Neutral Citation Number: [2011] EWCA Crim 2069

Case No: 2010 6610 D2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON-UPON-THAMES
MR. RECORDER LUCAS
T20100175

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/09/2011

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE HOOPER
and
MR JUSTICE BLAIR

- -

Between :

WAYNE PATRICK MALCOLM	**Appellant**
- and -	
THE CROWN	**Respondent**

- -
- -

MS. J. LEVINSON appeared for the **Appellant**
MR. LEE SCHAMA appeared for the **Respondent**

Hearing date: 30th June 2011

- -

Approved Judgment

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.

.....

MR JUSTICE BLAIR

Lord Justice Hooper :

1. On 19 November 2010 in the Crown Court at Kingston-upon-Thames (Mr. Recorder Lucas and a jury) the appellant was convicted unanimously of the theft "of a quantity of fixtures, fittings and furniture belonging to Warda Ltd". He did not give evidence. He was subsequently sentenced to 21 months' imprisonment. He appeals the conviction with the leave of Simon J. In the principal ground of appeal it is submitted that the Recorder "entered the arena and acted as an advocate and a second prosecutor." The appellant also appeals the sentence with leave. At the conclusion of the hearing we reserved judgment. The appellant has been released from custody.

2. In February 2009 the appellant approached Kinleigh, Folkard and Hayward ("Kinleigh") to find him a high quality furnished flat. Kinleigh did not have a suitable flat and Kinleigh approached Benham and Reeves. Kinleigh and Benham and Reeves agreed that Kinleigh could show the appellant 41 Dolphin House, Lensbury Avenue, Imperial Wharf in Fulham, West London on a shared commission basis. Kinleigh did so and the appellant agreed to take the flat. It emerged during the trial that the appellant had personal contact with only one person from Kinleigh, Davinia Tyrell.

3. Following credit checks and the appellant providing a copy of his passport, on 18 February 2009 he signed a 12 month tenancy agreement for the rental of the flat, fully furnished. The rent was £2166.66 per month payable in advance to Benham and Reeves. The lease required a security deposit of £3000 to be paid at the time of the agreement. The landlord was named as "Warda Ltd". The letting agent was named as Benham and Reeves. Before taking possession the appellant paid £5,166[1] representing one months' rent in advance and the deposit.

4. The appellant signed the inventory, an extensive list of the many items in the flat including furniture, pictures, a mattress, pillows, sheets, cutlery, washing machine, dishwasher, an American style fridge/freezer and a microwave oven. As against each item on the inventory was the word "new".

5. Following no further payment of rent, a warrant for the appellant's eviction was executed on 22 October 2009. The property was found to be empty and "all the fixtures and fittings had been stolen" other than the carpets.

6. The appellant was arrested on 6 January 2010 at his new address at Blenheim House, King's Road, Chelsea. Items from the flat at Dolphin House were found there being used. They were removed. There was no sign of many other items which were missing, such as the American fridge/freezer, washing machine and dishwasher.

7. The appellant gave a no comment interview but in a prepared statement the appellant wrote:

> "Wayne Malcolm will say as follows:
>
> I was a tenant of 41 Dolphin House. I had to move out and terminate the tenancy agreement signed by me soon after I moved in. This is because my financial circumstances had changed

[1] The managing agent, Mr Lugg, gives a different figure but that may be net of commission.

> significantly, i.e. loss of business income. I requested the agents to return my deposit money and keep one month's rent as agreed. I frankly told them I cannot pay the rent due to my change of circumstances. The agents refused to return the money. However they agreed to give me some furniture as a security towards my deposit because they advised that the landlord does not live locally so obtaining the money back from him will take some time. I was dealing with a representative of the agents all the time. This person was present when I left the property. I had planned to return these items once my deposit, subject of reasonable deduction, is repaid to me. I did not intend to deprive the owner or the agent of this property, i.e. the items listed on the next page. There was no intention to permanently deprive anyone. I did not take these dishonestly. I have been trying to contact this representative of the agent without success for under a year now. The person is a female. I do not remember her name precisely. She had told me that she had already discussed this arrangement with the other parties.
>
> I have been contacting her without success to resolve this issue without further delay. My intention is to get my money back and not to keep the items.
>
> Small two seater sofa I valued approx £450
>
> One small chest of drawers – I valued approx £350
>
> TV stand – I valued approx £350
>
> Coffee table – I valued approx £400
>
> 2 side lamps valued approx £60
>
> 2 small chairs valued approx £199 each
>
> None of the above items are brand new."

8. This statement makes clear that the person whom he was claiming to have given him permission to take away the property was a female who it would appear worked for the agency which was involved in the letting of the property to the appellant.

9. On 24 February 2010 the appellant was committed for trial by the West London Magistrates' Court. The Court set 26 March 2010 as the date of the plea and case management hearing ("the PCMH"). The Court was informed that the appellant would plead not guilty.

10. We are missing the second page of the directions made by the Magistrates' Court. If the usual directions had been made and there had been compliance with them, primary disclosure would have been completed before the PCMH and the defence statement would have been served before then.

11. The committal bundle included statements from Mr Lugg, the Managing Director of Matrix Maintenance Limited, a company responsible for the management and maintenance of property on behalf of Credit Suisse. He wrote that he had control of, and

responsibility for, the flat "on behalf of Credit Suisse and the owner, Mr Al Sharan who lives in Kuwait".

12. Mr Lugg described the flat and the decision to rent it. Mr Lugg continued:

> "I made contact with an agent at Benham and Reeves and a tenant was found for the property. I understand that the tenant was found by another agent, Kinleigh, Folkard & Hayward, who dealt with the reference checks and passed the details back to Benham and Reeves. The tenant's references were faxed to me and the agreed tenancy began February 18th 2009. I never met the tenant personally as this was dealt with for me by the agent." (Emphasis added)

13. Mr Lugg described what was in the flat when the appellant took over the tenancy, what was found to be missing in October 2009 and identified various items found in the appellant's possession as being property which had been in the flat. The total value of the items taken was some £15000-£20,000.

14. The only other statements were from police officers.

15. Mr Lugg's statements did not deal with the appellant's case as revealed in the statement which he gave on arrest. But Mr Lugg had named the agency, Kinleigh, which had dealt with the appellant.

16. The PCMH took place on 23 March 2010 in the Crown Court sitting at Kingston upon Thames. The appellant pleaded not guilty. The prosecution had not by then made primary disclosure (in accordance with section 3 of the Criminal Procedure and Investigations Act 1996) and was ordered to do so by 7 April 2010. The defence was ordered to serve the defence statement by 23 April 2010. The issue in the case was stated on the PCMH form to be "Intention". The box containing the question "what further evidence is to be served by the prosecution" was left empty. The prosecution list of witnesses to be called in person contained two names: Mr Lugg and PC Uppal, the officer in the case. The Court ordered the trial to be listed in the week commencing 5 July 2010 with a time estimate of two days.

17. The defence statement was dated 26 March 2010 and was drafted by the appellant's solicitors. Following a number of "standard" disclaimers which seem to us to be of no value, the statement read:

> "A. The nature of the accused's defence in relation to the charge:
>
> > The accused did not steal or intend to steal the said items as alleged. The accused also disputes that he was dishonest in his actions. The accused does not accept that he took all the items being claimed by the complainant.
>
> B. The accused takes issue with the prosecution in relation to the following matters:
>
> > That he stole the items from Matrix Maintenance Ltd and that he intended to steal the said items and permanently deprive Matrix Maintenance Ltd and that he was dishonest in his

> actions. The accused does not accept that he took all the items being claimed by the complainant.
>
> C. The reason why the accused takes issue with the prosecution about this matter is that the allegation is untrue."

18. By virtue of section 5(5) of the Criminal Procedure and Investigations Act 1996 where an accused has been committed for trial he "must give a defence statement to the court and the prosecutor".

19. By virtue of section 6A a defence statement is a written statement:

> "(a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
>
> (b) indicating the matters of fact on which he takes issue with the prosecution,
>
> (c) setting out, in the case of each such matter, why he takes issue with the prosecution,
>
> (ca)[2] setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and
>
> (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose."

20. Did the defence statement fail to meet the necessary requirements? As we shall explain in more detail below, it utterly failed to meet them and was seriously defective.

21. The defence statement not having been served before the PCMH, as it should have been if the prosecution had made timeous primary disclosure, the box in the PCMH form requiring the prosecution to state whether the defence statement complied with the requirements of section 6A could not be filled in. The PCMH form also requires the parties to identify the issues if not identified in the defence statement. The entry "Intention" was quite inadequate.

22. Unfortunately the inadequacies of the defence statement were not identified by the prosecution or by the court before the actual trial, notwithstanding that, as we shall show now, the case was listed for mention or trial on at least two if not three occasions. If the inadequacies had been identified the appropriate adverse inference warnings to the appellant could and should have been given.

23. The listing for the week commencing 5 July was ineffective.

24. The case was next listed for 23 July "for mention and fix". The prosecution attended. The appellant was not required to attend and no-one represented the appellant. The court ordered that the trial should start in the week commencing 26 July 2010.

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[2] This was in force at the time having come into effect on 3 November 2008, see the Criminal Justice and Immigration Act 2008, s 60(1) and SI 2008/2712.

