinary action imposed was unreasonable; or*

(b) *that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or*

(c) *there was a breach of the procedures set out in the Conduct Regulations[1], The Police (Complaints and Misconduct) Regulations 2012 or schedule 3 to the 2002 Act[2], or other unfairness which could have materially affected the finding or decision on disciplinary action.*

5. On 5 January 2017 the claimant filed grounds of appeal under Rules 4(4)(b) and 4(4)(c). The basis of appeal centred upon the evidence of a DS Shackleton and, to a much greater extent, the evidence of a Mr Philip Benson who, until 31 January 2013, had been a Detective Inspector at West Yorkshire Police Force and who was the claimant's superior officer. I shall come to the grounds of appeal and the evidence of both DS Shackleton and Mr Benson shortly. It is not disputed that the Panel were not seized of this evidence when they concluded that the claimant was guilty of gross misconduct and that he should be dismissed.

6. The claimant argued that the evidence of DS Shackleton and Mr Benson met both aspects of the test under Rule 4(4)(b) namely that it could not reasonably have been considered at the original hearing and that it could have materially affected the result. He also argued that it met both aspects of the test under Rule 4(4)(c) in that its absence from the hearing before the Panel constituted a breach of procedure on the part of the Investigating Officer, DC Leanne Horsfield[3] and/or was otherwise an unfairness and that, absent this breach of procedure and/or unfairness and thus deliberating with the benefit of this evidence, the Panel could have come to a different decision.

7. Indeed, the claimant went further; in his notice of appeal, he alleged that the absence of the evidence particularly of Mr Benson gave rise to issues of unfairness which could have provided the foundation for an application to dismiss the allegations without consideration of the evidence at all, on the basis of the principles enunciated *in R v Chief Constable of Merseyside Police ex parte Merrill* [1989] 1 WLR 1077 to which I shall come shortly.

8. Rule 11 imposes on the chair of the Police Appeals Tribunal an obligation to consider whether the appeal should be permitted to proceed to an oral hearing or should be dismissed without such a hearing. It was described in court as a "sift" mechanism which, presumably, is considered appropriate since a party aggrieved by a decision of the Panel can appeal as of right and does not need permission to do so.

9. The test to be adopted by the chair in considering the sift is set out in Rule 11(2) as follows:

11(2)An appeal shall be dismissed under this paragraph if the chair considers that –

(a) *the appeal has no real prospect of success; and*

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[1] The Police (Conduct) Regulations 2012
[2] The Police Reform Act 2002
[3] The police officer deputed to gather evidence in respect of the allegations against the claimant.

(b) *there is no other compelling reason why the appeal should proceed.*

10. Pursuant to Rule 11(3) if the chair considers that an appeal should be dismissed at this stage before making his/her decision he/she must give the appellant and the respondent notice in writing of his/her view together with reasons for that view. Rule 11(4) entitles both parties to make written representations about the chair's proposed course of action and the chair must consider those representations.

11. In this case, for the reasons which I shall explore in more detail below, the chair considered that this appeal had no real prospect of success and there were no other compelling reasons why it should proceed and notified the claimant and the IP to that effect pursuant to Rule 11(3) by a notification dated 16 February 2017.

12. Both the claimant and the IP took advantage of their right under Rule 11(4) to make further representations. Those of the claimant were dated 6 March 2017 and those of the IP are dated 7 March 2017. The chair duly considered those representations but, by her final decision of 22 March 2017, she dismissed the appeal on the basis that she remained satisfied that the claimant had failed to meet the Rule 11(2)(a) or 11(2)(b) test.

13. The claimant seeks a judicial review of that decision of 22 March 2017. He seeks an order that the decision to summarily dismiss his appeal be quashed on the basis that it was wrong in law, unreasonable and/or irrational. In the event that I accede to this application the issue then arises as to whether the matter is simply remitted to the chair of the Police Appeals Tribunal for the purpose of reconsideration of her decision or whether it is open to the court to order that the appeal be dealt with at a substantive hearing.

14. On 10 October 2017 Kerr J gave permission for judicial review of the decision of 22 March. He made the following observations:

> *"The grounds cross the threshold of arguability, although the question whether the evidence of Mr Benson was reasonably capable of making a difference to the outcome could prove a difficulty for the claimant. The points in the grounds of resistance are well made but they are for consideration at the substantive stage and are not in my judgment so strong as to render the claim unarguable".*

15. At this substantive stage the claimant is represented by Miss Helen Malcolm QC and Mr Stephen Crossley and the IP by Mr Elliott Gold of counsel. The defendant has taken no active part in this claim. Both Miss Malcolm and Mr Gold have provided me with helpful skeleton arguments and oral submissions for which I am grateful. Mr Crossley and Mr Gold appeared before the Panel and made the various written representations to the chair of the Police Appeals Tribunal to which I have referred above.

The legal framework in more detail

Police (Conduct) Regulations 2012 (the 2012 Regulations)

16. Where an allegation comes to the attention of the appropriate authority (in this case the Chief Constable of West Yorkshire) that the conduct of a police officer may amount to misconduct or gross misconduct the provisions of the *Police (Conduct) Regulations 2012* are engaged. Although this is a claim in respect of the decision of the Police Appeals Tribunal, these Regulations are relevant because they set out details of the obligations (including disclosure obligations) on the investigator, the appropriate authority and the police officer whose conduct is under scrutiny. Both the claimant and the IP pray the 2012 Regulations in aid of their respective positions. The claimant asserts that there has been a failure to disclose which supports his assertion that he has grounds which meet both the criteria under Rule 4(4)(b) and Rule 4(4)(c) and the Rule 11(2) threshold. The IP asserts that the claimant's failure to disclose the evidence upon which he now seeks to rely supports the contention that those grounds lack the requisite merit to survive the Rule 11(2) sift. It is as well therefore to set out the obligations in so far as they are relevant

17. By Regulation 12, where the appropriate authority assesses that the conduct, if proved, would amount to misconduct it shall determine whether it is necessary for the matter to be investigated. If it does then, pursuant to Regulation 13, it shall appoint an investigator who, by Regulation 14, is required to establish the facts and circumstances of the alleged misconduct or gross misconduct and assist the appropriate authority to establish whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer. In this case the investigator was DI Paul Campbell assisted by DC Horsfield. In the course of these proceedings DC Horsfield has been referred to as the Investigating Officer (IO)

18. By Regulation 15 the IO must arrange for the officer under investigation to be given written notice which includes, amongst other things, details of the conduct which is the subject matter of the investigation and how it is alleged that conduct falls below the Standards of Professional Behaviour expected and whether it is contended that this conduct, if proved, would amount to misconduct or gross misconduct. The claimant in this case was served with a Regulation 15 notice on or about 27 April 2016. It alleged that audits had shown that between 26 March 2014 and 16 September 2015 the claimant had accessed police computer systems other than for a policing purpose. Significantly, at that point the claimant was also under investigation not simply for professional misconduct but on the basis that there was a suspicion that he had attempted to pervert the course of justice and thus been guilty of a criminal act.

19. By Regulation 16 the officer under investigation may provide to the IO a written or oral statement relating to any matter under investigation and any relevant documents. By Regulation 16(3) "relevant documents" include documents "containing suggestions as to the lines of enquiry to be pursued or witnesses to be interviewed". An explanatory note attached to the Regulation 15 notice draws attention to the officer's right to provide such a statement and/or relevant documents.

20. By Regulation 17 where an IO wishes to interview the officer concerned he/she is entitled to do so and, pursuant to Regulation 17(7), the officer concerned is required to attend the interview. In this case there was a lengthy interview on 27 April 2016.

21. Regulation 21 is engaged where a case is actually referred to misconduct proceedings. In that event the appropriate authority must provide the officer concerned with,

amongst other things, written notice of the referral and details of the conduct that is the subject matter of the case and how it is alleged that conduct amounts to misconduct or gross misconduct as the case may be. The appropriate authority must also supply the officer under investigation with a copy of any statement he has made and, subject to the harm test set out in Regulation 4, the IO's report and any "relevant" documents gathered during the course of the investigation.

22. Paragraph 2.195 of the *Home Office Guidance on Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures* (HOG) provides that "*in determining which documents are relevant, the test to be applied will be that under the Criminal Procedure and Investigations Act 1996, namely whether any document or other material undermines the case against the police officer concerned or would assist the police officer's case*".

23. Pursuant to Regulation 22, on receipt of the Regulation 21 notice the officer under investigation must provide the appropriate authority with notice as to whether he accepts that his conduct has amounted to misconduct or gross misconduct. If he does he may submit written submissions by way of mitigation. If he does not accept that his conduct amounted to misconduct or gross misconduct or if he disputes part of the case against him he must provide the appropriate authority with notice of the allegations he disputes and his account of relevant events and any argument on points of law that he wishes to be considered at the misconduct proceedings. By Regulation 22(3) he must also provide the appropriate authority with a copy of any document he intends to rely on at the misconduct proceedings and by 22(4) the parties are required to exchange details of their proposed witnesses.

24. Regulation 23 deals further with witnesses. It is sufficient to recount that that Regulation enables the chair to consider the list of proposed witnesses and where the chair reasonably believes that it is necessary for a witness to attend in the interest of justice then in the case of a witness other than a police officer, the chair can cause the witness to be given notice that his attendance is necessary. In contradistinction, a police officer can be ordered to attend the misconduct proceedings.

The Police Appeals Tribunal Rules 2012 (the 2012 Rules)

25. I have already referred above to these Rules, in particular in the context of Rules 4 and 11. It is however necessary to draw attention to other parts of the 2012 Rules to which reference has been made at the hearing.

26. Rule 9, which sets out the procedure on notice of appeal, assumed importance at the hearing in the context of a discussion as to what witness evidence is permissible for consideration on an appeal.

27. Rule 9(4) sets out the documents that the appellant must supply to the respondent to the appeal. It states as follows:

> *The appellant shall supply the following documents to the relevant local policing body in accordance with paragraph (6) –*
>
> *(a) a statement of the relevant decision and (the appellant's) grounds of appeal*

(b) any supporting documents;
(c) where the appellant is permitted to adduce witness evidence –
(i) a list of any proposed witnesses;
(ii) a witness statement from each proposed witness; and
(d) if he consents to the appeal being determined without a hearing, notice in writing that he so consents.

