

Wednesday, 24th June 2009

SHERIFF WILLIAM GILCHRIST (continued)

1 (1.50 pm)

2 MR MOYNIHAN: I think what I was just going to turn to was  
3 the conclusion of this particular chapter where there  
4 was an exchange of correspondence that concluded matters  
5 as one might have anticipated; namely, that when the  
6 four officers had concluded their re-education, SCRO  
7 certified them as suitable to return to full duties and  
8 the Crown Office response was that they would have to  
9 await the outcome of the civil proceedings. Would that  
10 be a fair presentation?

11 A. Yes.

12 Q. Just for others, I am looking at a memo, which is  
13 12th February 2004 and is CO4086. You may also just  
14 bring up by the side 4087. The first one, 4086, is  
15 simply the formal intimation by the Scottish Criminal  
16 Record Office in 2004 that the officers had completed  
17 their re-training and were fit for full duties.

18 Correct?

19 A. Yes.

20 Q. Then as I said the response from Crown Office on  
21 23rd February by yourself was that, as you say in the  
22 third paragraph:

23 "As you might anticipate, the one immediate concern  
24 I have is the civil action is still unresolved ... and  
25 awaiting a report."

1 A. Yes.

2 Q. Then proceeding beyond that if I take you to  
3 10th March 2004, CO4089, this is now, in effect, later  
4 on in that same year, your recommendation is that Crown  
5 Office continue to await the outcome of the civil  
6 proceedings and in particular at that stage an expert  
7 report the Scottish Executive had commissioned from  
8 a John McLeod?

9 A. Yes.

10 Q. And if I look next 4090 -- it may be immediately the  
11 next one--

12 A. Yes.

13 Q. It comes from a Chris Orman. We see it's from the  
14 Lord Advocate's private office?

15 A. Yes. I think he was an assistant private secretary.

16 Q. It indicates the Lord Advocate has seen your minute we  
17 just looked at, agreed with your suggestion and, as you  
18 say, no-one was anticipating it might take so long. The  
19 Lord Advocate, however, didn't wish matters to be  
20 delayed too long?

21 A. Yes.

22 Q. That is followed by the next document 12th March 2004,  
23 4091, by you and, please, since this is an unsigned copy  
24 I don't know whether this was despatched or not but it  
25 would certainly bear to be a letter from you to Mr Bell,

1           again giving formal confirmation that, in effect, you  
2           are awaiting that civil proceeding and in particular the  
3           independent expert report.

4                        Would you know if that letter was sent?

5    A.    I would imagine it was. I've no reason to suppose it  
6           wasn't.

7    Q.    Unfortunately, at least for my purposes, we seem them to  
8           jump -- that's March 2004 -- in effect we jump to 13th  
9           December 2005, 4093, with a letter in fact from  
10           Mr Bell's successor as Director, a Mr McLean, to your  
11           successor as Deputy Crown Agent, a Mr Brisbane, and  
12           matters have just not progressed at all?

13   A.    Yes.

14   Q.    I will not take you in the correspondence really beyond  
15           this. So that's as matters were running in relation to  
16           that.

17                        Can I ask you the final point in relation to this is  
18           just to clarify one thing that is mentioned from time to  
19           time. There is mention of a Crown Office list of  
20           witnesses.

21                        Have you seen that in some of the correspondence?

22   A.    Yes, I've noted that from some of these documents.

23   Q.    Is that a misunderstanding?

24   A.    That would be my understanding. The Crown Office  
25           doesn't have or didn't have, and I presume still doesn't

1 have, a list of experts. There are forensic scientists  
2 and others, fingerprint officers, who are authorised  
3 under the 1995 Act, Criminal Procedure (Scotland) Act,  
4 and that's done by the Justice Minister. But it's not a  
5 Crown Office list of experts, as far as I know. Well,  
6 I'm sure I would know but I'm not aware of any Crown  
7 Office list.

8 Q. So there may in fact simply be a misunderstanding, even  
9 among those who ought to know who associate,  
10 authorisation under the 1995 Act, first of all, with the  
11 Crown Office as the responsible authority rather than  
12 Scottish Ministers and, therefore, refer to it as a  
13 Crown Office list when in fact all it is is  
14 authorisation under the Act by Scottish Ministers?