25. The trial was listed to start on 27 July. It was called on at 10.20. The prosecution were not ready to proceed in the absence of the officer in the case. Mr Lugg was there. The prosecution applied for a short adjournment. The case resumed at 12.29 when the judge was told by the prosecuting advocate that the officer in the case was uncontactable, being on maternity leave and that she would not be able to give evidence until October.

26. Over the objections of the defence advocate, the Court adjourned the trial until 8 November.

27. At no point was anything said about the inadequacy of the defence statement or any gaps in the prosecution evidence.

28. The trial did not start on 8 November but did start on Tuesday 16 November before Mr Recorder Lucas.

29. We now turn to what happened on that day. The prosecution was represented by Mr Lee Schama and the defence by Ms Jemma Levinson.

30. The Recorder was in the middle of a summing-up and the appellant's case was interposed during the morning in order to set the time at which the trial would start.

31. Within a short time it became clear that neither the Recorder nor Mr Schama had a copy of the defence statement, although it had been properly served. The Recorder was provided with a copy. His immediate response was: "I don't regard this as a defence statement", followed by "It is not worth the paper it is written on". The Recorder through Ms Levinson warned the appellant that a failure to provide a defence statement within the terms of the Act left him open to adverse comment from both the Crown and himself. Ms Levinson said that her client's position was that the defence statement was in line with the prepared statement (see above, para. 7). The Recorder made it clear that he was not in the least bit interested whether this was so or not. Mr Schama was shown the defence statement and accepted that the defence was not expressed as clearly as it could be and perhaps should be. Mr Schama then said that "having read the prepared statement I of course consider both in my mind together." To this the Recorder said: "You can't". Ms Levinson then explained the defence and the Recorder asked "Do we know who the agent was?". Ms Levinson replied that the defence knew the name of the agency but not the name of the individual. Having asked for the appellant's antecedents, the Recorder asked the prosecution to explain its position in relation to the defence case. Mr Schama said that it was the prosecution's case that it was inconceivable that the appellant would have been given the authority to remove the items and he drew the Recorder's attention to the terms in a copy of the lease. No copy of the lease had been exhibited at the time of the committal.

32. The trial started that day with the opening. The jury were told what the defence case was and were told that the central issue in this case was dishonesty.

33. The transcript then reveals that there were difficulties with the attendance of Mr Lugg who had an operation scheduled for the next day and who had only come to court following the issue of a summons. In addition to this difficulty, a juror had an appointment at 4.45 and the recorder had a jury in retirement.

34. Mr Lugg then gave evidence. He went through the tenancy agreement. He produced the inventory signed by the appellant. He described how, when the warrant was executed in October 2009, he discovered that everything had been removed from the flat other than

the carpets. In cross-examination Mr Lugg agreed that Benham and Reeves had delegated the finding of a tenant to Kinleigh. He said that he did not know the name of the person at Kinleigh dealing with the tenancy. Ms Levinson established that the copy of the tenancy agreement produced by Mr Lugg did not bear the appellant's signature. The Recorder then asked Mr Schama to make the necessary arrangements to get a copy of the signed original from Benham and Reeves. Ms Levinson then established that Mr Lugg had gone to the appellant's new flat and had, with the police, identified the items of property which had come from the flat- something which, so it appears, Mr Lugg had not been asked about by Mr Schama. Mr Lugg agreed that he had recovered everything missing from the flat other than the fridge freezer and the washing machine. That answer appears to have been over generous to the appellant. For example neither the dish washer nor the microwave oven were found when the warrant was executed.

35. Ms Levinson not having quite completed her cross-examination, the trial was adjourned until the next morning.

36. At 9.54 the next morning, Wednesday, the Recorder asked in the absence of the jury whether anyone had attempted to contact Kinleigh. Mr Schama said that he had come into possession of some unused material and had made a copy of a document in that material available to Ms Levinson. The Recorder then asked: "Is there a witness from" Kinleigh? Mr Schama said that: "The Crown hadn't proposed to call one."

37. During the course of the appeal we asked Mr Schama why he was not intending to call a witness from Kinleigh to deal with the appellant's assertion that a female, who must have been from Kinleigh, had given him permission to take the goods. He told us that, in his opinion, the account given by the appellant that he had been given permission was so incredible that no jury would accept it. Given, for example, that the deposit could be used under the terms of the lease to meet unpaid rent, given that the appellant owed a considerable amount of rent, given that he had taken some £15,000-£20,000 of items, some of which had not been recovered, the account given by the appellant, so Mr Schama submitted, was obviously false. Mr Schama also had, so he told us, a very practical concern. This was the third day on which Mr Lugg had come to give evidence and he had come to court the day before following the issue of a summons. Mr Schama anticipated that the trial might have to be aborted if the prosecution sought time to find and then call the female to whom the appellant had referred. If the trial were to be aborted it might be very difficult to persuade Mr Lugg to attend again. Mr Lugg was a crucial witness. In short, the prosecution was ready to proceed with the evidence then available.

38. The transcript continues:

> "THE RECORDER: Ms Levinson, is it going to be part of your case that there were discussions between your client and Kinleigh Folkard Hayward, the absence of evidence concerning which is an advantage to your case? Because if that is your position I'm going to demand a witness from Kinleigh Folkard Hayward presents his or herself here in the course of this trial, whenever that is.
>
> MS LEVINSON: Your Honour, certainly my client's case is that he had discussions with an individual. And Your Honour, yes, I was intending….

> THE RECORDER: Yes. I'd like a witness from Kinleigh, from the appropriate branch of Kinleigh Folkard Hayward here during the duration of this trial. I'd like an explanation from you, please, as the officer, why this hasn't been done before. Obvious step, should have been done. Gross oversight. All right? Please go off and attend to that now.
>
> Right, let's have the jury in, please.
>
> Once the evidence of this witness [Mr Lugg] is concluded I will review with Counsel what the standing of the law of this case is, because I am very troubled about it.
>
> …
>
> I have a number of questions for Mr Malcolm himself which may or may not answer some of the propositions. We'll see.

39. Mr Lugg's evidence having been concluded the jury were sent out of court and the following exchange took place at 10.49, the officer in the case having done what the judge had required of her:

> THE RECORDER: I've expressed my views for your consideration with your client. Mr Schama, what's the position? Is there a witness from Kinleigh Folkard Hayward on his way here?
>
> MR SCHAMA: May I just take instructions?
>
> (pause)
>
> MR SCHAMA: The officer says that there is a witness from Kinleigh Folkard Hayward on standby. They've been notified they are likely to be required today.
>
> THE RECORDER: Right. And does that witness have access to any file concerning this transaction? Yes. And has anyone taken a witness statement from Mr Nelligan at….is it something Reeves? Benham & Reeves? Is there a witness statement from Mr Nelligan?
>
> MR SCHAMA: I've seen records of conversation with him on the CRIS report, Your Honour, but I've not seen a witness statement from him.
>
> THE RECORDER: In which case the witness from Kinleigh Folkard Hayward must come straight away, as indeed must Mr Nelligan. They must both make witness statements, and Ms Levinson can then cross-examine about the discussions her client had with these witnesses in relation to the return of his deposit. Okay? So that's – those are the directions I am going to give for the moment. I'm going to go off the bench for ten minutes to allow these arrangements to be made, and for you, Mr Schama, and you, Ms Levinson, to discuss your respective positions.

> Because the jury's just – if they're to proceed with this case they're going to proceed with this case on a proper formal basis, and not with gaps in the evidence. Mr Schama, is ten minutes going to be long enough to make your enquiries?
>
> MR SCHAMA: Your Honour, we'll certainly do as much as we can in that time. If there is a problem, perhaps I can notify….
>
> THE RECORDER: Well, if there is a problem, let me know. If anything should change and you require me to give further directions or issue a witness summons I shall certainly do that." (Emphasis added)

40. We examine below the submission by Ms Levinson that the Recorder's direction to the prosecution to call witnesses which the prosecution was not otherwise going to call and from whom no statements had been taken rendered the trial unfair.

41. Mr Lugg then completed his evidence. We do not have a transcript of that. There is no suggestion in the summing up that the appellant was challenging the evidence of Mr Lugg as to what had been removed from the flat.

42. Some time later that day the prosecution called Ms Jane Jenrick from Kinleigh. We have been provided with a transcript of her evidence. That shows the Recorder asking a significant number of questions rather than allowing counsel to do so. We give an example from the examination-in-chief of Ms Jenrick in which the Recorder accepted that he was asking the questions which Mr Schama was going to ask anyway:

> "THE RECORDER: What's your designation then within the business?
>
> A: Well, I'm the lettings manager, so I don't on a day to day basis deal with applicants and take them out on viewings, but I still deal with all paperwork or checking of references, dealing with landlords and valuing properties. Because we are a small team I would still say that I 100 per cent know what's going on with all our properties and the majority of our applicants.
>
> THE RECORDER: Can I write it down slowly?
>
> A: Sorry, I know I speak quickly. Sorry.
>
> THE RECORDER: So you deal with all the paperwork.
>
> A: Mmm hmm.
>
> THE RECORDER: You check references?
>
> A: Well, we have a referencing team, but I would monitor that process, yes.
>
> THE RECORDER: You monitor references. What else do you do?
>
> A: I do the valuations on new properties.