28. So far as is relevant to this claim, Rule 9(5) states that:

For the purposes of (4)(c) –
(a) an appellant is only permitted to adduce witness evidence where he is relying on the ground of appeal set out in Rule 4(4)(b).....

29. The claimant sought in its appeal to rely on evidence from Mr Benson and DS Shackleton. The IP argues that, pursuant to Rule 9(5)(a) above, such evidence is not permissible to support an appeal under Rule 4(4)(c). The claimant does not accept that a true interpretation of Rule 9(5) has the effect of precluding that evidence in respect of an appeal on Rule 4(4)(c) grounds.

30. Pursuant to Rule 13, at any time following the provision of the documents mentioned in Rule 9(4) and (8) the appellant or the respondent (the requesting party) may apply to the chair for disclosure by the other party of any document which is relevant to the appeal. By Rule 13(3) where the chair requests disclosure of a document and a party does not comply, that party shall give the chair and the requesting party his reasons in writing for non-disclosure. There is a dispute between the parties as to whether the disclosure provisions apply before the decision has been made as to whether the appeal meets the test in Rule 11 to which I now refer. Mr Gold says it does not, Miss Malcolm disagrees.

31. The issue is relevant because in the process of its appeal to the Police Appeals Tribunal the claimant has sought disclosure of original notes taken by DC Horsfield when interviewing Mr Benson and documents relating to the circumstances which prompted the IP to decide to investigate the claimant's conduct.

32. I have already referred to Rule 11 and its centrality in this claim for judicial review. I need not repeat that here.

The chronology leading to the hearing before the Panel and events at the Panel hearing and thereafter.

33. First, with reference to the disclosure obligations referred to above, it is right to record that it is asserted by Mr Gold in his skeleton argument that the claimant did not suggest to the IO pursuant to Regulation 16 that the IO should interview Mr Benson or DS Shackleton. It is further asserted by Mr Gold that, in the course of his Regulation 17 interview and in his mandatory written response required under Regulation 22, the claimant made no reference to Mr Benson in the context of his assertion that his interrogation of the computer in respect of his son, Thomas, was for

a policing purpose[4]. Miss Malcolm has not suggested that Mr Gold is in error in respect of these assertions. It also appears to be unchallenged that in the course of his evidence before the Panel, the claimant made no mention of Mr Benson either during the course of his examination in chief or cross examination. It appears that Mr Benson was first mentioned when being asked questions by the Panel.

34. Having recorded that, I return to the chronology. In fact, in the course of her enquiries, the IO saw Mr Benson on 11 May 2016. She made an attendance note which, so far as is relevant, said as follows:

> *"Myself and DC Moore went to visit Phil Benson at his home address..... He stated he could remember DC O'Connor when he was in the reactive team at Huddersfield. He described him as a nice, well turned out lad but didn't really shine. He was aware that DC O'Connor has a son called Tom and that Tom had been in trouble with the police.*
>
> *At first he was unable to recall the shooting incident involving Thomas but after some detail he eventually recalled minor part of it (sic). Phil Benson did state that he wouldn't have asked him to check the systems directly. He can't remember any specific incidents involving DC O'Connor and his son."*

35. On 28 October 2016, before the Panel hearing, the claimants solicitors wrote to the appropriate authority. The email contained the following enquiry:

> *"In relation to Disclosure requests, would you please disclose any statements obtained from colleagues and supervisors of our client. Can you please confirm that they have taken no other statements. It is our understanding that a statement has been taken from Philip Benson, and if this is correct, can you please disclose this?"*

36. Presumably that email was forwarded to DC Horsfield by the solicitor at the appropriate authority because she responded to that solicitor as follows on 31 October:

> *"Philip (Benson) stated he could remember DC O'Connor when he was in the reactive team at Huddersfield. He described him as a nice, well turned out male but didn't really shine. He did state that if you tasked DC O'Connor with something specific he would complete that task however he stated he would not describe DC O'Connor as dynamic.*
>
> *He was aware that DC O'Connor has a son called Tom and that Tom had been in trouble with the police. At first he was unable to recall the shooting incident involving Thomas but after some detail he eventually recalled some of it. Mr Benson did state he doesn't remember talking to DC O'Connor about the incident. However if his son was involved in maybe (sic) possible that from a father perspective he may have discussed things with him. He couldn't*

[4] although, as I understand it, Mr Benson was mentioned in the Regulation 17 interview fleetingly on the basis that Mr Benson had "put a log on (the computer)" in respect of Thomas on an occasion following a shooting in which Thomas was the victim.

remember. If the police were unable to get hold of him he could understand why DC O'Connor would be approached to get hold of Thomas.

He didn't task DC O'Connor himself to check the IT systems

I have been in touch with Philip Benson to establish if he would be willing to provide a statement however he has not responded on and emails of telephone messages (sic).

I have emailed DS Shackleton for an amended statement. I will forward this once I received (sic) it."

37. The response therefore from the appropriate authority to the claimant solicitors, dated 1 November 2016, included the following assertion:

> "*I can confirm that there are no other witness statements available from any other officers, nor from Mr Benson.*"

38. At the misconduct hearing when the claimant was giving his evidence the Panel chair asked him to enlarge on an assertion made by the claimant that he had been asked many times by officers who wanted to talk to Thomas in connection with enquiries that they were involved in to assist them in making contact with him. The chair asked the claimant if he had ever been asked to look up anything about Thomas on the computer system. The claimant referred to the incident to which I have referred in footnote 4 above after Thomas had apparently been shot and was in contact with the claimant. In answer to the chair's question he mentioned that Inspector Benson, as he then was, had spoken to him about the matter and there was a discussion about updating the police log with information that the claimant was then receiving on the telephone from his son. This gave rise to further questions, the upshot of which was that it appeared to be the claimant's evidence that in respect of this particular incident, Inspector Benson had updated the log by accessing the computer.

39. After the Panel had retired to consider the allegations, DS Shackleton, acting as the claimant's welfare officer, disclosed to Mr Crossley that the IO had told him that she had in fact seen Mr Benson. The IO was approached and confirmed that and also that she had made the note of 11 May 2016 to which I refer above. Mr Crossley asked for sight of the note. That request was acceded to and Mr Crossley considered it. Understandably, he took the view that there was nothing in the note that required the Panel to consider it and so the Panel's deliberations continued undisturbed and in ignorance of this note. One of the criticisms raised by Miss Malcolm is that actually the email that the IO sent to the appropriate authority on 31 October was much fuller than the attendance note and could be construed as being significantly more beneficial to the claimant's defence. It points out that Mr Bennett could understand why the claimant would be approached by any police personnel seeking to get hold of Thomas and why discussion should take place between the claimant and his colleagues about Thomas "*from a father's perspective*".

40. Following the hearing Mr Benson was contacted by those representing the claimant to confirm that the position was as reflected in the note. It is the claimant's contention that that confirmation was not forthcoming and that in fact the information that Mr

Benson had given to the IO was far more favourable to the claimant than the note suggested. The claimant solicitors took a statement from Mr Benson dated 15 November 2016. It is essentially the evidence which they contend provides grounds for appeal under Rule 4(4)(b) and Rule 4(4)(c).

41. In his statement Mr Benson says the following:

(a) The IO made handwritten notes, possibly in her notebook.[5]

(b) The sentence in the IO's note that reads "*He can't remember any specific incident involving DC O'Connor and his son*" is not a true reflection of what was said because missing from the notes prepared by the IO is the fact that Mr Benson told her that he recollected 2 incidents relating to Thomas.

i. In the first, Thomas was either the perpetrator or victim of an assault and Mr Benson recalled speaking to the claimant about it. The claimant had said that the night before it was his birthday and he had gone out for a family meal and Thomas had been present but had not said anything (presumably about an assault). Mr Benson recalls questioning the claimant about Thomas being present at this birthday meal because he had previously been told by the claimant that he did not associate with Thomas. He was told by the claimant that Thomas had simply turned up with his new girlfriend. Mr Benson recounts in his witness statement that he told the IO that this incident should be easy to trace because it will have occurred around about the claimant's birthday between 2010, when the claimant arrived at Huddersfield police station, and 2013 when Mr Benson retired.

ii. In the second incident, Mr Benson recalled an occasion when an officer needed to contact Thomas urgently relating to the shooting incident and all lines of enquiry to trace him had failed. He recalled having a meeting with him in his office and asking the claimant if he could assist the police in getting a message to Thomas to come into the police station and the claimant readily agreeing. Mr Benson's statement recounts that at this point the IO asked him a question along the lines of "*would you not have given him permission to use the police systems?*" His response, recorded in his statement was that he had not directed the claimant to access the police computer systems "*but if he had done so to achieve the task that I had set him, then in my opinion that was for a policing purpose, there was nothing wrong with it and I would back him 100%.* "

(c) The statement goes on to say that Mr Benson was asked if he would provide a statement and he said that he would do so but the IO told him that she did not intend to take a statement from him at that time but would do so if one was required in the future.

[5] Hence the request to which I refer in paragraph 31 above for disclosure of DC Horsfield's original notes

42. The evidence of DS Shackleton is contained in the statement dated 17 November 2016. As I have said, he was the claimant's welfare officer and provided a statement to the IO in connection with the investigation against the claimant. After recounting that he had had an earlier conversation with the IO his statement says the following:

> *"I recall a further conversation with DC Horsfield during which she confirmed to me that she had visited and spoken to Mr Benson. She went on to state that Mr Benson's account "supported" or "corroborated" what Mr O'Connor had stated in interview but did not elaborate on that. I cannot recall whether the word used was "supported" or "corroborated" but believe it was one of these two words and can say with confidence that what DC Horsfield told me lead me to believe that the meeting with Mr Benson was in favour of what Mr O'Connor had stated in interview. I made the presumption from this conversation that a statement had been taken from Mr Benson as part of the investigation."*

The grounds of appeal against the Panel's determination

43. By paragraph 2 of the Grounds of Appeal dated 5 January 2017 the claimant sought to adduce as fresh evidence the statements of Mr Benson and DS Shackleton.