15 A. Yes.

16 Q. You are also quite straightforward in paragraph 57 of  
17 your statement in addressing the fact that the question  
18 of authorisation of these officers under the 1995 Act  
19 seems not to have been specifically considered on the  
20 basis of it would have been academic because the Crown  
21 Office was not proposing to use them as witnesses for  
22 the time being at any rate.

23 A. Yes.

24 Q. Is that a fair summary?

25 A. Yes.

1 Q. Would you even know if there was a procedure in place in  
2 connection with authorisation of witnesses under the  
3 1995 Act to have their competence and authorisation  
4 reassessed?

5 A. I'm not aware of it. There may have been. Frankly, I  
6 would doubt it. I don't think I was aware of any  
7 procedure to withdraw authorisations. I don't think the  
8 Act makes provision for it; it simply makes provision  
9 for granting authorisations.

10 Q. Would you accept that it is one possible matter that  
11 might be considered, the fact that the officers, on the  
12 face of it, have had their right to practice their  
13 profession to its full extent in court in suspense, as  
14 we see it from August 2002 through December 2005, as you  
15 have said the dilemma is there is no ability to have a  
16 judicial determination as such and, in fact, where they  
17 might get some form of determination (namely,  
18 consideration of the authorisation under the Act), there  
19 is, in fact, no procedure and they are kept in limbo?

20 A. Yes. The civil case took a very, very long time and  
21 that was regrettable but the civil case had potential to  
22 provide a judicial determination which was either a  
23 positive or negative from their perspective and the view  
24 that I certainly took throughout this matter was that to  
25 reinstate them when there was a possibility that a court

1 might find them to have been negligent or dishonest was  
2 simply not appropriate.

3 Q. But equally, for example, if the Crown had had to, which  
4 it didn't, proceed through some disqualification  
5 procedure, that may also have served as a means of  
6 having a determination of some of the issues that arose?

7 A. Yes.

8 MR MOYNIHAN: Thank you very much. I have no further  
9 questions.

10 THE CHAIRMAN: Miss Galbraith, do you have any application  
11 for cross-examination?

12 MISS GALBRAITH: Yes, sir. There are four matters that I  
13 would seek to ask this witness about certainly. Three  
14 have not been canvassed by Counsel to the Inquiry.  
15 Those are: firstly, regarding Malcolm Graham and the  
16 consideration that was given to him during the  
17 investigation process; secondly, really a short point  
18 regarding criticisms made by Peter Swann and Malcolm  
19 Graham in relation to the other independent experts; the  
20 third matter again is a very short point relating to the  
21 culture at SCRO at the time. It's a matter raised by  
22 the witness in his report. Lastly, I have some  
23 questions regarding the conclusions of the report, in  
24 particular with regard to the mis-identification of the  
25 mark.

1 THE CHAIRMAN: Yes. That's the report that Sheriff  
2 Gilchrist prepared that you are referring to?

3 MISS GALBRAITH: Yes, sir.

4 THE CHAIRMAN: Thank you.

5 MISS GRAHAME: May I make a comment please? I wonder if I  
6 may make a comment at this stage?

7 THE CHAIRMAN: Yes.

8 MISS GRAHAME: In light of the final request by  
9 Miss Galbraith regarding the conclusions of the report,  
10 I'd simply wish to say at this stage that the  
11 conclusions of the report relate to whether proceedings  
12 ought or ought not to be taken against SCRO officers.

13 Now this is a matter that has been raised previously  
14 by myself with the Inquiry and my position has been and  
15 remains that this is not within the Terms of Reference.

16 It is noted that this was specifically not covered in  
17 the examination-in-chief by my learned friend,  
18 Mr Moynihan. It's also specifically not referred to  
19 within the opening statement by the Inquiry team because  
20 it's understood it's not within the Terms of Reference.

21 So I would suggest --

22 THE CHAIRMAN: If I can interrupt you there, I understood --  
23 so that I get it clear in my own mind -- the conclusion  
24 was that there should be no prosecution.

25 Is that the conclusion that you're referring to?

1 MISS GRAHAME: Yes.

2 THE CHAIRMAN: I see. That, of course, is a decision that  
3 is made --

4 MISS GRAHAME: It is within the prosecutorial discretion.

5 THE CHAIRMAN: Yes, but I'm not sure that I understood that  
6 the actual conclusion was being questioned but I will  
7 just clarify that with Miss Galbraith.