THE RECORDER: Anything else?

A: I deal with any problems, complaints, any issues that would come up during the tenancy.

THE RECORDER: And whilst your colleague Davinia dealt with Mr Malcolm, did you in any way oversee what she was doing?

A: Yes. We do that, we have a morning meeting every morning where we discuss all our applicants and what's going on with every process of any let that is proceeding.

THE RECORDER: So you oversaw Davinia's work?

A: Yes. Yes, 100 per cent.

THE RECORDER: I'm sure Mr Schama's going to ask you anyway, so I'm asking the questions. Is she still working for the business?

A: She does. She doesn't work for, she still works for us a company but not working in lettings. She now works for our sales team.

THE RECORDER: Where is she at the moment?

A: She still works in the Fulham office, but working in sales rather than lettings.

THE RECORDER: So she's there at the moment, is she?

A: Yes. Yes, she is. Well, she's not, as we speak this day, she's actually away on holiday at the moment, but she works, works there, yes.

THE RECORDER: When's she back from holiday?

A: Monday.

THE RECORDER: Right. Where is she on holiday, do you know?

A: She's in Holland, I believe.

THE RECORDER: In Holland. Do you have a contact number for her?

A: I would do, yes. Yes.

43. During the course of the cross-examination of Ms Jenrick, the Recorder asked the following question:

> "Can I understand the case you're putting, Ms Levinson? Are you suggesting that the person who was, who this discussion took

> place with was the same person as had shown your client around the flat? Is that your suggestion?"

44. Ms Levinson responded "Yes". Ms Jenrick then told the Recorder (in the presence of the jury) that Davinia Tyrell was the person who had showed the appellant around the flat. It was then put to Ms Jenrick by Ms Levinson that the (alleged) conversation with the female had taken place shortly after the appellant had moved into the flat.

45. Ms Levinson submits that the Recorder should never have asked the question which we have set out in paragraph 43. We return to that submission below.

46. Shortly after asking this question Ms Levinson completed her cross-examination and before any re-examination the recorder asked a series of questions:

> "THE RECORDER: Can I ask one or two questions, please? Davinia Tyrell showed the, showed Mr Malcolm round the property.
>
> A: Mmm hmm.
>
> THE RECORDER: If, if a tenant had subsequently contacted, after a rental is arranged, subsequently contacted the negotiator to say, "Look, I've got a real problem," are there standing instructions at your firm as to what if any record the negotiator should make of that contact?
>
> A: She would just pass it directly to myself, to be honest. She wouldn't get involved herself. He or she shouldn't get involved themselves. To be very honest though, as well …
>
> THE RECORDER: Just pause please.
>
> A: Sorry.
>
> THE RECORDER: You were saying.
>
> A: Because the property wasn't one of our properties though we would have no contact details for a landlord. So if the tenant had, say, approached me directly and said he wanted to get out of the lease, or whatever the situation was, I would have had to refer him back to the Benham & Reeves, because we have no way of speaking to the landlord. So again, that was the only contact I would have had. And again, if he'd ever asked Davinia and she hadn't referred back to myself, again that was the only information she would have been able to give him because we don't even know, the company name, we have no contact details for the landlord or any way of assisting, so even if we'd really have wanted to help we couldn't. We would have had to refer them back to the other agent.
>
> THE RECORDER: Let's take a hypothetical situation. Davinia *(sic)* negotiates a tenancy with a member of the public.
>
> A: Mmm hmm.

THE RECORDER: He or she moves in. A little while later there's a problem and he contacts Davinia and says, "Look, I have a real problem. My wife has left me/my husband's left me, whatever the position might be, I've been sacked." Would Davinia in those circumstances ever go to visit the tenant at the flat?

A: No. Well, firstly I think she would pass it straight to myself …

THE RECORDER: Just pause. I'm sorry, I don't mean to be rude …

A: No, no, no, it's okay.

THE RECORDER: … but it's quicker to say just pause than miss the answer.

MS LEVINSON: Your Honour, may I just, sorry to interrupt, but obviously this witness can only answer what she believes Davinia would or wouldn't do rather than …

THE RECORDER: Well, she can answer about what the system is in her office.

MS LEVINSON: Yes, exactly …

THE RECORDER: Yes.

MS LEVINSON: … the system, but rather than, this witness cannot answer on behalf of Davinia as to what she did or didn't, or would or wouldn't have done. All this witness can say, with respect, is what she would expect to happen in those circumstances.

THE RECORDER: That's what I thought she was saying.

MS LEVINSON: Well, I'm not sure that that's, with respect the way that Your Honour asked the question.

THE RECORDER: Davinia would pass it to me.

MS LEVINSON: And then Your Honour asked, "Would Davinia ever go to the flat?"

THE RECORDER: Isn't that a way of asking is that part of the system that she would employ?

MS LEVINSON: Well, if the question's asked in that way then I don't object, but … not that I would be likely to object to questions asked by Your Honour …

THE RECORDER: I think it's for me to decide if I sustain your objection or not to my own question. Please answer the question.

A: Our policy in the office, well first and foremost is the safety of the member of staff, so I would never dream of visiting a property to discuss something with a tenant that was in … and didn't, hadn't told us any, well, we weren't aware of any tragic story, any upset. I would, I would never visit a property myself, would never want any member of my team to go and do so where there is a potential situation in a property. And we're talking quite substantial rent arrears. Well, obviously, I don't know what date, we don't know what date this meeting potentially happened, but I would never visit a property, I would never want a member of my staff to do so either. For what could become quite a heated discussion, well, I would never expect it to happen.

THE RECORDER: Let me understand the procedure which a member of staff is supposed to follow. So if a tenant rings up and says, "I have a genuine problem," what would you expect that member of staff to do?

A: They would pass the call straight to myself.

THE RECORDER: Would you expect a member of staff to act on their own authority and go and visit the tenant in question?

A: Absolutely not.

THE RECORDER: Not?

A: No. Definitely not.

THE RECORDER: Are your members of staff, and you're the manageress of this branch, this unit, are your members of staff, do they have the authority to authorise the termination of a tenancy?

A: No, definitely not. Nobody apart from the landlord has that authorisation to make.

THE RECORDER: Are they authorised to permit a tenant to clear out a flat as a security against the return of a deposit?

A: Absolutely not.

THE RECORDER: If for some reason you were not contactable at the time a tenant contacted a negotiator, are there any procedures within your firm as to the record a negotiator should make of the problem?

A: Again, I don't believe they would deal with it. If anyone's on annual leave we have, we work as a pairing, so myself working in Fulham we have a pairing with our Putney office. We do it as a manager to cover valuations and we also do it our administrative purposes, that if I'm away on annual leave and there is the slightest problem they would have called the manager in our Putney office to ask for advice. And then they would have dealt with the situation.

> THE RECORDER: Is Davinia an experienced person or not?
>
> A: She's actually now been with our company for about three years. She's quite young, she's early 20s. At the time I would say she was about 21. I wouldn't say she's hugely experienced, and I wouldn't say she has the … yeah, I wouldn't say, she'd probably been working in lettings about a year at the time, she wasn't like myself, I've been doing it for ten years, and I wouldn't say she's the sort of person who takes it upon herself to …
>
> THE RECORDER: Sorry?
>
> A: I'm, I'm saying, I mean she's not hugely experienced, no. And thus isn't the sort of person that would want to get involved in an issue like this in any way.
>
> THE RECORDER: Did Davinia at any stage draw any such problem with Mr Malcolm to your attention?
>
> A: No. As I said she very shortly after this, the tenancy moved in, actually stopped working in our lettings team and transferred to work in our sales team. So whilst still in the same office, she wouldn't pick up a lettings call. If subject, if a call came through to her it would get passed through to me, because we didn't want to interrupt her doing her new sales job. So I think, I'll have to double check the date, I think it was the 1st March or April, very shortly after this, was one of the last ever lets she did for us.
>
> THE RECORDER: Now, do either Counsel have any questions arising out of my questions? Ms Levinson? No?
>
> MS LEVINSON: No."

47. Ms Levinson complains about these questions, albeit she accepts that if they had been asked after any re-examination she would have had no complaint.

48. Mr Schama then asked a number of questions. His first question was:

> "If I were to say to you now that one of the negotiators on your team had authorised a tenant to remove property against a deposit, what disciplinary action if any would you recommend in respect of that person?"

49. The effect of Ms Jenrick's answers to the Recorder and to Mr Schama was that (in her opinion) the permission claimed to have been given by the appellant in his prepared statement would never have been given and that, if someone had given permission, he or she would have been dismissed.

50. After Ms Jenrick had given evidence, the prosecution did not immediately (so it appears) ask for an adjournment to find Ms Davinia Tyrell. The recorder in the absence of the jury criticised the failure of the appellant to identify who it was from Kinleigh with whom he had had dealings. The transcript continues:

> "THE RECORDER: Well, that's not the only matter I've raised with you, Ms Levinson. I'm being forced into the arena in this trial, much against my wishes, because at the outset I pointed out to you that your client had failed to comply with the defence statement requirements. There is no detailed explanation from him of what his defence is and what aspect of the Crown's case he takes issue with. Having raised this with you, this has not been rectified in any way, shape or form. It seems to me that the – and I don't say this critically – but the position the defence appears to be adopting is to seek to raise a lacunae in the Crown's investigation to their advantage. Now in most cases that is a legitimate tactic, but equally I think part of my job here is to ensure trials are fairly conducted so that a jury, when it comes to making its decision, has the evidence available. And if those lacunae can be filled properly without causing any injustice, well then they should be. I'm sorry you don't like it. I'm afraid that's the way it's going to be. And if that means my having to descend occasionally into the arena to ask questions that need to be asked, I'm afraid I will." (Emphasis added)

51. Mr Schama said that he now realised for the first time that it was Ms Tyrell who it was being said by the defendant, had given the authorisation.