44. It was contended by the Grounds of Appeal that the evidence of Mr Benson gave rise to the following grounds of appeal against both the finding in relation to (gross) misconduct and in relation to the disciplinary outcome:

Ground 1

45. It provides additional support to the claimant's case that he believed himself to be acting in a policing role when accessing information about Thomas on the police computer. It was asserted that the evidence of Mr Benson could have been relevant to the Panel's assessment of whether the conduct alleged amounted to a breach of standards of professional behaviour and, if so, whether it amounted to misconduct, gross misconduct or neither. It was also asserted that in any event the evidence of Mr Benson could be relevant to the outcome namely the consequence of any breach found to have been proved. Although the ground of appeal does not say so, it seems tolerably clear that this ground of appeal prays in aid Rule 4(4)(b). It was contended that the evidence of Mr Benson could not reasonably have been considered at the original hearing since the IO had provided a note which inaccurately disclosed that Mr Benson had no relevant evidence to give and that the claimant was entitled to rely on the accuracy and/or good faith of the IO's disclosure.

Ground 2

46. It demonstrates that the email of 1 November 2016 in response to that of 28 October 2016 was misleading and further, was a departure from the statutory framework which requires that all relevant documents are provided to the officer. This ground of appeal specifically prays in aid Rule 4(4)(c)

Ground 3

47. The misleading nature of the email of 1 November 2016 created an unfairness, a ground of appeal also envisaged by 4(4)(c).

Ground 4

48. This ground appears to be very similar to ground 3 but it appears to suggest that if the disparity between the IO's record of her conversation with Mr Benson and the actual contents of that conversation is one motivated by bad faith then there are grounds to appeal under 4(4)(c) but also on the basis that bad faith of that nature would justify dismissal of the allegations regardless of what the evidence might reveal, in accordance with the principles enunciated in *Merrill* to which I have referred above. It was held in *Merrill*[6] that:

> *"The Chief Constable had no need to concern himself with "abuse of process." As a judicial tribunal, he had a discretionary power to dismiss the charge without hearing the full evidence if he was satisfied that, whatever the evidence might reveal, it would be unfair to proceed further. "Unfairness" in this context is a general concept which comprehends prejudice to the accused, but can also extend to a significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both."*

The grounds of resistance to the appeal from the Panel's determination

49. Mr Gold asserted in his Grounds of Resistance to the appeal to the Police Appeals Tribunal dated 30 January 2017 that there was no new evidence not previously available, no unfairness or breach of procedures and that the appeal had no prospect of success. He reminded the chair of the specific requirements of Rule 11 and the need for the claimant to satisfy the chair that an appeal had a real prospect of success. He emphasised that the prospect must be "real" not false, fanciful or imaginary. In short, the prospects of success have to be better than merely "arguable".

50. Mr Gold prayed in aid the claimant's failure to comply with the Regulations, in particular the obligation under Regulation 22(2) of the 2012 Regulations and his failure to provide an account of the relevant events. At paragraph 7 of his grounds of resistance he set out 4 respects in which he contended the claimant failed to comply with his Regulation 22 obligations.

51. At paragraph 8 of his Grounds of Resistance, Mr Gold criticised the claimant for failing to provide the specific information required by Regulation 22(2) by instead incorporating into his Regulation 22(2) notice his factual account given in his misconduct interview, which was an inadequate statement of his case and where he had been unable to answer questions as to why he made certain accesses and argues that the appellant's failure to make his position clear resulted in an obfuscation of his case and the issues in dispute.

52. As to the specific grounds of appeal, in the context of an appeal based on Rule 4(4)(b), Mr Gold argued that the evidence of Mr Benson failed to meet both

[6] At 1085F

requirements of an appeal on this ground in that it was not fresh evidence (because it was available for the claimant to obtain himself before the misconduct hearing and so could reasonably have been considered at the original hearing) and that, in any event, it could not have materially affected the finding or decision of the Panel.

53. In connection with the first aspect of the appeal on this ground he cited *Ladd v Marshall* [1954] 1WLR 1489 which states that to justify the reception of fresh evidence 3 conditions had to be fulfilled: first, that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence was such that, if given, it would probably have an important, though not necessarily decisive, influence on the result of the case; thirdly, the evidence was capable of being believed and was apparently credible, though not necessarily incontrovertible.

54. Mr Gold argued that the evidence of Mr Benson could have been obtained by the claimant with reasonable diligence.

55. With regard to the second aspect of the appeal on this ground, namely whether the additional evidence could have materially affected the outcome, Mr Gold pointed out that at no stage prior to or during the hearing did the claimant seek to rely on any conversation that he had had with Mr Benson in support of his contention that his conduct did not constitute misconduct of any kind, gross or otherwise or in the context of mitigation, the Panel having found against him in respect of the characterisation of his conduct.

56. He points out that if the evidence of Mr Benson was relevant then the claimant did not require disclosure in respect of Mr Benson because the existence of this evidence was something within the claimant's primary knowledge. It is suggested that the fact that the claimant did not bother to secure this evidence itself casts significant doubt on his assertion that such evidence had any relevance.

57. Moreover however, Mr Gold argues that in fact the evidence of Mr Benson undermines the claimant's credibility and in those circumstances could not have materially affected the outcome to the claimant's advantage.

58. At paragraph 43 of the Grounds of Resistance, Mr Gold set out 6 reasons why Mr Benson's evidence could not have affected the findings. Briefly those are: firstly, that the evidence of Mr Benson suggests that the claimant appeared to give conflicting accounts as to his relationship with his son. On the one hand he had led Mr Benson to believe that he had washed his hands of his son and had no relationship with him, on the other he recalls that the claimant told him that Thomas had turned up with his girlfriend at the claimant's birthday meal. Secondly, that the limit of Mr Benson statement is that he asked the appellant to get a message to his son. He did not tell him to use the police computer systems to do so. Thirdly, that nowhere does Mr Benson say this task would have required the claimant's use of the police computer systems. Fourthly, that Mr Benson's evidence relates to an occasion some 15 months before the first access to the computer about which the Panel was concerned. Fifthly, nowhere does Mr Benson say that it would have been permissible for the claimant to access the computer in the circumstances in which he did so and which formed the basis of the allegations against him. Sixthly, that in any event the evidence of Mr Benson does not accord with that of the claimant who believes that any access to the computer was at

Mr Benson's request to update the relevant log but ultimately it was Mr Benson who updated that log. In addition, it is right to say that any access to the computer in respect of Thomas's whereabouts in relation to the shooting incident inevitably occurred in the context of an enquiry into the whereabouts of Thomas initiated by a superior officer. It was not suggested by the claimant that any of the accesses in respect of which the disciplinary proceedings were brought was prompted by any order, request or suggestion, implied or otherwise, by any other police officer.

59. As to the appeal under Rule 4(4)(c), Mr Gold argues that there was no breach of procedures or other unfairness. The view taken by DC Horsfield that the evidence that Mr Benson had to offer was not relevant was a reasonable one to take and in the circumstances it was unnecessary to disclose it. By reference to HOG, it neither undermined the case against the police officer nor assisted the police officer's case.

60. As regards the evidence of DS Shackleton, it is argued that even if DS Shackleton's recollection is not mistaken, his evidence could not have materially affected the Panel's decision because, as a fact, Mr Benson's evidence was not favourable to the claimant, for the reasons already outlined.

61. As to the allegation of bad faith, Mr Gold argues that this cannot have been argued before the Police Appeals Tribunal with any real prospect of success bearing in mind that the claimant would have known of the information that Mr Benson was able to supply because it was in his primary knowledge. There would, accordingly, be no real prospect of the Police Appeals Tribunal concluding that the IO would conceal or deliberately flout the disclosure obligations in respect of evidence whose existence is likely to have been known to the claimant.

62. At paragraph 68 of his grounds of response, Mr Gold raises the point to which I allude in paragraph 29 above and about which there was much argument at the hearing. In that paragraph Mr Gold argues that Rule 9(5)(a) makes clear that an appellant in respect of a finding at a misconduct hearing by a Panel is, on appeal, only permitted to adduce witness evidence where he is relying on the grounds of appeal set out in Rule 4(4)(b). He argues that there is no power for the Police Appeals Tribunal to permit witness evidence in support of an appeal under Rule 4(4)(c). He refers to the specific wording of the Rule which I have reproduced at paragraph 28 above.

The chair's decision under Rule 11(3)

63. On 16 February 2017 the chair of the Police Appeals Tribunal issued her notification under Rule 11(3). She dismissed the appeal on the basis that there was no real prospect of the appellant successfully arguing on appeal either his Rule 4(4)(b) or his Rule 4(4)(c) grounds.

64. As regards the former, she observed that there was no indication that the claimant had taken steps prior to the hearing to obtain evidence from Mr Benson and she was clear that the claimant had not shown that Mr Benson's evidence could have materially affected the finding or the outcome. She observed that Mr Benson had retired from the police force in January 2013, a considerable period before the first of the incidents listed in the allegations and his evidence regarding the propriety of accessing police computer systems related only to the narrow issue of the appellant contacting his son

in response to a request by Mr Benson on one occasion. She observed that that evidence did not extend to the broader issues raised in the allegations which formed the basis of the misconduct hearing and she observed that none of the accesses which formed the subject matter of the allegations " *were connected with a request from a colleague".*

65. Equally she was not satisfied that DS Shackleton's evidence could have had a material effect on finding or outcome either in respect of an appeal under 4(4)(b) or 4(4)(c). It was clear that she did not consider that DS Shackleton's evidence could materially affect the finding of the Panel nor did she accept that that evidence supported a Rule 4(4)(c) argument. At paragraph 63 of her Rule 11(3) decision she stated "*DS Shackleton may have been aware that Mr Benson's account was consistent with the appellant's account at interview of the interaction between them. However, this falls short of demonstrating that Mr Benson had provided relevant information, or that any such information was then wrongly concealed or withheld.*"

66. More generally as regards the appeal under Rule 4(4)(c), she was not satisfied that there had been a breach of procedures or other unfairness. She found that the IO had reasonably taken the view that Mr Benson provided no relevant information. She was not satisfied that the attendance note to which I refer in paragraph 34 above contained significant inaccuracy or omission.