8 MISS GALBRAITH: Yes, sir. The point really relates to what  
9 the conclusion was in terms of the mark being a  
10 mis-identification or being mis-identified. That is  
11 contained within the conclusion section of the report.

12 THE CHAIRMAN: Yes.

13 MISS GALBRAITH: I think that the witness today has  
14 indicated now perhaps a different position and I really  
15 wanted to go over that with the witness to clarify his  
16 position at the time with regard to whether or not mark  
17 Y7 was mis-identified.

18 THE CHAIRMAN: It is quite a narrow gap between that and the  
19 decision whether or not to prosecute. I mean, that is  
20 certainly not something in my view that can be raised in  
21 the Inquiry.

22 The decision to prosecute or not is one for the  
23 Lord Advocate and I don't propose to pass any comment  
24 or, indeed, to investigate his decision or the decision  
25 made on his behalf.

1 MISS GALBRAITH: I entirely accept that, sir. The approach  
2 I was proposing to take was that my interpretation of  
3 the thrust of Sheriff Gilchrist's report is that there  
4 was a mis-identification of the mark but it's whether  
5 that mis-identification would thereafter merit any  
6 criminal proceedings and I certainly wouldn't seek to  
7 address that matter. But it's quite simply whether or  
8 not in his view at that time the mark was  
9 mis-identified. In my submission, it being  
10 mis-identified would not automatically justify criminal  
11 proceedings.

12 THE CHAIRMAN: I think you can certainly ask the witness his  
13 opinion of whether there had a mis-identification or not  
14 on the evidence that he had available to him. But  
15 beyond that, then you mustn't go. So, subject to that,  
16 if you deal with the points that you wish that you  
17 raised with me.

18 **Cross-examined by MISS GALBRAITH**

19 Q. Sheriff Gilchrist, if I can ask you firstly about your  
20 involvement with Malcolm Graham, I understand that  
21 during the course of your investigation you met with  
22 Mr Graham, although you don't remember that meeting now.

23 In speaking to Mr Graham, this was in the context of  
24 you considering what evidence may be relied on at any  
25 future prosecution; is that correct?

1 A. Sorry, I'm not sure I follow the question. Why was I  
2 speaking to Mr Graham?

3 Q. That is probably a simpler way of approaching it.

4 A. Because I was investigating whether there had been a  
5 mis-identification. That was the first question I had  
6 to address.

7 THE CHAIRMAN: I am not sure if we can hear you properly.

8 A. I was investigating whether there had been a  
9 mis-identification and then, secondly, if there had, why  
10 had there been a mis-identification. Malcolm Graham was  
11 an expert who had a view or had expressed a view as to  
12 whether this was or was not a correct identification, so  
13 he was a witness who had evidence that was relevant to  
14 the matter that I was investigating.

15 MISS GALBRAITH: Mr Graham produced a report for the trial  
16 against David Asbury, although it is understood that at  
17 the trial of Mr Asbury that fingerprint evidence itself  
18 was not disputed.

19 Would you agree with that?

20 A. Yes.

21 Q. Would you also agree that at the time that report was  
22 completed, although print Y7 and the attendance of  
23 Shirley McKie at the house was in issue, it was  
24 peripheral to the case against Mr Asbury at that time?

25 A. Yes.

1 Q. Did you look at the report that was completed by  
2 Mr Graham?

3 A. I assume so. I don't at this stage now remember.

4 Q. If I can just ask you briefly to have a look at  
5 reference number DB0201, we can see that bears to be a  
6 report on the examination of fingerprints in connection  
7 with the case of **HMA v David Asbury** and that bears to be  
8 by Mr Graham.

9 Do we see that the date of the report at the bottom  
10 of the page on the bottom right-hand side, probably in  
11 the small font, bears to be 8th May 1997?

12 A. Yes.

13 Q. If I could ask you please to look at the third page of  
14 that report, if we look at the second paragraph, which  
15 is the paragraph where Mr Graham considers print Y7, he  
16 states that:

17 "Book marked L contains two actual size photographs  
18 of fingerprints marked Y7 on a doorframe. Both show  
19 exactly the same fingerprint. One is dated 16th January  
20 1997 and the other is dated 18th February 1997. The  
21 fingerprint is a fragment of a tip of a right thumb."