52. The transcript continues:

> "THE RECORDER: The whole point of a defence statement is to prevent surprise defences, which is what I get the impression this trial is all about. A wholly inadequate defence statement has been provided. The defendant refused to answer questions in interview. He has provided a prepared statement in the very most general of terms. I raised this with Ms Levinson yesterday at the beginning of this trial, and despite my raising it in very clear terms nothing has been done to remedy the position. And I have been forced in to causing enquiries to be made so that this surprise tactic would not persist. This is, I think, very much part and parcel of my job. Now…
>
> MR SCHAMA: My learned friend may well be bound by those who instruct her, and they'll be bound by whatever instructions they're given.
>
> THE RECORDER: If the position is that the defence refused to provide a defence statement, then so be it, but as I have said yesterday there will be consequences to that, potential consequences.
>
> MR SCHAMA: Well, Your Honour, the only point I was going to raise is the person who is alleged to have given this authorisation now has a name. It is Davinia. We understand that she is abroad until Monday.
>
> THE RECORDER: She can be contacted. She is in Holland.

MR SCHAMA: Yes.

THE RECORDER: Holland is not so far away. If necessary she can be here by tomorrow morning.

MR SCHAMA: All I was going to say was that if it is the defence case that it was Davinia who authorised it, then that's obviously something the Crown has to deal with.

THE RECORDER: Yes.

MR SCHAMA: If it's simply an unidentified person, then I'm probably satisfied on the basis of the evidence that has been called already. But if it is being said specifically it is Davinia, then that's obviously something that, if nothing else, she is entitled to answer. That's all I'd say.

THE RECORDER: The jury's entitled to hear her.

MR SCHAMA: Yes." (Emphasis added)

53. Mr Schama then suggested that Ms Levinson take instructions in order to confirm whether it was the appellant's case that it was Ms Tyrell who had given him permission. The transcript then reads:

"MS LEVINSON: Your Honour, it's a matter for my learned friend which witnesses the Crown seek to call. At the moment the only … up until the close of the prosecution case the evidence in relation to my client's defence is what's set out in the prepared statement, which doesn't name Davinia. It is only the, it is the service of this witness' statement shortly before the luncheon adjournment which has identified this witness by name, and only if this witness were in Court and my client presumably were able to see her would he confirm or not confirm that that is in fact the person that he's referring to.

THE RECORDER: Ms Levinson, we're entirely at cross purposes. It wasn't beyond the ability of your client or those who represent him to put in the defence statement that the person the Defendant spoke to was the person who showed him around the flat. That would have been an immediate point of identification as to who the person was. That wasn't done. It's not clear in this defence statement, is it?

MS LEVINSON: I accept that, and there are consequences which flow from that which Your Honour will, Your Honour's already mentioned …

THE RECORDER: And one of those consequences might well be a hiatus in this trial whilst we have to wait for the arrival of that witness. This matter was never, never disclosed before. This is an ambush defence, Ms Levinson.

MS LEVINSON: Your Honour, I …

> THE RECORDER: The Courts strongly discourage ambush defence.
>
> MS LEVINSON: Your Honour, I don't accept that it's an ambush defence. It certainly was not intended to be an ambush defence.
>
> THE RECORDER: Ms Levinson, I have decided it is an ambush defence whether you accept it or not. Let's deal with what we've got, shall we? Now, where do we go from here? Do you want time to consider your position?
>
> MS LEVINSON: Yes, but is the question Your Honour is asking whether, whether I want the Crown to call this witness? Or … I'm not sure what …
>
> THE RECORDER: It's not for me to tell you what discussions you have with Mr Schama or, indeed, with your client. We've heard from this last witness, Ms Jenrick, and she has told us that it was Davinia Tyrrell who was the negotiator who showed your client around the property. You have told us now publicly that the person your client claims to have had this negotiation with was the negotiator who showed him around the property. She's identifiable. And so the question I need to have addressed is does it remain the contested position that this was the discussion held with that negotiator, or is there some other position that we are all to consider? And if that position does remain, what are the consequences to this trial? It's very simple, it seems to me. If your client's position remains the same, and you're bound by those instructions, it seems to me we'll have to get Ms Tyrrell here to give evidence about it." (Emphasis added)

54. The underlined passage is a reference to what Ms Levinson had said in the presence of the jury, as to which see paragraphs 43 and 44 above.

55. The Recorder said a few moments later:

> "Ms Levinson. We have reached a position in the trial where the lettings manager from Kinleigh, Folkard & Hayward has said that under no circumstances was, would any of her members of staff be authorised to do that which your defence says, defence, your prepared statement says happened. The negotiator who showed your client around the flat was Ms Tyrrell, and you seem to have indicated that that was the person with whom your client came to this arrangement. Now, she is an identifiable person. We've been told she's in Holland at the moment. There is a contact number for her. This jury is capable of receiving evidence from her either at very short notice, to her inconvenience, or on Monday, when it's less inconvenient for her and more inconvenient for the rest of us. So I'd simply like to know what course, what application the parties wish to make as to how this trial should progress. That's all."

56. Following an adjournment, Ms Levinson told the recorder that she would not pursue as part of her client's case that it was Davinia Tyrell who had given the permission. The transcript reads:

> "MS LEVINSON: Your Honour, thank you for the time. I have no application to make. It is not a, I am not pursuing that as a positive part of my client's case, that assertion that it was in fact Davina Tyrrell. I will not submit that to the jury in closing. And so that's the position.
>
> THE RECORDER: Why did you assert it?
>
> MS LEVINSON: Your Honour …
>
> THE RECORDER: Was that a mistake?
>
> MS LEVINSON: Your Honour, I have instructions. I am satisfied that my professional position is intact, as it were. Your Honour asked me a question and I answered the question. I don't think I put it to the witness, I think I only, I only made the statement in response to a question from Your Honour. Obviously it's up to my client what he positively wishes to … what his case, what he wants his case to be put, how he wants his case to be put positively.
>
> THE RECORDER: Then how are you proposing to withdraw the positive statement in the presence of the jury?
>
> MS LEVINSON: Well, I'm … I'm perfectly prepared and can say to the jury that I ought not to have positively, I ought not to have answered Your Honour's question positively when Your Honour asked whether or not it was my client's case positively that it was Davina Tyrrell.
>
> *(pause)*
>
> THE RECORDER: I'll reflect on that. Mr Schama, what's your position?
>
> MR SCHAMA: Your Honour, all I've said to my learned friend is that the Crown's only concern is as to the submissions that be made in defence closing. If it were to be said that it was Davinia Tyrell that authorised it then of course that's something which can't be said unless she's given an opportunity to comment on that. If it's simply being said it was an unidentified female agent then I'm satisfied that anyone who ought to have had the opportunity to comment on that has now done so, either through live evidence or, as my learned friend will do, through agreed admissions.
>
> THE RECORDER: Is the last witness still here?
>
> MR SCHAMA: She is still here, Your Honour's asked her to wait around, so she is here. So far as whatever was said in front of

the jury is concerned, the Crown's position is simply that the jury will of course, are of course instructed in every trial that what Counsel says isn't evidence, and so far as …

THE RECORDER: No, can I …

MR SCHAMA: … any arguments are concerned those are contained in closing speeches.

THE RECORDER: The position we've arrived at is this. A witness has … the flat was let by Kinleigh, Folkard & Hayward *(indistinct)*. We know the negotiator who showed Mr Malcolm the flat was from Kinleigh, Folkard & Hayward. There's an assertion from Mr Malcolm that an agent, unspecified, unnamed, undescribed, from an agency unnamed, permitted him to remove property. We have evidence from the two agencies which were involved in this transaction. In summing up I'd be bound to say to the jury that there was the opportunity for the defence to question witnesses from each of those agencies with a view to ascertaining who the agent was, either by description, or by name, or in some other fashion, by date, by diary entry, so that the positive assertion could be put. The opportunity was there. Now, I'm simply not prepared to allow this trial to go by default on the basis that having made a positive assertion in the presence of the jury the defence be entitled to withdraw it and resort to a "I'm not commenting" basis of putting their case. It seems to me to be wholly wrong and against the principles of a fair criminal trial. So those are my thoughts on the subject. Ms Levinson, you can ask for any witness to be recalled, I give you that opportunity. You can put your case in any shape or form you wish to put it. If you don't wish to put it then … I'd be in breach of my duty to the jury if I didn't give them some guidance as to how this matter might be resolved will be to identify who it was your client says he spoke to. I give you every opportunity to do that, Ms Levinson. Description, age, colour of hair, time, which agency, which office. That's all within the knowledge of your client. I don't see that it can't be.