67. She addressed her mind to the issue of potential bad faith on the part of the IO, in particular her failure to make a note of the 2 incidents in which Mr Benson and the claimant discussed Thomas and to which I refer in paragraph 41(b)(i) and (ii) above and the contention that her attendance note of the meeting with Mr Benson was inaccurate in that it did not reflect other matters which Mr Benson had brought to her attention. The chair concluded, at paragraph 55 of her decision, that it was more likely than not that the IO did not consider the information obtained from Mr Benson to be relevant. It is clear that the chair was not satisfied that there was a real prospect of establishing that the IO's decision as to relevance was reached in bad faith.

68. As regards disclosure of the attendance note of her meeting with Mr Benson, the chair's view was that it was reasonable for the IO to take the view that the information obtained from Mr Benson was not relevant in the sense required by HOG and, under those circumstances, did not require to be disclosed.

69. As to inaccuracies in her attendance note, she found that there were no significant inaccuracies that went to the core of the evidence that Mr Benson was able to give and the attendance note itself and/or the failure to disclose it did not represent a significant regulatory departure or support a finding that the processes had been unfair. She observed that *"owing to its brevity, and the purpose for which it was made, the detail in the note was necessarily limited."* She concluded that the allegation of bad faith amounted to "*unsupported conjecture*" and could not be sustained.

70. She also considered whether the email of 1 November 2016 to which I refer in paragraph 37 was misleading in any way. Her firm conclusion was that it was not. In her view, it was essentially an accurate answer to the question posed in the email of 28 October 2016.

Steps taken after the Rule 11(3) decision.

71. As I have said, the parties took advantage of their right under Rule 11(4) to make further representations. The claimant argued that the chair had failed to address the specific grounds advanced under 4(4)(b) and had made findings of fact in respect of the Rule 4(4)(c) ground of appeal which were factually wrong, wrong in principle and were unsupported by the documentary evidence.

72. I do not intend to summarise all of Mr Crossley's submissions in response to the provisional decision. Suffice it to say that Mr Crossley contended that the chair had made a finding of fact that the IO took the view that the information provided by Mr Benson was not relevant. He contended that it was not accepted by the claimant that that was genuinely the IO's view and that issue was one that could only be properly ventilated at an appeal with cross examination. He argued that, contrary to the chair's provisional view, the evidence of Mr Benson, if true, was clearly relevant not least because it went to the context of the claimant's conduct, namely that his accessing of the computers in relation to Thomas was against a background of his superior officer having had in the past a sympathetic approach to access for that purpose.

73. Specifically as regards the 4(4)(c) grounds of appeal, Mr Crossley took issue with the chair's conclusion that the absence of information in the attendance note supported a finding that there was no relevant information. He argued that that was inconsistent with the actual evidence provided by Mr Benson and that, as a fact, and contrary to the chair's conclusion, the note cannot be described as consistent with the evidence of Mr Benson.

74. Mr Crossley argued that the provisional decision appears to prefer the evidence of the IO to that of Mr Benson on the issue of what was discussed at her meeting with Mr Benson. He argues that it is unreasonable to prefer the evidence of one witness over the other at the Rule 11 stage without the opportunity to hear the evidence on the matter in issue and subjecting it to challenge.

75. It is right to say that the further representations do not appear to address the issue of whether Mr Benson's evidence was fresh evidence which could not have been obtained by the claimant with reasonable diligence on *Ladd v Marshall* principles. Nor does it address the issue of the status of Mr Benson's and indeed DS Shackleton's evidence in the context of an appeal founded on Rule 4(4)(c). It will be recalled that Mr Gold had argued at paragraph 68 of his Grounds of Response that witness statements in support of an appeal based on that ground were not permissible.

76. In his further representations pursuant to Rule 11(4), as well as pointing out that the claimant's representations failed to address the *Ladd v Marshall* issue Mr Gold repeats the point he had made at paragraph 68 of his Grounds of Response. At paragraph 10 of his further submissions Mr Crossley had said that "*The Chair is invited to allow the appeal to progress to an oral appeal before a full Panel... where the evidence of Mr Benson might be heard and tested and determination made of his credibility and reliability*". At paragraph 7 of his representations Mr Gold says that such a course is impermissible and prohibited by Rule 9(5) which permits oral evidence only to support ground 4(4)(b). He makes the point again at paragraph 10. Mr Gold makes the point that in terms of 4(4)(c) it is not simply a question of breach

of procedure/unfairness. It has to be breach of procedure/unfairness which could have materially affected the outcome and that is an issue to be decided on the papers. Furthermore, he argues at paragraph 11 that in any event the evidence of Mr Benson could not have materially affected the Panel's decision bearing in mind that even he does not contend that he instructed the claimant to access the computer on that occasion when he and the claimant were discussing Thomas and does not suggest that the claimant was permitted to access records and information in respect of those occasions covered by the disciplinary proceedings.

The chair's final decision dated 22 March 2017

77. The first 45 paragraphs of the 72 paragraph decision repeat almost verbatim the first 45 paragraphs of the provisional decision. Of course, I make no criticism of that, they merely set out the status of the decision, the background, the nature of the appeal, the parties' respective submissions and the law.

78. In connection with the Rule 4(4)(b) ground, in her final decision the chair simply adds to her original paragraph 46 the observation that "*It was open to the appellant to adduce Mr Benson's evidence and he did not do so*". At paragraphs 48 and 50 of the final decision she takes the opportunity of enlarging on that conclusion.

79. At paragraph 47 she repeats the conclusions provisionally reached and notified earlier to the parties that she was satisfied that the claimant had not shown that Mr Benson's evidence could have materially affected the finding or outcome.

80. At paragraph 51 she repeats her initial conclusion that an appeal on the basis of the grounds set out in 4(4)(b) has no real prospect of success.

81. As regards the appeal on ground 4(4)(c), at paragraph 52 she states that "*The appellant is only permitted to adduce witness evidence where he is relying on the ground of appeal set out in rule 4(4)(b), so it is not open to him to argue that Mr Benson's evidence should be heard in support of this ground of appeal.*" This assertion had not been contained in the provisional decision. It was a procedural point that Mr Gold had of course emphasised in his representations under Rule 11(4) and, of course, had also mentioned in his Grounds of Response at paragraph 68, as I have already mentioned more than once.

82. It is one of the principal challenges that the claimant makes to this decision that the chair is wrong in relation to her conclusion that reliance on witness statements in respect of an appeal under 4(4)(c) is impermissible; and further, that it was not appropriate for her to reach that conclusion without hearing arguments to the contrary, or at least including it in her provisional decision thus inviting appropriate written submissions.

83. Paragraph 54 of the final decision departs a little from the corresponding paragraph in the provisional decision in the context of the IO's attendance note. The chair recognises that there are discrepancies between the evidence of Mr Benson contained in the witness statement and the attendance note but she repeats her view that it has not been shown that the note contained any significant inaccuracy or omission "*such that it amounted to a breach of procedure*". She recognised, at paragraph 55, that a

different IO may have taken a different approach and may even have taken a statement from Mr Benson rather than a brief note but the chair's view was that even if Mr Benson's account of his meeting with the IO was preferred, it was reasonable for the IO to take the view that Mr Benson's evidence would not be "needed"[7].

84. In the context of bad faith, as she had done at paragraph 55 of her provisional decision, in paragraph 57 and 60 of the final decision she analyses the attendance note of 11 May 2016 and compares it to Mr Benson's evidence and recognises that there are indeed discrepancies. However, once again, she emphasises her view that the IO genuinely did not consider the evidence of Mr Benson to be relevant. In the end, the chair took the view that whatever inadequacies there were with regard to the note, it did serve as a record of the fact that the IO did not consider it necessary to take a statement at that time (because presumably the evidence of Mr Benson was not seen by her to be relevant).

85. At paragraph 60 she observes that, whatever the discrepancies between Mr Benson's evidence and the note, it had not been shown that the difference between the account given by Mr Benson and the record made by the IO was "*such that it would have made a material difference to the findings or outcome*". The chair emphasised that she was "*not satisfied that the evidence of Mr Benson was of such significance that it could have made a material difference to the findings in respect of the appellant's access to a number of police records for personal reasons, 18 months to 2 years later*".

86. Her conclusion, repeated at paragraph 61, was that inconsistencies such as they were did not go to the core of the allegations against the claimant and did not represent a significant regulatory departure and did not support a finding that the process had been unfair.

87. At paragraph 62 the chair considered the question of non-disclosure of the attendance note. She merely repeated what she said in paragraph 59 of the provisional decision to the effect that the note contained the salient points of the meeting between the IO and Mr Benson and it was reasonable for the IO to conclude that her conversation with Mr Benson produced nothing of relevance.

88. At paragraph 63 of the final decision the chair considered the impact of the email of 1 November 2016 and whether that was misleading. She had done so at paragraph 60 of her provisional decision. The conclusion that she reached provisionally was couched in the same terms in her final decision, namely that it was not misleading; the email said that no statement had been taken and no statement had been taken.

89. In a consideration of DS Shackleton's evidence, the chair simply reproduced what she had said in the provisional decision and which I have covered in paragraph 65 above. The same is true of her consideration of breach of procedure and unfairness and the claimant's request for further disclosure.

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[7] In fact, Ms Malcolm challenged the use of the word "needed". It does not figure in the rules. I am satisfied that the chair is not importing a different test to that of "relevance". The use of the word "needed" may be unfortunate but it is clear that she was considering this aspect of matters in the context of relevance of Mr Benson's evidence.

The grounds of challenge to the final decision

90. As to the chair's decision in respect of the appeal based on Rule 4(4)(b), the Statement of Facts and Grounds argues that it was unreasonable for the chair to determine that the evidence of Mr Benson was not evidence that could not reasonably have been considered at the hearing. Essentially it was argued that the IO had a duty to disclose this evidence and her failure to do so only became apparent following sight of the attendance note, the emails of 28 October and 31 October 2016, the email of 1 November 2016 to which I have referred in paragraphs 35 to 37 above and the subsequent statement given by Mr Benson to the claimant's own solicitors. Furthermore, and as set out by the claimant in paragraph 47(4) of the Statement of Facts and Grounds, where the evidence of Mr Benson was not called in circumstances which amounted to a breach of disclosure obligations, it was wrong in principle to conclude that the evidence could reasonably have been considered at the hearing. Such a conclusion would mean that the appropriate authority was benefiting from its own default and profiting from its erroneous decision to withhold relevant material.