22 Do you see that?

23 A. Yes.

24 Q. Just for the sake of completeness, could I ask you also  
25 please to look at production CO2755, I think with the

1 reference number CO, it will be Crown Office documents  
2 provide to the Inquiry by Crown Office.

3 Would you agree that that would appear to be the  
4 same report?

5 A. Well ...

6 Q. I appreciate --

7 A. Yes, but I haven't read it. I mean, I didn't read it  
8 just now in sufficient detail to say that it's identical  
9 or not.

10 Q. No doubt if it's not, it will be raised. It's really  
11 just to clarify with you that Crown Office had this  
12 document and, again, if you look at the date on the  
13 bottom right-hand corner it would appear to be  
14 23rd June 2000.

15 A. Yes.

16 Q. Does even just seeing that excerpt from the report, does  
17 that help your memory any as to whether you saw that  
18 report?

19 A. No, not at all. I would have seen it if it was a  
20 production that was obtained by the Tayside Inquiry and,  
21 if not, I might have seen it within Crown Office papers  
22 if it was within -- if either of these reports were in  
23 Crown Office papers. But I don't know. I don't  
24 specifically remember seeing them.

25 Q. The reason that I read out that particular excerpt is

1           that Mr Graham was noting that the mark is of the right  
2           thumb.

3                        Would you like to see --

4    A.    Yes, I can recall reading that on the earlier document,  
5           yes.

6    Q.    The SCRO experts were of the view that it was of the  
7           left thumb?

8    A.    Yes.

9    Q.    Do you see that?

10   A.    Yes.

11   Q.    Were you aware of that difference when you considered  
12          the matter?

13   A.    I simply do not remember.

14   Q.    Do you think that would have been something that you  
15          would have considered significant when you were weighing  
16          up the evidence of Mr Graham?

17   A.    If -- well, if I had been aware of it and had -- aware  
18          of it in the sense of having seen the report and having  
19          noted he was talking in the reports about the right  
20          thumb, I would no doubt have raised it with him. But I  
21          have no recollection of that at all. As I say, I would  
22          have seen it if it was part of the Tayside Inquiry  
23          report to me, but if it wasn't, then I may not have seen  
24          it, so I don't know.

25                        Is it in the Tayside report? If it is, I would have

1           seen it.

2       MR MOYNIHAN:   Sir, I may be able to assist. The date that  
3           would ring certain bells that suggests it's the wrong  
4           Sheriff, the wrong Deputy Crown Agent. It may be  
5           Sheriff Crowe is the person to ask about the report of  
6           23rd June 2000. There certainly is some reference in  
7           Sheriff Crowe's statement to the Crown Office having  
8           instructed a report from Mr Graham and, if memory serves  
9           me correct, that is the date that's mentioned.

10      MISS GALBRAITH:   Thank you. I am very much obliged.

11                 If we move away from the actual report that  
12           Mr Graham completed for Mr Asbury's trial, in terms of  
13           your assessment of Mr Graham and his opinion, you  
14           indicated earlier that the question of honesty or  
15           dishonesty is important you were mentioning in the case  
16           of deciding whether or not to prosecute.

17                 Would you agree that the issue of motivation would  
18           be relevant to whether somebody is honest or dishonest?

19    A.   Yes.

20    Q.   As I indicated earlier, although Mr Graham gave evidence  
21           at Mr Asbury's trial, we understand that the fingerprint  
22           evidence itself was not disputed. So it may be we can  
23           take it from that that the view of Mr Graham was relied  
24           upon at that stage.

25    A.   Yes.

1 Q. Would you not agree that Mr Graham could, therefore,  
2 have a personal and professional motivation for seeking  
3 to stand by his opinion in the future?

4 A. Yes.

5 Q. I think you note in your Inquiry statement that he could  
6 not be considered independent?

7 A. I certainly took the view that any fingerprint expert  
8 who had offered an opinion during the course of the  
9 Asbury and McKie cases could not now be viewed as being  
10 independent, yes, because they expressed an opinion and  
11 there was always the possibility that they were simply  
12 sticking to that opinion and not owning up.

13 Now, that's not the conclusion I reached but I  
14 accept that there is always a risk, which is why, if you  
15 are looking for independent experts, you would go to  
16 someone who had no prior involvement in the case, no axe  
17 to grind, no position to defend, no colleagues to  
18 defend. You would look for somebody outside, completely  
19 outside, the case and the institutions, which is why I  
20 went to Durham.