MS LEVINSON: Your Honour, I'll take further instructions, but I'm, I am not putting positively who it was. And if my learned friend wants to comment, and he will in due course, I imagine, about the absence of a description or any further details, unless of course my client gives some evidence in the witness box which changes the position, but if there are no further details about that person then it will be, the position will be the same as in many cases where the Crown will rely on the absence of a, the absence of a description.

THE RECORDER: No, it's much more specific than that. Who are the people who could have spoken to your client? It's finite, limited and identifiable. It can only have been one of two, at most three, people from the offices of Kinleigh, Folkard & Hayward, it was from there. Or a limited pool of people at the other agency, if that's where he says the person came from. I don't know. There

> are witnesses now open to you to cross-examine from each of the agencies concerned with a view to identifying who the witness is. And there's a duty on you, it seems to me Ms Levinson, to put that if that is your case. Now, what I'd like you to do, please, is to reflect on the position overnight. I'm going to ask this last witness to be back here tomorrow morning in case you wish to put that positive case to her. If you reflect overnight that you don't wish to because that isn't your positive case and you wish to put it to a member of the alternative agency, then I encourage you to contact Mr Schama so that he can make those, those arrangements.
>
> MS LEVINSON: May I ask if the position is that I do not wish to positively …
>
> THE RECORDER: I will tell the jury that I gave you the opportunity of doing so and you didn't. It's Counsel's duty, it seems to me Ms Levinson, to, to put the case that the jury are being invited to consider.
>
> MS LEVINSON: Your Honour, yes. But the position is that my client is arrested a year, 21 months after the event that he's talking about.
>
> THE RECORDER: Yes.
>
> MS LEVINSON: He may or may not be in a position to take the matter further than he can, that he does in his prepared statement, which is the say, "The person is a female and I don't remember her name precisely." That may remain the position.
>
> THE RECORDER: That I entirely accept. What I find very difficult to accept is that he has no recollection of what she looked like, or indeed which agency he contacted with a view to obtaining her presence at his flat.
>
> MS LEVINSON: I think I've, I've put to this witness [Ms Jenrick] that it wasn't her but it was somebody."

57. The Recorder then received a plaintive note from the jury: "Are we allowed to know what is happening". The jury were then sent away for the day, it now being 4.40. The jury had been told that they would be away by 4.45. The only evidence which the jury had heard that day was the last part of the evidence of Mr Lugg and Ms Jenrick's evidence.

58. There were then further discussions during which Ms Levinson said that she was not suggesting that it was Davinia Tyrell who gave the appellant the alleged permission. Mr Schama said, a little later, that an admission which he expected the defence to make (and which was in fact made) excluded anyone from Benham and Reeves as having given permission. We have a jury note which asked whether a representative of Benham and Reeves visited the property. We note that, contrary to good practice, the note is not dated or timed (nor indeed were other notes). We remind those involved with jury trials of what another division of this Court said in *Zulhayir* [2010] EWCA Crim 2272, which concerned two important undated and untimed jury notes:

> "17. ... Unfortunately, neither of the notes is dated and timed. This is not the first time that this court has had to grapple with jury notes which, at least in the form that they are presented to us in the Court of Appeal, are not dated and timed. We urge those responsible for the administration in Crown Courts to make sure that jury notes are dated and timed, with any other relevant details."

59. The transcript continues:

> "MR SCHAMA: So far as I'm concerned I'm satisfied in the absence of an allegation against a specific individual the Crown has dealt with the issue of Kinleigh, Folkard & Hayward. The only potential other party who might be said to be an agent is Mr Lugg or any of his staff.
>
> THE RECORDER: And he's dealt with that.
>
> MR SCHAMA: And he's dealt with that."

60. A little later the Recorder described what he was minded to say to the jury should the defendant not give evidence and should Ms Levinson submit to the jury, on the back of the prepared statement, that the defendant could not remember what happened but he believed that he had been given permission. The Recorder made it clear that *he* would make a number of comments to the effect that common sense would suggest that the defendant would know the details of the person who gave him permission:

> "Ms Levinson, let's not beat about the bush and put everyone's … let me put my cards on the table so you know what my approach to this case is. What I see happening, my impression is that an attempt will be made, no doubt very properly, to make a submission to the jury on the back of the prepared statement, say 20 minute later, "Can't remember what happened but this is what he genuinely believed, he wasn't being dishonest," and there will be no evidence from the Defendant. Now if that position were to arise I would anticipate giving the jury, well consider giving the jury a direction, I'd have to give the jury a direction about his failure to give evidence. And I would have to indicate to them the sorts of issues which could have been canvassed with him had he given his evidence. And I would probably have to indicate the common sense position that if the assertion in the prepared statement were true that he had had this discussion with somebody and had spent about a year trying to contact the person, he might have somewhere the person's name. He might have somewhere the person's telephone number. He might be able to provide a description of the person, so that at the very least you could have put that description in cross-examination to the previous witness with a view to attempting to identify the witness, so that that witness could be brought to Court to answer questions in support of your client's case. Now that is what, the stance I'm likely to take if the course, if the trial goes in, takes that course. I don't think that would be in any way unfair, because that's, those are the

> sorts of questions which the Defendant is likely to be asked if he gives evidence. Yes?"

61. There was then further discussion about this and also discussions about recalling Ms Jenrick. At the conclusion of the day the Recorder said that he was not going to require Ms Jenrick to be recalled and that he would leave the matter of her recall to the parties.

62. The next day, Thursday, Ms Jenrick was recalled because Ms Levinson wanted to cross-examine Ms Jenrick about her evidence that Davinia Tyrell was on holiday in Holland. Enquiries had been made by the defence and it had become clear that Davinia Tyrell was not in Holland. Ms Levinson hoped to show, in effect, that Ms Tyrell had lied about this to cover up for Ms Jendrcik. Ms Jenrick gave evidence to the effect that she had made a mistake and had wrongly presumed that Davinia was on holiday.

63. Ms Tyrell was then called, having made a statement dated that day. In examination-in-chief she said that she had had no contact of any kind with the appellant after showing him around the flat and agreeing the tenancy. In cross-examination she did not accept that she had given the appellant the permission to remove the property.

64. Ms Tyrell having completed her evidence, it was by now about 4.10 in the afternoon. Although we do not have the precise timings, it appears that the jury had only been in court for a short period during the day. In addition to the evidence of Ms Jenrick and of Ms Tyrell, the jury heard the evidence of the officer in the case. We have been provided with a transcript of the interventions by the Recorder in the examination-in-chief and cross-examination of the officer. Without a whole transcript it is not possible to ascertain the ratio of the Rcorder's questions to the questions of the advocates, although it is right to say that the Recorder did ask a significant number of questions about the procedures in the police station.

65. At the conclusion of the prosecution case, Ms Levinson in the presence of the jury asked for time. The Recorder responded. "You've had plenty of time both yesterday and today." Ms Levinson said that she wished to raise a matter in the absence of the jury an the jury were asked to leave court. In the absence of the jury Ms Levinson told the Recorder that she wanted to know whether the defendant intended to give evidence and she wanted to obtain an endorsement on her brief. The Recorder suggested that 30 seconds might be enough. The transcript then reads:

> "MS LEVINSON: Well ...
>
> THE RECORDER: We have wasted a vast amount of time on this case. I'm not saying it's your fault, but the fact of the matter is that's what's happened. Now …
>
> MS LEVINSON : I …
>
> THE RECORDER: … I will give you five minutes to get the instructions you need. I will sit again at exactly a quarter past four and I expect you to be ready. I will call upon you then, Ms Levinson, whether you're ready or not, to tell me whether you're going to be …
>
> MS LEVINSON: Well, Your Honour, may I now make an application for ten minutes? I don't want to keep Your Honour

> waiting. I'm anxious, anxious as you are and as I'm sure my client is that this matter is dealt with swiftly. It hasn't been the defence fault that there have been delays in this case and it wasn't …
>
> THE RECORDER: I'm afraid in part it is due to an abject failure to deal with a defence statement properly.
>
> MS LEVINSON: Your Honour, I don't accept that that's the reason for the delay.
>
> THE RECORDER: Well, I don't care whether you accept it or not, that's my view.
>
> MS LEVINSON: The defence has not required the witnesses to be at Court, which has caused the delay.
>
> THE RECORDER: Right. Please don't argue with me. My view is there was an abject failure at providing a proper defence statement. You may have until 20 past." (Emphasis added)

66. At 4.20 in the presence of the jury, Ms Levinson informed the court that the defendant would not be giving or calling evidence. The jury were then sent home.

67. Closing speeches and the summing-up followed on the Friday. The jury retired at 12.21 and brought in the verdict of guilty at 12.50.

68. By the end of the trial a strong case at the beginning of the trial had become overwhelming in the light of the evidence of Ms Jenrick and Ms Tyrell and in the absence of any evidence from the appellant. On the evidence which the jury heard the conviction is undoubtedly factually safe.

69. We turn shortly to the grounds of appeal but we will first look at the question of the adequacy of the defence statement.