91. In addition, it is argued that the attendance note was, as a fact wholly inadequate. Had it been accurate and comprehensive then the Panel could have been recalled from their deliberations to peruse it and hear submissions as to its effect.

92. Finally, it was argued that the chair's conclusion that the email of 1 November 2016 was not misleading was wrong in principle. The chair's reasoning that the appropriate authority had only to address itself to the literal enquiry made on behalf of the claimant was wrong in principle since it ignored the positive obligation on the IO and indeed the appropriate authority to disclose relevant material.

93. The challenge on ground Rule 4(4)(c) was firstly on the basis that the chair gave no reasons why the claimant was not permitted to call fresh evidence where complaint was made of significant failings as to the discharge of the positive obligation of the IO and the appropriate authority to disclose relevant material.

94. It will be recalled that at paragraph 52 of her final decision the chair had observed that the appellant is only permitted to adduce witness evidence where he is relying on the ground of appeal set out in Rule 4(4)(b).

95. As I stated in paragraph 29 above, the claimant takes issue with that. At paragraph 40 of the Statement of Facts and Grounds it was suggested that *"Rule 9(5)(a) does no more than indicate that neither party is allowed to introduce evidence on appeal other than through the gateway of Rule 4(4)(b)*".

96. The argument is that a purposive construction of Rule 4(4)(c) would allow all relevant evidence to be heard by the Police Appeals Tribunal on any matter where it could materially affect the finding or decision on disciplinary action. She argues that Rule 9(5)(a) does not exclude new evidence – only old evidence or evidence that could have been available before the Panel with reasonable diligence. Miss Malcolm supports this contention by contending that there is an obvious overlap between the grounds of appeal recognised by the court in *R v Chief Constable of Durham* v *PAT* [2012] EWHC 2733.

97. Mr Gold does not dispute that in that case the court appears to have recognised an overlap but it was not a point that was directly argued and was obiter and wrong. He supports that contention on the basis that Rule 4(4)(b) and Rule 4(4)(c) are clearly separate grounds and conflating them actually offends the express wording of the 2012 Rules which specifically draws a distinction between Rule 4(4)(b) and Rule 4(4)(c). Both are separated by the disjunctive "*or*" and Rule 9(5)(a) makes it abundantly clear that there is a distinction between them.

98. He does not dispute that an event may give rise to an appeal under both separate grounds. He gives the example of a misconduct hearing premised upon an officer being convicted of a criminal offence and the failure to adjourn the hearing before a successful appeal in respect of conviction. The officer concerned would then have a right of appeal based on the fresh evidence of his acquittal (Rule 4(4)(b)) and separately for unfairness in the Panel's refusal to adjourn (Rule 4(4)(c)) but, he argues, this does not mean that the grounds are not entirely separate and distinct.

99. He also argues that Rule 9(5)(a) is not a gateway that opens the door to new evidence. As he says in paragraph 60 of his skeleton argument "*it permits an appellant to rely on fresh evidence only where they rely on a ground of appeal in Rule 4(4)(b)... Where that ground is found to have no merit, it cannot then be permissible for such evidence to remain in use on other grounds (for example Rule 4(4)(c))*".

100. The claimant asserts at paragraph 44 of the Statement of Facts and Grounds that "*The decision on permitted evidence for the purpose of Rule 4(4)(c) should not have been reached without allowing oral submissions, given that it was a novel point of law on construction: particularly where no mention had been made of it by the chair in her provisional notification under Rule 11(3)*".

101. It cannot be denied that in fact, in her decision the chair considered the evidence of Mr Benson and indeed DS Shackleton at some length notwithstanding what she said in paragraph 52. Miss Malcolm argues that her conclusions, however, that witness evidence was not permissible under Rule 4(4)(c) was a starting point and that what she subsequently said concerning that evidence and the weight she attached to it has to be viewed in that context.

102. The claimant makes the subsidiary point that the issue of the admissibility of evidence of unfairness in support of the Rule 4(4)(c) appeal should have been a compelling reason for a hearing even if it was reasonable to take the view that there was no real prospect of a successful appeal.

103. In fact, I am not sure that the parties are that far apart on the admissibility of evidence of unfairness, breaches of procedure or impropriety generally. In his submissions during the course of the hearing, Mr Gold referred me to paragraph 65 and 66 of his Grounds of Resistance to judicial review in which he stated:

> "*65 Any argument of error, concealment or prosecutorial impropriety by the IP would form part of the analysis as to why the claimant could not have obtained Mr Benson's evidence with reasonable diligence, pursuant to Rule*

4(4)(b) rather than giving rise to a separate fairness ground of appeal under Rule 4(4)(c).

66 Accordingly the PAT chair correctly construed Rules 4(4)(b) and 4(4)(c) as substantially different grounds and Rule 9(5) as permitting new evidence to be adduced only in reliance on Rule 4(4)(b). Any arguments of error, concealment or impropriety resulting in evidence not being obtained properly fell to be addressed under Rule 4(4)(b)". (my emphasis)

104. In his oral argument before me, Mr Gold confirmed that he accepted that the issue of unfairness can form the basis of an appeal under Rule 4(4)(b).

105. Furthermore, at paragraph 42 of the Statement of Facts and Grounds it is argued that:

> *"Rule 4(4)(b) does not prevent an appellant relying on fresh evidence to identify regulatory departure or other unfairness where it is necessary to do so in order to demonstrate that the matter complained of could have materially affected the finding or decision on disciplinary action..."*

106. This seems to me to make exactly the same point as is made in paragraph 65 and 66 of the Grounds of Resistance quoted above. Nevertheless, Miss Malcolm has asked me to interpret the interplay between Rules 4(4) and 9(5) and consider the question of whether witness evidence can ever be adduced in relation to an appeal based on Rule 4(4)(c). She argues that this is a novel point of law and the chair should not have come to the conclusion to which she came in paragraph 52 of the decision without oral argument. She argues that the chair simply accepted Mr Gold's assertion in his Rule 11(4) representations that witness evidence was simply not receivable in connection with a Rule 4(4)(c) appeal. She further argues that insofar as Rule 9(5) has to be interpreted as precluding witness evidence in relation to a Rule 4(4)(c) appeal, I should conclude that natural justice requires that Rule be overridden. She seeks a ruling on that.

107. One thing is clear however, in the context of an appeal under Rule 4(4)(b) – evidence of the unfairness/impropriety complained of can only be considered for the purpose of an appeal if it could not reasonably have been considered at the original hearing and could have materially affected the outcome.

108. An appeal under Rule 4(4)(c) does not appear to be subject to the same requirement that the evidence in support of it could not reasonably have been considered at the original hearing. Indeed, in the light of the fact that Rule 9(5) precludes witness evidence in support of an appeal under Rule 4(4)(c) it would be illogical if Rule 4(4)(c) had made it a condition of an appeal on that ground that evidence could not reasonably have been considered at the original hearing.

109. Mr Gold's argument is that any evidence of unfairness/impropriety fails at both Rule 4(4)(b) hurdles on the basis that it is not fresh evidence and it could not have materially affected the outcome.

110. A further ground of appeal set out in the Statement of Facts and Grounds is broadly a complaint in relation to the chair's findings of fact and in particular her finding that the IO can be taken to have genuinely assumed that the evidence of Mr Benson was not relevant and her finding that the IO's failure to take a statement or to give more detail in her attendance note did not amount to a significant regulatory departure.

111. I remind myself of the fact that the email of 31 October 2016 written by the IO to the appropriate authority does contain some information which was not contained in the attendance note. Miss Malcolm's point is that a conclusion reached as to the state of mind of the IO should not have been reached at a summary stage but only after cross examination. She set out 6 areas of cross examination which it is likely would have been raised at a substantive hearing namely:

- Did the IO make handwritten notes as Mr Benson alleges? If so why have those not been produced?
- How does the IO account for the differences in her attendance note and in her email of 31 October 2016 to the appropriate authority?
- What did she know of what Mr Benson would have thought permissible in terms of accessing the police computer systems?
- Why does she leave it open to contact Mr Benson again if she thought that he had nothing relevant to say?
- Who is responsible for applying the test of relevance set out in HOG and who accordingly is responsible for the decisions on disclosure?
- It may have been necessary to open up a line of questioning on issues of bad faith depending on the answers to the above.

112. The claimant also argues that Mr Benson's evidence could have materially affected the Panel's finding on outcome and sanction. Essentially, that with the benefit of this evidence it could have concluded that if the claimant's conduct was culpable, it was merely misconduct rather than gross misconduct or, even if it was gross misconduct, the outcome could have been something other than dismissal without notice.

113. It is contended that this is so because Mr Benson's evidence could have informed the Panel's view as to the state of mind of the claimant with regard to the appropriateness of interrogating the police computers in respect of Thomas as well as demonstrating context as to the culture, knowledge and attitude of the claimant's supervisors as regards the claimant interrogating the computer for information concerning Thomas and whether doing so was for a policing purpose.

114. She draws my attention to the fact that the Panel had been concerned at the claimant's lack of insight into his actions. It was one of the reasons why they took the view that he should be dismissed for gross misconduct. The evidence of Mr Benson would have thrown some light on to this issue because it tied directly back to the culture the claimant was operating in. As Miss Malcolm puts it in paragraph 28 of her skeleton argument;

"The further evidence of Mr Benson was capable of providing assistance to the Panel on the supervisory attitude of West Yorkshire Police to a blurring of the claimant's personal and professional position and could have materially affected its decision on Outcome. The attitude of supervisors (the evidence of Mr Benson) and the absence of any guidance to the claimant provided by West Yorkshire Police were relevant matters to a decision as to the necessary and proportionate Outcome in the claimant's case. These matters were absent from the panel's reasoning on Outcome."

115. As would be expected, Miss Malcolm's skeleton argument otherwise broadly repeats the grounds contained in the Statement of Facts and Grounds. I do not intend to go through that in any great detail. I have considered it carefully. I confine myself simply to making some brief observations on it.

116. As well as emphasising the point that she is made in relation to Rule 4(4)(b) and Rule 4(4)(c), Miss Malcolm also made the additional point that the departure between what was said in the attendance note and the actual conversation that the IO had with Mr Benson could have provided the foundation for an application to dismiss the allegations without consideration of the evidence under *Merrill* principles.