21 Q. Indeed, that may be something that I will come back to,  
22 that there was that independent analysis of the mark in  
23 this case.

24 Could the same point be made in relation to  
25 Mr Swann?

1 A. Yes. The point can be made in relation to every expert,  
2 whatever view they came to, that they might be inclined  
3 to defend the position that they had adopted at an  
4 earlier stage. That's on both sides of the dispute. It  
5 applies to all of them -- potentially.

6 Q. Although would you not accept that perhaps that may not  
7 apply in relation to the independent expert that you  
8 just explained would be necessary?

9 A. Yes.

10 Q. So that kind of influence and motivation may be apparent  
11 within Mr Graham and Mr Swann and perhaps the SCRO  
12 officers?

13 A. It is a potential difficulty with all the fingerprint  
14 experts who were involved in the original cases. They  
15 all expressed a view and there is always the potential  
16 danger they are simply sticking to it and not wanting to  
17 admit that they made a mistake. There's a potential for  
18 that.

19 Q. Was that something that you took into account during the  
20 course of your investigation, the potential motivation  
21 for the views of each of the experts you spoke to?

22 A. Yes.

23 Q. Can I move on, please, to ask you about particular  
24 criticisms that were made both by Mr Swann and Mr Graham  
25 starting, firstly, with Mr Peter Swann.

1                   He has advised or had advised the Justice 1  
2                   Committee who, I think you are aware, considered the  
3                   issue of this mark?

4       A.    Yes.

5       Q.    I regret to say I don't have a copy of the submission I  
6            will refer to but I do have -- it's readily available on  
7            the Internet and I can provide the web address.

8                   Mr Swann advised the Justice 1 Committee that he  
9                   thought the evidence from Durham was flawed and he also  
10                  said that Pat Wertheim's evidence was flawed.

11                  Do you recall him making these comments when he met  
12                  you?

13       A.    As I said in the statement, I simply do not remember the  
14            detail of what was said. I simply remember that he  
15            continued to hold the view that Y7 was that of Shirley  
16            McKie. That's all I remember. But obviously I can  
17            refer to my report and other correspondence that  
18            amplifies what I discussed with him, so if it's in that  
19            then I can adopt it, but I don't remember it.

20       Q.    One thing you particularly mentioned is that he gave you  
21            a chart with characteristics marked on it. I take it  
22            that is not something you recall either?

23       A.    Sorry, he gave me the chart?

24       Q.    Yes.

25       A.    Yes, I think he probably did. I think he probably did

1 illustrate to me where his 21 characteristics were, yes.

2 Q. After speaking to Mr Swann and receiving his comments,  
3 did you go back and re-interview the officers at Durham  
4 or speak to Mr Wertheim?

5 A. No, no.

6 Q. Why was that?

7 A. Well, I suppose this was a process that had to be  
8 stopped at some point. I had obtained a view from the  
9 Durham experts. They were clearly of the view it was  
10 not Shirley McKie's fingerprint. I had now been to see  
11 Mr Graham and Mr Swann to assess their evidence and I  
12 knew what their evidence was but I wanted to assess how  
13 persuasive they were and, having done that, I was  
14 satisfied that that was sufficient for my purposes  
15 because I was quite clear in my own mind at that point  
16 that this could not result in a prosecution. So that  
17 was enough.

18 I mean, I could have gone back to Durham and said,  
19 "What do you think about these criticisms", and got  
20 their response and then gone back to Mr Swann or  
21 Mr Graham and said, "... and here's what Durham have  
22 said", but I think one had to draw the line somewhere.

23 Q. In the same vein, you interviewed Robert Mackenzie, I  
24 think, on 18th July 2001?

25 A. Yes.

1 Q. At that time he had been removed from operational  
2 duties?

3 A. Yes.

4 Q. We understand that he may have been suspended. Were you  
5 aware of that?

6 A. If he had been, I would probably have been aware of it,  
7 yes.

8 Q. Similarly, Mr Mackenzie said or indicated grave concern  
9 about the conclusions of the independent experts from  
10 Durham and also Mr Wertheim. Again, after hearing that,  
11 you didn't then go and speak to these independent  
12 experts again?