Adequacy of the defence statement

70. Guidance about defence statements has recently been given by another Division of this Court presided over by the Vice-President, Hughes LJ, in *Rochford* [2010] EWCA Crim 1928. The Court held that a failure to amend a defence statement in accordance with a direction made by the judge that it must be amended, would not be a contempt of court on the part of the defendant. We take the facts from the judgment:

> "2. The defendant appeared before the Crown Court on an indictment charging a single count of dangerous driving. The Crown's case was that the van in question had been followed from a petrol station and that the petrol station's CCTV showed the defendant getting into the driver's seat. According to the Crown, the van had been driven dangerously thereafter, but the pursuing police car had lost sight of it after a number of miles and it had been found later the same night some little way from where contact had been lost. The defendant was arrested about five days later after being, it was said, identified from the CCTV footage. In interview he declined to answer any questions.

> 3. In the normal way the case was listed before the Crown Court for a plea and case management hearing. The defendant entered a plea of not guilty. On the same day, through his solicitors, he served a defence statement. It contained the following paragraph under the heading: "General nature of the defence - section 6A(1)(a)":
>
> > "The Defendant was not the driver of the vehicle in question at the material time. He accepts he may have been the person shown on the CCTV at the garage."
>
> The remainder of the defence statement does not need citation. It said, consistently with the passage which we have just cited, that the defendant took issue with the prosecution in so far as it was suggested that he was the driver of the vehicle at the material time.
>
> 4. On the morning of the trial, the judge asked counsel for the defendant what his case was. The judge said that he had read the defence statement as suggesting that the defendant was asserting that he may have been the driver of the vehicle at the petrol station, but that he was not at the material time. In that event, said the judge, why was there no mention of alibi? Was it that he was saying that he was in the vehicle but not the driver? Counsel for the defendant responded to this extent only. He told the judge that the defendant's case was that the defendant was not in the vehicle.
>
> 5. There followed a good deal of discussion which it is not necessary to recite. The judge took the view that the defence statement failed to comply with section 6A. It did not say where the defendant was at the material time if he was not in the driving seat. Having taken that view, the judge invited counsel to amend the defence statement. That invitation became, over the course of discussion, in effect a direction to amend the defence statement, although no formal order to that effect was, as it seems to us, ever explicitly made. What was undoubtedly said was that a failure to amend would be treated as a contempt of court."

71. After further discussion and an adjournment overnight the judge took the view that in the absence of amendment the defendant was in contempt of court because he was disobeying the judge's order that the defence statement must be amended. The defendant was sentenced accordingly to 28 days' imprisonment. His appeal against the finding of contempt was allowed by the Court of Appeal. The Court held that the sanction for non-compliance is explicit in the statute in section 11 and that it is not open to the court to add an additional extra statutory sanction of punishment for contempt of court.

72. For the purposes of this appeal what the Court said about the adequacy of the defence statement is important:

> "16. The first question which we think we ought to address is whether there was in this case a failure to comply with section 6A [see above paragraph 19]. The answer to that is that we do not know and neither did the judge. If the defendant was going to say that he was somewhere else rather than in the driving seat then

> there had been a failure to comply with section 6A. If he was going to call evidence from some source other than himself that he was somewhere else other than in the driving seat then there had been a failure to comply with section 6A. If, even, the possibility that he had been somewhere else was going to be raised distinctly before the jury by way of submission or argument, that too would entail a failure to comply with section 6A. Once the issue is going to be raised in any of those manners (and there may be other ways in which it could be,) section 6A(1)(ca) and (c) would apply and would require the defendant to set out why he took issue with the Crown on his location and to give particulars of the matters of fact on which he intended to rely for that purpose. However, if the defendant was going to make no positive case at all and not raise the issue of his possible location elsewhere, and if he was simply going to sit tight and ensure that the Crown proved its case, then, as it seems to us, there would have been no failure to comply with section 6A.
>
> 17. The judge was entitled to ask, and indeed to ask insistently and trenchantly. He was not, however, entitled to require counsel to reveal his instructions if no positive case was going to be made in any of the ways which we have identified or any other. From a position of ignorance the judge was not in a position to know, any more than we are at this stage, whether there had been a breach of section 6A or not. Only time will tell as the trial, which has not yet begun, proceeds."

73. The Court dealt with the issue of legal professional privilege, saying:

> "21 Do legal professional privilege and the defendant's privilege against self-incrimination survive section 6A? The answer to that is "Yes". What the defendant is required to disclose by section 6A is what is going to happen at the trial. He is not required to disclose his confidential discussions with his advocate, although of course they may bear on what is going to happen at the trial. Nor is he obliged to incriminate himself if he does not want to. Those are fundamental rights and they have certainly not been taken away by section 6A - see the reasoning in the slightly different context of the Criminal Procedure Rules in R (Kelly) v Warley Magistrates Court [2007] EWHC 1836 (Admin), [2008] 1 WLR 2001."

74. The Court also gave importance guidance about the responsibilities of those giving advice to a defendant about a defence statement and guidance about the content of a defence statement when, for example, a defendant refuses to give instructions either at all or on specific points. The defence statement must then say that the defendant does not admit the offence or the relevant part of it as the case may be, and calls for the Crown to prove it. In these circumstances the defence statement must also say that the defendant advances no positive case. If he is going to advance a positive case that must appear in the defence statement and notice of it must be given (see paragraph 24). Although the Court does not expressly say so, it seems that, to this extent the defence statement in *Rochford* may not have been in accordance with section 6A. If the defendant was

advancing no positive case, then the defence statement must make that clear to comply with the statutory requirements.

75. In our view *Rochford* is quite different from this case. The appellant in *Rochford* had said nothing in interview and was, so it appeared at this early stage of the trial, doing no more than requiring the prosecution to prove that he was the driver. That is not this case. Given the content of the prepared statement which was to be in evidence, it was clearly the intention of the appellant Malcolm to put forward a positive case about a number of matters, including a positive case that he had been given permission.

76. It follows that the defence statement was, as the Recorder said, hopelessly inadequate in the light of the requirements of section 6A. Ms Levinson did not seek to argue otherwise. To satisfy the statutory requirements, it was insufficient merely to say that the defendant did not accept that he took all the items being claimed by the complainant. The appellant was required to identify what was taken by him from the flat and to identify those items said to be stolen which he had left in the flat. If he had taken, for example, the fridge freezer and dishwasher, what had he done with them? If, as alleged, he did not intend permanently to deprive the owner of the items, what was his intention particularly in relation to those items missing from 41 Dolphin House and not found in use at his new flat? If he was alleging, as he had alleged in his prepared statement, that he had been given permission by a female agent to take items from the flat, who had given him the permission, when and in what circumstances? If he did not know her name, then he should have identified her in some other way, e.g. the female from the agency to which he had gone and who showed him round the flat. To satisfy the statutory requirements, the appellant ought also to have explained whether he accepted the value of some £15,000-£20,000 for the items taken and explained why, in his view, he was entitled him to take the items which he did take.

The trial was not fair because of the Recorder's conduct in the absence of the jury but in the presence of the defendant

77. It is submitted that by requiring the prosecutor, albeit in the absence of the jury, to call witnesses to fill what the recorder saw as a gap in the prosecution's case, the Recorder denied the appellant a fair trial. It is also Ms Levinson's submission that the appellant was denied a fair trial because of the manner in which the Recorder dealt with the defence statement. The effect of Ms Levinson's submissions is that a defendant is entitled to a fair trial before an impartial judge and that in our adversarial system the judge ceases to be impartial if he takes over the running of the prosecution case as, it is submitted, this Recorder did.

78. We shall summarise first of all Ms Levinson's submissions in relation to the witnesses.

79. As we have already said, Mr Schama, for the reasons he explained to us, was content to call only Mr Lugg and the officer in the case. It seems as if his view was shared by those who had had conduct of the prosecution's case prior to the trial date. Before Mr Schama took over the case for the trial, the prosecution had been represented by three other counsel. The Recorder, we should add, was the fourth judge to be involved in the case, the three earlier judges being judges of considerable experience. We should add that Mr Schama was called in 2003 and, if we may say so, appeared to us to know how to prosecute a criminal trial in a proper manner.

80. The Recorder made it clear that he did not agree with Mr Schama's approach and that he required witnesses to attend. Ms Levinson points to a number of passages from the

transcript. She relies on the passages which we have underlined in paragraph 38 above. "... I'm going to demand a witness from Kinleigh Folkard Hayward presents his or herself here in the course of this trial." "I'd like a witness from Kinleigh, from the appropriate branch of Kinleigh Folkard Hayward here during the duration of this trial." There was then a serious criticism of the officer ("gross oversight") followed by a direction: "Please go off and attend to that now", i.e. get the witnesses to court. The Recorder also said: "I have a number of questions for Mr Malcolm himself which may or may not answer some of the propositions. We'll see." This latter comment seems to us to be unfortunate.

81. Ms Levinson relies on passages which we have underlined in paragraph 39 above. "In which case the witness from Kinleigh Folkard Hayward must come straight away, as indeed must Mr Nelligan. They must both make witness statements". The Recorder described this as a direction, saying "[T] hose are the directions I am going to give for the moment." "If anything should change and you require me to give further directions ... I shall certainly do that."

82. Later he also said, in reference to filling lacunae in the prosecution's case: "I'm afraid that's the way it's going to be" (paragraph 50 above) and also (paragraph 53 above): "It seems to me that we'll have to get Ms Tyrell here to give evidence about it."