117. She enlarges upon her contention that it was impermissible for the chair to dismiss the conflict between the evidence of the IO as to what Mr Benson had told her and Mr Benson's evidence of what he had told the IO. Miss Malcolm's assertion was that this conflict needed to be resolved at a hearing and not dismissed simply at a Rule 11 stage.

118. Miss Malcolm develops her argument that the chair's finding that it was reasonable for the IO to conclude that Mr Benson's evidence was not relevant was one which was not reasonable in all the circumstances - not least in the light of the evidence of DS Shackleton and the broad nature of what is disclosable pursuant to the HOG. She makes the point that initially the claimant faced criminal investigation for perverting the course of justice. The necessity for comprehensive disclosure under the circumstances was enhanced not least because the *AG's Guidelines on Disclosure* 2013 in respect of criminal proceedings imposes a duty on investigators to establish what actually happened and to be fair and objective. In other words, it is not the objective of the investigator to establish a case against the investigated come what may but rather the obligation is to establish the actual facts.

119. At paragraph 16 of her skeleton argument, Miss Malcolm refers to *Ladd v Marshall*. She does not assert that it is irrelevant and accepts that the issue of whether evidence could reasonably have been considered at the original hearing is in effect a consideration of whether the evidence is fresh evidence in respect of which *Ladd v Marshall* is the leading case. However, she regards Mr Gold's reliance on it as misconceived since the issues of the failure to record relevant information (in the attendance note) non-disclosure and issues of bad faith surrounding non-disclosure arose because of the absence of any statement from Mr Benson in circumstances where, it is argued, the IO was obliged to disclose to the claimant the outcome of her conversation with Mr Benson.

120. In addition, she points out that *Ladd v Marshall* principles are not now applied with the stringency which may have applied before the introduction of the Civil Procedure Rules on the basis that they import an obligation to have regard to the overriding objective. I should say that Mr Gold accepts that in the context of litigation conducted through the courts which are governed by the CPR the stringency of the *Ladd v Marshall* principles has been subject to some relaxation[8] but his argument is that that does not extend to the procedures before the Police Appeals Tribunal. The PAT, he argues, is subject to a stringent and unmodified application of *Ladd v Marshall* principles because it is not governed by the principles of the overriding objective which controls civil litigation through the courts. The grounds of appeal to the PAT are governed by a self-contained regulatory regime which provides, pursuant to Rule 4(4)(b) of the 2012 Rules, that an appeal based on evidence that was not before the Panel can only be made out if that evidence could not have been reasonably considered at the original hearing[9]. He argues that the wording of Rule 4(4)(b) is determinative and is not reproduced in the CPR in the context of evidence receivable on appeals. He points out that CPR 52.21(2) merely confines itself to stating that the appeal court will not receive evidence that was not before the lower court unless the court orders otherwise. It is the proviso that opens the gateway to a consideration of principles of fairness and the overriding objective. There is, he argues, no such proviso in the 2012 Rules which would open a gate to similar considerations.

121. At paragraph 21 of her skeleton argument, Miss Malcolm addresses the appropriate authority's response to the claimant solicitors email of 28 October 2016. I have already recorded that the claimant challenges as unreasonable the conclusion reached by the chair that the response to the effect that there were no witness statements available from any other officers nor from Mr Benson was acceptable because it was literally correct. Miss Malcolm's point is that it was not an open and fair response and omitted significant information of assistance to the claimant and therefore relevant for the purpose of disclosure.

122. In her oral submissions she developed her arguments concerning the Rule 11 test applied by the defendant. Bearing in mind the analogy between the test in Rule 11 and the test in CPR 24 there was the inevitable reference to *Swain v Hillman* (2001) 1 All ER 91 and the guidance given by the court that an application for summary judgment does not involve the court conducting a mini trial; the point made by Miss Malcolm being that the chair's conclusion that the IO genuinely concluded that Mr Benson's evidence was not relevant, was a finding that ought not to have been made on a summary basis. Miss Malcolm also prays that case in aid of the necessity to have regard to the fact that summary judgment is a serious step which should not be taken lightly. Of course it also provides guidance on what is meant by real prospect of success and the need for the court to consider whether a case has realistic, as opposed to fanciful, prospects of success.

123. Miss Malcolm asked me to have regard to the fact that the test under Rule 11 is couched in negative terms in that the chair is directed to dismiss the appeal if he/she

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[8] See *Webster v Norfolk CC* [2009] EWCA Civ 59 and *Hamilton v Al Fayed (no. 2)* 2001 EMLR 15 which both refer to the *Ladd v Marshall* test being applied in the light of the overriding objective and *Sharab v Prince Al-Waleed* [2009] EWCA Civ 353 wherein it is stated that *Ladd v Marshall* principles do not apply with the same stringency under CPR 52.11.

[9] And, of course, that the evidence could have materially affected the outcome

considers that there is no real prospect of success. She argues that couching it in these negative terms lowers the threshold that the appellant has to negotiate. She draws my attention to the case of *International Finance Corp v Utexafrica* 2001 CLC 1361 at paragraph 8 where Moore Bick LJ observed that;

> *"The fact is that in ordinary language to say that a case has no realistic prospect of success is generally much the same as saying that it is hopeless; whereas to say that case has a realistic prospect of success carries the suggestion that it is something better than merely arguable."*

124. Penultimately, Miss Malcolm criticises the decision on the basis that it fails to focus on the prospects of success of an appeal against outcome i.e. sanction. There is a mention of outcome at paragraphs 47, 48 and 60, and at paragraph 69 there is a reference to disciplinary action which is clearly a reference to outcome. Nevertheless, Miss Malcolm argues that there has been no separate analysis of outcome in the context of a case where the Panel had concluded that there was no malice, dishonesty or dissemination of confidential information by the claimant. On this basis Miss Malcolm argues that the decision is flawed.

125. Finally, for completeness I record that Miss Malcolm also takes issue with the chair's treatment of the disclosure request under Rule 13. It gives rise to the dispute between the parties which I identified in the final sentence of 30 above. She refers me to paragraph 39 of the decision in which the chair stated that the respondents had submitted the Rule 13 disclosure could only be done after a Rule 11 decision and not to support a prospective ground of appeal. Miss Malcolm contends that the chair ruled on this at paragraph 71 where she says;

> *"None of the matters raised by the appellant supports the serious allegation that the IO's integrity is in issue or that documents exist which could have materially affected the Panel's decision, and which could not reasonably have been considered by the Panel. The matter is not therefore to proceed to a hearing there, and there is therefore no basis for directing disclosure relating to the appellant's arrest or any other disclosures which are now sought by the appellant."*

126. She argues that the wording of Rule 13 is clear. It provides that "at any time" (my emphasis) following the provision of the documents mentioned in Rule 9(4) the appellant or respondent may apply to the chair for disclosure of any document. There is thus power, on the face of the Rule itself, to order disclosure even before the Rule 11(3) sift.

127. Mr Gold's argument is that that is not so. The very fact that Rule 13 appears after Rule 11 suggests, he argues, that it applies only after the Rule 11 sift.

The Grounds of Resistance

128. These essentially commence at paragraph 63 of the Grounds of Resistance. Mr Gold argues that the evidence of Mr Benson and indeed DS Shackleton is only permissible in respect of an appeal under Rule 4(4)(b) and that an appeal under Rule 4(4)(b) has, as one of its pre-requisites, the fact that the relevant evidence could not

reasonably have been considered at the original hearing. He argues that that clearly imports the unmodified *Ladd v Marshall* principles and, in particular, that the reception of fresh evidence can only be justified if it could not be obtained with reasonable diligence for use at the trial. He argues that Mr Benson's evidence manifestly fails to meet that threshold.

129. He argues that the claimant would always have known that Mr Benson had asked him to contact his son on one occasion and perhaps may have permitted him to use the computer systems for that purpose. He argues that that was a matter within his knowledge. Mr Gold asserts that the statement taken by the claimant solicitors after the misconduct hearing contains no new evidence about which the claimant was unaware.

130. Furthermore, it had been open to the claimant to request that a statement be taken from Mr Benson under regulation 16 of the 2012 Regulations. It will be recalled that that Regulation enables the officer under investigation to make suggestions as to lines of enquiry to be pursued by the IO. Furthermore, he argues that he could have instructed his own solicitors to take the statement from Mr Benson, to point out the relevance of Mr Benson in his regulation 22 notice and to request that the chair of the Panel give notice to Mr Benson to attend the hearing under regulation 23. He observes that it was open to the claimant to refer to Mr Benson's evidence in the supportive terms to which he now alleges it can be applied, but he failed to do so. He also refers me, as indeed did Miss Malcolm to *General Medical Council v Adeogba* [2016] EWCA Civ 162; [2016] 1 WLR 3867 where, at paragraph 20 it is said;

> "….. *there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession.*"

131. He argues that, in the circumstances, it cannot be said that the chair of the Police Appeals Tribunal's decision, set out at paragraph 46 of the decision to the effect that this evidence did not meet the *Ladd v Marshall* test, was irrational.

132. Furthermore, he argues that even if this evidence could not have been obtained with reasonable diligence, the chair's decision that there was no real prospect of successfully arguing that this evidence could have had a material impact on the finding or decision was one which she was perfectly entitled to reach and was not in any way irrational or otherwise unlawful.

133. It will be recalled that Miss Malcolm's position is that the evidence of Mr Benson and in particular his confirmation that as far as he was concerned it would have been entirely permissible for the claimant to access the computers to retrieve information concerning Thomas following a request to contact him from Mr Benson, demonstrated a culture with regard to accessing the computers which was more relaxed in reality then it was in theory.

134. Mr Gold repeats the reasons to which I refer in paragraph 58 above as to why the chair was entitled to conclude that Mr Benson's evidence would not have made a difference. As the chair points out in her decision at paragraph 47:

"*(Mr Benson's) evidence regarding the propriety of accessing police computer systems relates only to the narrow issue of the appellant contacting his son in response to Mr Benson's request on one occasion. It does not extend to the broader issues raised in the allegations of the incidents which took place between June 2014 and August 2015, none of which were connected with a request from a colleague....*"

135. Mr Gold considers the evidence of Mr Benson in the context of the allegation of what he calls "prosecutorial misconduct" (by which he means the alleged failure of the IO to comply with the obligations under the 2012 Regulations). As I have said in paragraph 103 above, he does not shrink from the proposition that this prosecutorial misconduct can be invoked to support a claim under Rule 4(4)(b) but of course he argues that on that basis there is still an obligation on the claimant to show that this evidence could not have been obtained for use at the trial with reasonable diligence.