13 A. No.

14 Q. And would that be for the same reason as Mr Swann?

15 A. Yes. At that stage I'd already submitted my report in  
16 which I concluded there was no basis for a prosecution.  
17 This was -- the interview of Mr Mackenzie was after  
18 that. It simply reinforced the view that I'd already  
19 taken.

20 Q. If I can move on, please, to ask you about the culture  
21 at SCRO at the time in 1997, which is something you  
22 mention in the report. Perhaps if I can ask you to look  
23 at your report. Just bear with me, I'll find the  
24 reference number.

25 MR MOYNIHAN: CO0003.

1 MISS GALBRAITH: Thank you. If we go to page 32, 32 of the  
2 report and perhaps this excerpt starts on the earlier  
3 page, 31.

4 About halfway down the page, Sheriff, you have  
5 included an excerpt from findings of an expert group on  
6 fingerprint identification set up by an Interpol  
7 European Committee 1997. Do you see that there?

8 A. Yes.

9 Q. I think the reason for that is that it had been referred  
10 to by Mr Rudrud and Zeelenberg.

11 Do you recall that?

12 A. Yes.

13 Q. What the excerpt relates to is comments on mistaken  
14 identifications and seeks to give some explanation of  
15 why mistaken identifications have been made.

16 If we go on to the following page, page 32, in  
17 particular the third paragraph down it refers to:

18 "Hierarchy (rank) in scientific decision-making is  
19 considered to be inappropriate. The dangers of such a  
20 process, which must be recognised and overcome if a  
21 hierarchical system is used, are that: the junior tunes  
22 his/her opinion to that of the senior; the culture of  
23 the longer serving expert 'sees more'; [and] the  
24 pressure of the junior to please the senior."

25 Now, would it be fair to say that in your own view

1 at the time you thought that this excerpt was pertinent  
2 to the issue of mis-identification and to that extent  
3 you have included the full excerpt in your report?

4 A. Well, I was exploring, as I have already said, I was  
5 exploring two things. Was there a mis-identification  
6 and, secondly, if there was, why? And this is was one  
7 possible explanation as to why you might get a mistaken  
8 identification.

9 Q. Was this your understanding of the working conditions or  
10 environment which was prevalent within SCRO at that  
11 time?

12 A. I was aware of HMCIC's findings in relation to that but,  
13 again, unfortunately, I can't specifically remember what  
14 was said. But my recollection would be that there were  
15 concerns, possibly, about some of these issues. I mean,  
16 I was aware from this particular case about the  
17 hierarchy involved in the examination of the mark; so I  
18 considered it relevant to -- these comments to be  
19 relevant to this case.

20 Q. If I can lastly move on to consider the terms of your  
21 report with particular reference to the  
22 mis-identification, would you agree with me or not that  
23 the terms of your report indicate that at the time it  
24 was submitted your conclusion was that there was a  
25 mis-identification of mark Y7?

1 A. Yes. I think I proceeded on the basis that there was a  
2 mis-identification. The experts to whom I had gone in  
3 Durham had told me it was a mis-identification. They  
4 were the last experts to whom I had spoken before  
5 submitting the report and I accepted their conclusion  
6 but not, I think, to the extent of not entertaining some  
7 doubts.

8 Q. If we can go to your report, which I think is still on  
9 the screen, and if we look at the second page, we can  
10 see from the heading what your report covers and it  
11 states that it is arising out of whether criminal  
12 proceedings should be taken against fingerprint officers  
13 employed by Scottish Criminal Record Office arising out  
14 of the mis-identification of fingerprints.

15 A. Yes. I mean, I could have put alleged  
16 mis-identification every time I spoke about  
17 mis-identification. It was an alleged  
18 mis-identification and the experts to whom I had gone  
19 told me it was a mis-identification so I proceeded on  
20 that basis.

21 Q. Again, there are numerous other references throughout  
22 the report to mis-identification.

23 Can I take it that you would simply make the same  
24 comment in relation to those other references, that the  
25 word "alleged" could be put in front of it?

1 A. Yes.

2 Q. Can I ask you to look please at a letter that was sent  
3 accompanying your report and it was submitted to the  
4 Deputy Crown Agent. The reference is CO0007.