83. In our view judges are entitled to, and should not be reluctant to, invite the prosecution (or indeed the defence) to consider putting further evidence before the jury. Such an invitation is consistent with the trial judge's duty to ensure a fair trial. Fairness in this context does not mean just being fair to the defence. As Lord Steyn said in *R. v. A.* [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 Cr App R 2, the concept of what a fair trial entails involves a balancing and:

> "[38] ... account may be taken of the familiar triangulation of interests of the accused, the victim and society. In this context proportionality has a role to play."

84. However, none of us have come across a case in which the judge has used the kind of language used by the Recorder in this case.

85. We turn to the issue of the defence statement. We have already said that the defence statement failed by a very long way to meet the statutory requirements (paragraph 76 above).

86. The Recorder's immediate response on first seeing the defence statement was: "I don't regard this as a defence statement", followed by "It is not worth the paper it is written on". The Recorder made it clear that he was not in the least bit interested whether this defence statement was in line with the prepared statement or not. Mr Schama said that "having read the prepared statement I of course consider both in my mind together." To this the Recorder said: "You can't" (paragraph 31 above). The recorder was right to point out that it is the defence statement which must comply with the statutory requirements (albeit that a defence statement could expressly incorporate what had been said in interview or in a prepared statement).

87. The Recorder did warn the appellant of the adverse consequences that could flow from the failure to comply with the requirements (paragraph 31 above). He was right to do so. The time limit for serving a defence statement had passed and under the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 SI 1997/2680 there is no power to extend the time limit for the service of a defence

statement after the expiry of the limit in the absence of an application before expiry. Nonetheless a late defence statement may, in certain circumstances, mitigate criticism of the defendant and the Recorder was entitled to give the defendant an opportunity to amend his defence statement.

88. On the next day, Wednesday, the Recorder had said: "I'm being forced into the arena in this trial, much against my wishes, because at the outset I pointed out to you that your client had failed to comply with the defence statement requirements." He said that although he had raised the issue "this has not been rectified in any way, shape or form." He continued:

> " It seems to me that the – and I don't say this critically – but the position the defence appears to be adopting is to seek to raise a lacunae in the Crown's investigation to their advantage." (Paragraph 50 above)

89. Shortly afterwards he said:

> "A wholly inadequate defence statement has been provided. The defendant refused to answer questions in interview. He has provided a prepared statement in the very most general of terms. I raised this with Ms Levinson yesterday at the beginning of this trial, and despite my raising it in very clear terms nothing has been done to remedy the position. And I have been forced in to causing enquiries to be made so that this surprise tactic would not persist." (Paragraph 52 above)

90. A little later he characterised the defence as an ambush defence (paragraph 53 above). Later still he said:

> "It wasn't beyond the ability of your client or those who represent him to put in the defence statement that the person the defendant spoke to was the person who showed him around the flat. That would have been an immediate point of identification as to who the person was. That wasn't done." (Paragraph 55 above)

91. As we have seen (paragraph 65 above), the Recorder referred again to the abject failure to provide a defence statement after the close of the prosecution's case. We have also seen how he said that he would make a number of comments to the jury should the defendant not give evidence and should reliance be placed on the defence statement (paragraph 60 above).

92. Ms Levinson points out, as she did to the Recorder, that the only consequence of failing to comply with the statutory requirements is that a jury may draw an adverse inference following comments by the prosecution and a direction from the judge (another possible consequence may be an order of costs). If a defendant, as this defendant must have done, deliberately fails to comply with the statutory requirements after being reminded, as he was, by the Recorder of the consequences, then that, so Ms Levinson submits, is that. The judge should not enter the arena and become a second prosecutor. A defendant remains entitled to require the prosecution to prove its case without his assistance, notwithstanding the likely adverse consequences for the defence case if he fails to comply with the applicable statutory and procedural requirements.

93. We turn to the authorities on this topic, emphasising that all of the problems in this case, and the criticisms now advanced of the judicial conduct of the trial, arose from the hopelessly inadequate defence case statement, and the Recorder's attempt to overcome them.

94. Ms Levinson relies particularly on the judgment of the Privy Council given by Lord Brown in *Michel v The Queen* [2010] 1 WLR 879; [2010] 1 Cr App R 24; [2009] UKPC 41. The appellant had been convicted of offences of money laundering by the Inferior Number of the Royal Court of Jersey, consisting of a Commissioner and two Jurats.[3] His appeal against conviction had been dismissed by the Court of Appeal of Jersey and the Board concluded that the appeal should be allowed and the conviction quashed and so advised Her Majesty.

95. Lord Brown said that if

> "26. ... the sole touchstone of a safe conviction ... was whether the Appeal Court could be satisfied that the jury (here the Jurats) would inevitably have come to the same conclusion even without the judge's inappropriate interventions, it might be difficult to upset this verdict: the case against the appellant was in truth a formidable one."

96. He continued:

> "27. ... there comes a point when, however obviously guilty an accused person may appear to be, the Appeal Court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor."

97. Lord Brown cited a passage from the opinion of the Board given by Lord Bingham of Cornhill in *Randall v R* [2002] 2 Cr App R 17; [2002] UKPC 19. Lord Bingham said:

> "28. While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is

[3] Jurats are elected by a special electoral college. They do not necessarily have a legal qualification but are elected for their known history of sound judgment and integrity. The facts are decided by the Jurats, the Commissioner retiring with the Jurats but not joining in the fact-finding exercise unless the Jurats disagree: see *Michel*, paras. 19 and 31.

> absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

98. Lord Brown referred to the defendant's "basic right underlying the adversarial system of trial, whether by jury or Jurats: that of having an impartial judge to see fair play in the conduct of the case against him." He continued:

> "31. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials."

99. It is to be noted that Lord Brown, in the last sentence, refers to the requirement that the judge remain "neutral during the elicitation of the evidence". In *Michel* what was found to be the unfair conduct of the case by the Commissioner took place in the presence of the Jurats.

100. The ground of appeal which we are now considering concerns the behaviour of the judge in the absence of the jury. Such behaviour can have the effect of denying a defendant a fair trial. An example can be found in *Tedjame-mortty* [2011] EWCA Crim 80; [2011] Crim. L.R. 676, with a commentary by Professor Ormerod. In that case (said by the Court to be unprecedented) the judge had behaved in such a wholly inappropriate manner towards the defendant shortly before he gave evidence that the quality of his evidence could have been affected. The conviction was quashed because "we cannot safely exclude the possibility that the appellant might have been acquitted if he had given his evidence as credibly as he may have done if the judge had dealt with the matter appropriately."

101. Another example of judicial misbehaviour can be found in *Cordingley* (2007) EWCA Crim 2174. One of the grounds of appeal was that the judge behaved oppressively towards defence counsel in the absence of the jury and in consequence the appellant did not receive a fair trial. Laws LJ said:

> "13. ... Whereas we entirely endorse robust case management and the importance of ensuring that all court time is used sensibly, we are bound to say we consider that the exchanges between the judge and counsel, especially on the first day, betray a rudeness and discourtesy of which the judge should be ashamed. His treatment of the issue about the appellant's change of clothes was brutal. His withdrawal of bail was at least questionable. "

102. Allowing the appeal Laws LJ went on to say:

> "15. The safety of a conviction does not merely depend upon the strength of the evidence that the jury hears. It depends also on the observance of due process. In this case it seems to us inescapable that the effect of the judge's conduct must have been to inhibit the defendant in the course of his defence. He clearly felt that the judge was prejudiced against him, as Mr Smith's recollection of his client's own words demonstrate. It may well be that what the judge had said in his presence (although in the absence of the jury) affected him so as to have adverse consequences for his credibility before the jury. But whether or not that is so, it is to be remembered that every defendant, and this is no more than elementary, is entitled to be tried fairly - that is courteously and with due regard for the presumption of innocence. This appellant was not tried fairly. There was a failure of due process by reason of the judge's conduct."

103. *Cole* (2008) EWCA Crim 3234 provides another example, albeit in *Cole* the judicial conduct of which complaint was made occurred both when the jury was in court and when the jury was out of court. Amongst other things which the judge did in *Cole*, was to provide defence counsel in the presence of her client with a disparaging note about her competence. The court took that into account when considering whether or not the appellant could have felt that he was getting a fair trial in front of this judge.

104. The bundle of authorities prepared for the appeal include cases concerning the judge's powers in the face of a refusal by the prosecution to call a witness whose statement has been served as part of the prosecution's case (or to use language no longer applicable, a witness whose name is on the back of the indictment) and whose evidence may assist the defendant. Even if a judge has the power, in the exercise of his duties to ensure a fair trial, to require the prosecution to call a witness in certain very limited circumstances (as to which see Blackstone's Criminal Practice, 2011, para. D15.23), we do not think that this is of help in considering the issues raised by this case. We were referred to a report in the Times of the case of *Baldwin*, May 3 1978, and we have obtained a full transcript. The prosecution had declined to call a witness whose statement had been provided to the defence as part of what we would call to-day "unused material". The judge had required the prosecution to call the witness. Roskill LJ said:

> "With respect to the learned judge, we think that the course that he took was wrong and ought not to be taken. The question who should be called to give evidence for the Crown is a matter for counsel for the Crown. ... But it is wrong, merely because it may be advantageous to a defendant that the Crown should call a witness whom counsel for the Crown is reluctant to call, that the trial judge should seek to insist on counsel for the Crown calling that witness."