136. In addition, he points out that even an appeal grounded upon prosecutorial impropriety on Rule 4(4)(b) principles could only rationally have been allowed to proceed to a final hearing in the event that there was a real prospect of establishing that that prosecutorial impropriety could have materially affected the outcome. For the reasons already articulated, Mr Gold argues that there was nothing irrational in the chair's conclusion that this appeal had no real prospect of success.

137. In respect of the appeal under Rule 4(4)(c), Mr Gold argues that the chair's decision to the effect that the claimant had no real prospect of successfully arguing that there had been a breach of procedure was not irrational and was one which was perfectly open to her. It was open to the chair to take the view that the IO must have genuinely considered Mr Benson's evidence to be irrelevant in the light, not only of what Mr Benson had said (or not said in the sense that at no stage did he suggest that it would have been permissible in principle for the claimant to access the computers to retrieve information concerning Thomas save in respect of the specific request made to the claimant by Mr Benson about seeking to establish Thomas's whereabouts) but also in the light of the fact that this one occasion when Mr Benson took the view that interrogation of the computer would have been permissible on the part of the claimant was something like 16 months before the first access which forms part of the subject matter of the charges against the claimant.

138. In any event, Mr Gold points out that evidence of a breach of procedures or other unfairness is not enough to found a successful appeal. It must be a breach or unfairness which could have materially affected the outcome. In this respect the claimant comes up against the same obstacles as affect him in respect of his appeal under Rule 4(4)(b).

139. As regards an appeal based upon *Merrill* principles and bad faith, Mr Gold argues that the chair's conclusions in relation to allegations of bad faith by the IO to the effect that they amounted to unsupported conjecture and could not be sustained was one which it was entirely rational for her to reach. In any event, for misconduct proceedings to be terminated on grounds of bad faith, there would be a need to

establish more than just negligence but rather conduct far more reprehensible than that alleged against the IO. There would need to be deliberate unlawfulness involving bad faith, malice or improper motive amounting to a repugnance[10].

140. Even then, the claimant would still have had to have a real prospect of succeeding in showing that the entirety of the proceedings could have been struck out, the issue of a strike out having to be balanced with the public interest in ensuring that a police officer misconducting himself ceases to continue in that office. Mr Gold referred me to *Warren v AG for Jersey* (2011) UKPC 10 which upheld a Commissioners decision not to strike out a case despite "*grave prosecutorial misconduct*" as one which it was impossible to characterise as perverse or one which no reasonable judge could have made.

141. Alternatively, for misconduct proceedings to be terminated on *Merrill* principles in the absence of bad faith, it would have to be shown that it was impossible for the claimant to have a fair hearing.

142. Mr Gold argues that the chair considered bad faith and unfairness and concluded that both were absent and her decision to that effect was one which it was perfectly open to her to reach and was entirely rational.

Conclusion

143. First let me deal with the 2 issues that have arisen with regards to the construction of the Rules.

144. The first relates to admissibility of witness statements in support of an appeal based on Rule 4(4)(c). It is the question of the interrelationship between Rule 4 and Rule 9(5). Despite Miss Malcolm's articulate presentation, I simply cannot accept that the Rules can be interpreted as permitting witness evidence to be adduced to support an appeal on that ground.

145. There appears to me to be no basis for the "gateway" argument raised by Miss Malcolm and to which I refer in paragraph 95 above. In order to conclude that that was right I would have to ignore the precise wording of Rule 9(5)(a) which makes it clear that "*an appellant is only permitted to adduce witness evidence where he is relying on the ground of Rule 4(4)(b)*"

146. As Mr Gold points out, it is improper for the court to embark upon a purposive interpretation of a statutory instrument when its meaning is otherwise clear. He cites *R v (N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin) in paragraph 65:

> "*When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. That assumption shows appropriate respect for Parliament, enables Parliament*

[10] see Clay v South Cambridgeshire Justices (2014) EWHC 321 and R v Sadler (Clayton) (2002) EWCA 1722

most effectively to achieve its purpose and promotes the integrity of the law. In essence, the courts interpret the language of the statute or statutory instrument as having the meaning which best explains why a rational and informed legislator would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort".

147. He also cites *Whiteman v Sadler* (1910) AC 514:

"The upshot of the matter seems to me that each statute must be judged of and by itself. Now in the present statute we find a direct prohibition as to contracts in s 2(1)(c)..... It seems to me that express enactment shuts the door to further implication. "Expressio unius est exclusio alterius..."[11]

148. Of course, I accept that the court in *R v Chief Constable of Durham* recognised an overlap between grounds of appeal. As I understand it, that case was a judicial review of a decision of a Police Appeals Tribunal to whom an appeal had been made from the decision of a Panel on the basis that the Panel's decision had been unreasonable under Rule 4(4)(a). That particular sub-rule is not in issue in this case. The court simply held that there may be an overlap *"in that unfairness may lead to an unreasonable conclusion".*

149. In my view all that means is that a set of circumstances can provide a basis of appeal under Rule 4(4)(b) and/or Rule 4(4)(c). It is the point made by Mr Gold in paragraph 98 above. It does not mean that the 2 grounds can be conflated and that a gateway is provided for the admission of evidence in support of an appeal under Rule 4(4)(c).

150. In any event, the court in *Chief Constable of Durham* did not address the interaction between Rule 4 and Rule 9, as I am required to do.

151. I recognise that the *Walsall Metropolitan Borough* is authority for the proposition that it is possible to attribute error and oversight to Parliament as a last resort. This is presumably the basis for Miss Malcolm's assertion that the court has jurisdiction on the basis of natural justice to permit witness evidence to be adduced in support of an appeal under Rule 4(4)(c).

152. I do not accept that that is necessary bearing in mind that it is accepted that issues of unfairness can form the basis for an appeal under Rule 4(4)(b) and that witness evidence is admissible in those circumstances. Accordingly, it does not strike me as being inappropriate that witness evidence cannot be adduced in respect of an appeal purely under Rule 4(4)(c) which deals broadly with procedural irregularities.

153. I accept that the conclusion reached by the chair at paragraph 52 to the effect that it was not open to the claimant to argue that Mr Benson's evidence should be heard in support of an appeal under Rule 4(4)(c) was one that was reached by her without hearing argument to the contrary. I remind myself however that Mr Gold had

[11] express mention (of a thing) excludes all others

made that clear in paragraph 68 of his Grounds of Response to the original appeal to the Panel. It was not a position that was challenged in the Rule 11(4) response by Mr Crossley. The chair under those circumstances can hardly be blamed for assuming that that principle was not in issue.

154. In any event, in my judgment, in reaching the conclusion that she expressed in paragraph 52 of her final decision, it cannot be said that the chair erred in law. Her conclusion accorded with the clear wording of the relevant rule and, in my view, it would not have been open to her to reach the opposing conclusion.

155. In her opening, Miss Malcolm asked for a determination on the issue of whether one can ever have witness statements in relation to an appeal on the basis of Rule 4(4)(c) unfairness. In my judgment, and following on from what I say above, the answer is in the affirmative but only on the basis that those witness statements are adduced in support of an appeal based upon unfairness grounded on Rule 4(4)(b).

156. The second issue upon which a determination was sought in relation to construction of the rules was the relationship between Rule 13 and Rule 11. It is the issue which I refer to in paragraph 30 above.

157. I should make it clear that I do not accept that the chair made any finding that disclosure of the documents sought by the appellant could not be made before the Rule 11 sift. By paragraph 71 she merely makes the obvious point that there is no point in ordering disclosure where the appeal has been struck out because there are then no extant proceedings in which disclosure is relevant. Nowhere is it suggested in the decision that the chair may have come to a different decision had she had the documents but she was not in a position to require them. Her decision to dismiss the claim was based upon the grounds of appeal, the resistance to it and the supplementary submissions. Nowhere in the supplementary submissions does it suggest that the chair should order disclosure of the documents before she made her final decision.

158. Accordingly, in my judgment it is not necessary to resolve the issue as to the relationship between these 2 rules because they did not figure in the chair's decision. If, however, I am required to make a determination then it seems to me that what is sauce for the goose is sauce for the gander. Mr Gold has asked me to interpret rule 9(5)(a) in accordance with its terms and on the basis that where those terms are clear it is inappropriate to depart from them. Rule 13(1) is equally clear. It provides that:

> "*At any time (my emphasis) following the provision of the documents mentioned in rule 9(4) and (8) the appellant or respondent (the requesting party) may apply to the chair for disclosure of any document by the other party which is relevant to the appeal.*"

159. Rules 9(4) and (8) require the parties to provide documents in anticipation of the Rule 11 sift and indeed Rule 11 itself makes it clear that the chair's consideration of dismissal should take place on receipt of the documents required by Rules 9(4) and (8). It is therefore entirely clear that the appellant or the respondent under Rule 13 may apply to the chair for disclosure before the sift has actually occurred because

Rule 13 makes it clear that they can do so "*at any time*" following provision of the documents which have to be provided before the chair can undertake the sift exercise.

160. I now turn more specifically to the evidence of Mr Benson and DS Shackleton. It is a fact that the chair did consider their evidence at some length in the context of its applicability to the appeal based upon Rule 4(4)(b) and so, in my judgment, it cannot be argued that the chair was somehow misled by Mr Gold's assertion that the evidence could not be considered in the Rule 4(4)(c) context into believing that she could not look at it at all.

161. Miss Malcolm argues that albeit the chair did consider that evidence, she did so from the starting point of believing that the evidence was impermissible and that this would have affected the weight that she attached to it in terms of the effect that it could have on both liability and outcome. I do not accept that. As I have said, the only conclusion that can be drawn from the decision of the chair is that she concluded that that evidence was inadmissible in the context of the appeal grounded on Rule 4(4)(c).

162. In my view she considered that evidence critically in the context of the appeal grounded on Rule 4(4)(b). I do not accept that issues as to its admissibility affected its weight in the context of the consideration of an appeal under Rule 4(4)(b) to such an extent as to cause her to unquestioningly accept that DC Horsfield had acted in good faith in the preparation of her attendance note and in her decision not to disclose it earlier. Nor do I accept that issues as to admissibility affected its weight in the context of what effect that evidence would have had if the Panel had been seized of it.

163. She compares carefully the attendance notes and the various emails with Mr Benson's evidence. She recognises that there are discrepancies but her conclusion that the IO genuinely did not consider Mr Benson's evidence to be relevant, and was entitled to do so, was one which was reached after a clear analysis of Mr Benson's evidence.

164. She considered at length what difference Mr Benson's evidence could have made. This is of course relevant in terms of the consideration of the second leg of an appeal on the basis of Rule 4(4)(b) but it is also relevant in the context of a consideration of unfairness based upon a failure to disclose relevant evidence. If evidence, even if accepted, is unlikely to have any material effect on outcome then its relevance is questionable.

165. The chair also considered the evidence of DS Shackleton and how that impacts upon questions of good faith and disclosure obligations generally. The point she makes at paragraph 66 of the decision to the effect that DS Shackleton's evidence falls short of demonstrating that Mr Benson had provided relevant information or that any such information was then wrongly concealed or withheld was, in my view, one which was rationally reached and was open to her to properly make.

166. Furthermore, I do not get the impression from a close reading of the decision that the chair concluded that the evidence of the IO was to be preferred to that of Mr Benson. The decision shows an analysis of Mr Benson's evidence leading to a conclusion that, in any event, it did not go to the core of the allegations against the

claimant and that it was not of such significance that it could have made a material difference to the findings of the panel and the sanction imposed. Even if the claimant had been entitled to ask the questions of the IO to which Miss Malcolm alluded in paragraph 111 above it is difficult to see any basis for contending that any answers would have affected the materiality of Mr Benson's evidence.

167. I remind myself that at paragraph 61 of the decision she concludes that the inconsistencies in the evidence of Mr Benson and that of the IO do not represent a significant regulatory departure. If nothing else, this clearly indicates a consideration of unfairness as part of the Rule 4(4)(b) ground of appeal. The conclusion to the effect that the inconsistencies did not go to the core of the allegations and did not constitute a significant regulatory departure was, in my judgment, one which it was entirely open to her to reach.

168. It has to be said that in terms of analysis of the evidence of Mr Benson and indeed DS Shackleton, I am at one with the chair that there was no real prospect that this evidence could have materially affected the finding decision. The chair puts it succinctly at paragraph 60 where she says:

> *"None of the allegations related in any way to police work in which the appellant was involved, or was asked to be involved and I am not satisfied that the evidence of Mr Benson was of such significance that it could have made a material difference to the findings in respect of the appellant's access to a number of police records for personal reasons, 18 months to 2 years later".*

169. As to Miss Malcolm's assertion which I record in paragraph 114 above, that Mr Benson's evidence throws light on the culture under which the claimant worked, I simply do not accept that it does cast the light that the claimant asserts. The evidence merely states that if, in response to a request from Mr Benson to try and discover the whereabouts of Thomas, the claimant had interrogated the police computer systems then Mr Benson would have backed him. The allegations before the Panel were entirely different. They related to access to the police computer systems at various times, many months later where there had been no request by another officer for the claimant to do anything with regard to Thomas. These were accesses which were entirely at the claimant's initiative and not for a purpose associated with any other officer's enquiries.

170. In my opinion, it cannot be said that, in concluding that it was not arguable that this evidence could have materially affected the finding or decision, the chair reached a conclusion which it was not realistically open to her to reach.

171. In terms of an appeal under Rule 4(4)(b) of course the claimant has the additional problem of establishing that this evidence from Mr Benson and DS Shackleton could not reasonably have been considered at the original hearing.

172. I think that it is appropriate firstly to deal with the issue about whether *Ladd v Marshall* applies in proceedings before the Police Appeals Tribunal with greater stringency than it would be applied in proceedings governed by the CPR. It will be recalled that this was an issue on which Mr Gold and Miss Malcom differed. I refer to this it in paragraph 120 above.

173. It would be unfortunate if the bar in relation to the introduction of fresh evidence was set higher in some proceedings than in others. It is clearly desirable that where there are considerations of whether fresh evidence is permissible in the context of an appeal that the principles to be applied should be common principles.

174. Perhaps more importantly however, in so far as the principles in *Ladd v Marshall* may have been relaxed a little in the civil litigation context, it is in order to meet the overriding objective of dealing with a case justly. If the view has been taken that it is "just" to relax the principles then it would be unattractive to apply the principles more rigorously in other jurisdictions because that would involve paying less respect to what is "just".

175. I do not accept Mr Gold's assertion that the wording on Rule 4(4)(b) imposes a straightjacket that precludes the Police Appeals Tribunal from applying *Ladd v Marshall* principles as they are applied in the civil litigation arena by reason of the specific wording of CPR 52.21(2). The Rule precludes evidence that could reasonably have been considered at the original hearing. The Rule imports a test of reasonableness which, in my opinion, provides a basis for aligning the approach of the Police Appeals Tribunal and the approach of the civil courts. That, for the reasons that I give in paragraph 173 and 174 above, seems to me to be a desirable conclusion as well as a justifiable one. In my judgment the principles of *Ladd v Marshall* applied by the courts should be the principles applied by the Police Appeals Tribunal. On any view that does not involve a wholesale departure from the original *Ladd v Marshall* principles. It is clear that they remain of highly persuasive importance.

176. In this case, I fully appreciate the arguments as to the IO's obligations for disclosure but there is, in my opinion, considerable strength in the contention that this evidence was available to the claimant because he had primary knowledge of it and so could have been produced by him, not least in accordance with his disclosure obligations under Regulations 16, 17 and 22. In my judgment it may well be unlikely that on a substantive hearing the Police Appeals Tribunal would have properly admitted this evidence with the result that an appeal under Rule 4(4)(b) would have failed on that ground without consideration of the extent to which the evidence might have materially affected the outcome. But the issue is whether any decision by the chair that it was not arguable with any real prospect of success that that evidence should be adduced, is one that she was entitled to reach. I should say that it is not clear to me that the chair dismissed this appeal on the basis that this was evidence which could have been adduced earlier. For the avoidance of doubt, in so far as she did so it seems to me that that was a decision which would have been in error because it is, in my view, sufficiently arguable to meet the low Rule 11 threshold that the evidence of Mr Benson and DS Shackleton could not reasonably have been considered at the original hearing. But of course, that only assists the claimant if the chair could not have properly reached her decision that it was not arguable that this evidence could have materially affected the outcome.

177. I should add, simply for completeness, that that is true in respect of an appeal grounded on Rule 4(4)(c) as well as one grounded on Rule 4(4)(b). An appeal on Rule 4(4)(c) can only survive dismissal under Rule 11 if the chair concludes that there is a real prospect of finding that that evidence could have materially affected the finding

or decision. If it does not do so on the Rule 4(4)(b) ground then it cannot do so on the Rule 4(4)(c) ground.

178. Equally, the chair's conclusion at paragraph 72 that there are no other compelling reasons why the appeal should proceed is one which it was entirely open to her to reach. I do not accept that the appeal should survive dismissal under rule 11(2)(b) on the basis that there was a novel point of law as to the meaning of rule 9(5)(a) if the meaning asserted by the claimant is one which is essentially doomed to failure and, in any event, would have made no difference because the evidence concerned could not arguably have materially affected the outcome.

179. Nor do I accept that the issues which the claimant raises as to possible lack of good faith on the part of the IO provide a compelling reason not to dismiss the appeal. It should be borne in mind that there was no assertion of lack of good faith. The line of questioning that Miss Malcolm would have undertaken had this matter proceeded to a substantive appeal may, she said, depending on the answers, have led her to conclude that it may have been necessary to open a line of questioning on issues of bad faith but that was by no means inevitable. In any event, the chair's conclusion that allegations of bad faith were "*unsupported conjecture*" which could not be sustained was, in all the circumstances, one which it was entirely open to her to reach having considered all the evidence including that of Mr Benson and DS Shackleton. I should add that I recognise that the chair gave consideration to whether the email of 1 November 2016 was misleading in terms of good faith and general disclosure obligations. The conclusion that this email was not misleading was one which was properly open to her to reach for the reasons given by her at paragraph 63 of the decision.

180. I do not accept that the principle in *Merrill* forms the basis for a successful challenge to the chair's dismissal of this appeal at the rule 11 stage. For the reasons which I address in paragraphs 140 and 141 above, I do not accept that the chair was in error in concluding it was not arguable that the issues relating to the disclosure of the evidence of Mr Benson could have led to the dismissal of this claim by the Panel without even consideration of the evidence.

181. Further, I do not accept that the chair has erred in overly focusing on how the evidence of Mr Benson and DS Shackleton would affect the initial decision as to misconduct with the result that its effect on outcome was marginalised. The decision is replete with references to that evidence in the context of both findings and outcome and it is clear that the chair had the evidence very much in mind in respect of both aspects. Paragraph 60 of her decision specifically deals with the materiality of the evidence in terms of outcome as well as in respect of initial findings. It is true that the last sentence of paragraph 60 only makes reference to the significance of that evidence in terms of the material difference it could have made to findings but there is that specific reference to outcome earlier in that paragraph and, for the reasons which I have summarised at paragraph 135 above and elsewhere, it is simply not realistically arguable that this evidence could have materially affected outcome and the chair's conclusion to that effect is one which it was perfectly open to her to reach.

182. Finally, let me say that I have had regard to the threshold for the test under Rule 11 and the principles set out in *Swain v Hillman* and *Utexafrica* to which I have

referred above. I recognise that the threshold that the claimant has to meet to avoid dismissal under Rule 11 is not a high one but, for the reasons already set out, I am satisfied that the chair's conclusion that the threshold had not been crossed in this case was one which it was open to her to reach even taking account of the negative phraseology of the test.

183. In all circumstances, whilst I have some sympathy for the claimant, I am not satisfied that the conclusions reached by the defendant in dismissing this appeal were irrational, unreasonable and/or otherwise unlawful. The application therefore falls to be dismissed.

I am grateful to counsel for their very able assistance in this matter.

HHJ Saffman