105. We turn to *Grafton* (1993) 96 Cr. App. R. 156; [1993] Q.B. 101. The headnote in the Criminal Appeal Reports reads:

> "The appellant was charged with causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861. At his trial a witness called by the Crown gave evidence which supported the appellant's claim that he had been acting in self-defence. The Crown decided to offer no further

> evidence. After a discussion with counsel the judge [HHJ Owen Stable QC] made it clear that he thought the case should proceed, but counsel for the Crown declined to take any further part. The judge called the one remaining prosecution witness. The appellant was acquitted of the offence contrary to section 18, but was convicted of the lesser offence of causing grievous bodily harm contrary to section 20 of the Act."

106. Taylor LJ (as he then was) giving the judgment of the Court said at the outset of the judgment:

> "Trials on indictment in England and Wales are adversarial. The prosecution decides who to charge and with what offences. They present the case for the Crown. Counsel for the defence presents the case for the accused. The judge is there to hold the ring impartially and to direct the jury on the law. These simple propositions are truisms, but their importance and the dangers of departing from them are highlighted by this appeal, which we allowed on March 13, 1992."

107. After the complainant had given evidence the prosecution called a witness "E" who gave evidence which assisted the defendant (as he had done at the committal proceedings). Taylor LJ describes what then happened:

> "... prosecuting counsel, after consulting those instructing him, said he would offer no further evidence. This prompted an unusually animated argument between counsel and the judge, who was clearly outraged at what he expressly called the crass incompetence of the Crown Prosecution Service in serving and making part of the prosecution case a witness they knew would support the defendant and then seeking to discontinue when predictably he did just that.
>
> Expressing his view that the case should go on, the learned judge made clear that he thought [the complainant] was "a witness of truth and a very accurate and careful one," [E] was "patently false." He told prosecuting counsel it would be "utterly, utterly wrong to chuck your hand in at this stage." Nevertheless, prosecuting counsel maintained his position and took no further part. The learned judge then decided that the case should not stop and that he would call a police officer who was the remaining witness for the Crown. He referred to that witness's testimony as "only a formal piece of evidence." The officer proved the notes of the appellant's interview. Admittedly, the notes were signed by the appellant and not disputed but the evidence was necessary to link him with the assault.
>
> At the conclusion of the prosecution it may be that a submission of no case was made and rejected. Certainly, the learned judge had indicated in the earlier argument that if such a submission were made he would reject it.

> The appellant did not give evidence on his own behalf. We are told that his decision not to do so was influenced by his impression that the judge was hostile to him so that he was reluctant to be questioned by the judge. He signed a statement to that effect. Counsel for the defence addressed the jury and the learned judge summed-up. After a three hour retirement, the jury acquitted the appellant of the offence charged under section 18, but convicted him of the lesser offence under section 20."

108. A little later having referred to the report of the Farquharson Committee, Taylor LJ said:

> "It is well established that the judge in a criminal trial has power to call a witness. It is, however, a power which should be used most sparingly and rarely exercised (see Roberts (J.M.) (1985) 80 Cr.App.R. 89, and the cases therein cited at p. 96). Where the power is exercised, it should be for achieving the ends of justice and fairness. Thus in Tregear (1967) 51 Cr.App.R. 280, [1967] 2 Q.B. 574, a judge's decision to call a witness at a late stage of the trial was upheld because he was 'not seeking to supplement the prosecution.' "

109. Taylor LJ contrasted that decision with the decision by the judge case with which the Court of Appeal was concerned:

> "Here by calling the last witness, the learned judge was not only supplementing the prosecution; he was in effect taking it over. It cannot in our judgment be right that a judge can refuse to allow the prosecution to discontinue before their case is concluded if he believes the evidence already called raises a *prima facie* case. The effect would be that after a complainant gave evidence which the judge thought credible, if the prosecution at this point decided on due reflection to discontinue, the judge could go on to call all the remaining prosecution witnesses himself. In doing so, he would inevitably have descended into the arena in a totally unacceptable way."

Taylor LJ then referred to what might have happened if the defendant had given evidence: "the alternatives would have been either for the judge to cross-examine him or for his evidence to remain untested and unchallenged." Taylor LJ continued:

> "by proceeding as he did, the learned judge was no longer holding the ring. He took over the prosecution. There was no other prosecutor. The reaction of any neutral bystander could only be that the judge had become the adversary of the defence."

110. In that last sentence Taylor LJ refers to the neutral bystander. It is not of course suggested that the Recorder was biased against the defendant. But there remains the issue of the appearance of bias. The modern test to decide whether there has been the appearance of bias is to be found in *Re Medicaments and Related Classes of Goods* [2000] EWCA Civ 350; [2001] 1 WLR 700, in which Lord Phillips MR gave the judgment of the Court, and in *Porter v Mcgill* [2002] 2 AC 357. The test is whether, having regard to all the circumstances which have a bearing on the suggestion that the

judge was biased, a fair minded and informed observer would conclude that there was a real possibility of bias. In this case the alleged bias is a bias against the defendant.

111. Mr Schama reminded us of the Criminal Procedure Rules and submitted that the judge was doing no more than actively case managing the case. We highlight that Part 1 provides that the overriding objective is to deal with cases justly and that dealing with a case justly includes acquitting the innocent and convicting the guilty. It also includes dealing with the prosecution and defence fairly and recognising the rights of the defendant, particularly under Article 6 of the European Convention on Human Rights. Amongst those rights, in effect declaratory of the common law, is the right to a trial by an impartial tribunal. Simultaneously, however, active case management by the judge is an essential feature of the modern criminal trial process.

112. The essential question which arises can be described in a number of different ways. Thus, in the context of *Grafton*, the question would be: "had the Recorder, who said that he had reluctantly entered the arena, done so in a 'totally unacceptable way' by forcing the prosecution to call witnesses from the estate agency in order to fill the gaps left by the defence statement?" Alternatively would a fair and minded and informed neutral bystander conclude in all the circumstances that there was a real possibility that the Recorder was biased against the defendant when the Recorder directed the prosecution to call the witnesses in the way he did and when he continued to raise the issue of the inadequacies of the defence case statement, in effect, throughout the entire trial? But dealing with it compendiously, what we are required to resolve is whether, looking at the trial process as a whole, the Recorder, albeit unintentionally, crossed the line between appropriate and inappropriate judicial conduct by adopting or appearing to adopt the role of the prosecutor. When all the authorities have been examined, in the end, this is a fact specific question.

113. We have examined it in the light of full transcripts of the evidence and exchanges which bear on these issues. Not without some reluctance we have reached the conclusion that the way in which the Recorder descended into the arena was inappropriate. It was his duty to manage the case in a direct and robust way. We should not criticise him for having done so. But here, the combined effect of his constant repetitious criticism of the inadequacies of the defence statement (when, having given the defence every opportunity to make good those deficiencies, he would have been entitled to make strong comments in his summing up) together with the directions he gave to the prosecution about witnesses who were to be called, would have created in the mind of the informed mutual observer the perception that there was a real possibility that the Recorder had become biased against the defendant.

114. It follows that the conviction is unsafe.

Recorder's intervention during the cross-examination of Ms Jenrick

115. As we have already noted, during the cross-examination of Ms Jenrick, the recorder asked this question of Ms Levinson, to which she replied "Yes":

> "Can I understand the case you're putting, Ms Levinson? Are you suggesting that the person who was, who this discussion took place with was the same person as had shown your client around the flat? Is that your suggestion?"

116. As we have seen, the affirmative answer given by Ms Levinson to the recorder caused the defence difficulties and she later sought to retract it.

117. Ms Levinson submits that this question should not have been asked. The recorder knew by now that the defendant was declining to give any further information and the recorder should not have pressed her, so she submits.

118. We see no merit in Ms Levinson's submission particularly in the light of the prepared statement, in the light of her cross-examination of Ms Jenrick about there being four female members of staff on the lettings team, her attempts to identify those persons, questions about absences from the office and questions such as the following. "Are you sure that it was Davinia that dealt with him on that occasion [the letting]?" "And you instructed Davinia that she should be the person to deal with him?" "Assuming the system works correctly, you would assume that Davinia's the only person dealing with Mr Malcolm." "What Mr Malcolm says is that somebody, and he doesn't suggest that this is you but that somebody who he believed to be an agent had given him, or had reached an agreement with him whereby he would, he was permitted to take certain items of property from the premises and whilst the situation in relation to the possible return of his deposit was discussed with the owner of the property. Now as I say, he doesn't suggest that that was with you … ."

119. Given that the purpose of these questions must have been in some way to support the appellant's account in his prepared statement, the recorder was certainly entitled to ask the question which he did.

Judge's questions of witnesses whilst giving evidence to the jury

120. Ms Levinson submits that the number of questions asked by the Recorder were such as to render the trial unfair. The Recorder accepted that if what he was doing "means my having to descend occasionally into the arena to ask questions that need to be asked, I'm afraid I will." He certainly did ask a large number of questions. Given our conclusions that conviction is unsafe, we do not need to decide whether the questioning itself was such as to render the trial unfair.

Conclusion

121. In conclusion we allow the appeal and quash the conviction. We invite written submissions as to whether, notwithstanding that the appellant has been released from custody, there should be a retrial.