5 A. Yes.

6 Q. Can we look at page 2 of that report. I am sorry, I  
7 should have confirmed with you from the first page, do  
8 you agree that this letter is a letter that was sent  
9 accompanying your report to the Deputy Crown Agent?

10 A. Yes, of course.

11 Q. On the second page at the third paragraph down do you  
12 see you have written:

13 "I am confident that the crime scene marks were  
14 mis-identified."

15 A. Yes.

16 Q. Would it be fair to say then that was your opinion at  
17 that time?

18 A. Yes. Well, as I say, I keep saying, I accepted the  
19 expert opinion offered to me by the experts I had  
20 consulted. I think -- I'm sure I say somewhere else  
21 though that I'm not certain.

22 THE CHAIRMAN: But not being an expert yourself on  
23 fingerprints, you had to rely on the assistance you had  
24 been given from Durham and that was to the effect that  
25 it was not Shirley McKie's mark.

1 A. Yes and it wasn't simply that Durham -- I had gone to  
2 Durham, it was also the point that your earlier  
3 questioning has alluded to that all the experts that had  
4 been consulted by HMCIC, by myself subsequent to the  
5 allegation being made, were independent. They had no  
6 prior involvement. So it wasn't just that those were  
7 the experts that I had consulted, it was also they were  
8 consulted at a stage when they knew that there was this  
9 major dispute about the identification, they had no axe  
10 to grind, they had no previous position to protect or  
11 adopt, no colleagues to protect. So I obviously placed  
12 great weight on their evidence.

13 But I should -- I've just noticed that and perhaps I  
14 should correct it. I notice at the top of that letter  
15 on the page that is actually on the screen I refer to  
16 Peter Swann insisting that he was correct to identify  
17 Q12. I think that must be a mistake. It should be a  
18 reference to Peter Swann identifying Y7.

19 MISS GALBRAITH: To be clear that at that time when you  
20 submitted your report you considered the weight of  
21 evidence, that you value the opinion of the independent  
22 experts and that is the basis for your assertion there  
23 that you're confident that the crime scene marks were  
24 mis-identified.

25 A. Yes.

1 Q. I think you very fairly accepted today in today's  
2 evidence and indeed that letter we have just been  
3 looking at that there was a tendency to be more  
4 influenced by the last expert that you spoke to.

5 A. Yes.

6 Q. In your consideration of this investigation, the last  
7 expert you spoke to happened to be Mr Mackenzie; is that  
8 right?

9 A. Yes. Every expert that I spoke to, my conclusion was  
10 that they genuinely believed that the position that they  
11 were putting to me was the correct one. That was my  
12 assessment of every expert I spoke to.

13 Q. I think on a previous occasion you have been similarly  
14 persuaded by Mr Mackenzie. You refer in your report to  
15 a facilitated meeting at Tulliallan which had been  
16 attended by Mr Mackenzie and Mr Dunbar in addition to  
17 Mr Rudrud and Mr Zeelenberg.

18 Do you recall that?

19 A. Yes, I do.

20 Q. Specifically, you mention in your report, which is at  
21 page 24 -- you don't necessarily have to go to it unless  
22 you would like to have a reference to it -- but you say  
23 there that the presentation by Mackenzie and Dunbar was  
24 at first persuasive?

25 A. Yes.

1 Q. But became less so when challenged by Rudrud and  
2 Zeelenberg?

3 A. Yes.

4 Q. Is that your --

5 A. Yes.

6 Q. And would that fit in with the evidence that you have  
7 already given, that your view altered depending on the  
8 last expert that you spoke to?

9 A. Yes and after speaking to Robert Mackenzie it led to my  
10 adopting the view that they were possibly all wrong, to  
11 the extent that they were all definite. Perhaps none of  
12 them should have been definite.

13 THE CHAIRMAN: That might be the best conclusion.

14 MISS GALBRAITH: Just bear with me for one moment please.

15 **(Pause)**

16 Just finally it's really on the same point, Sheriff:  
17 given that there was this competing evidence or opinion  
18 and, to an extent, you were balancing and considering  
19 what you were being told by each expert as you were  
20 being told it, you mentioned or agreed earlier that  
21 certainly Mr Swann, Mr Dunbar and any expert from SCRO  
22 could have a motivation to maintain a view that they had  
23 expressed at an earlier stage, which is a motivation  
24 that the independent experts did not have?

25 A. Yes.

1 Q. Would you agree with that?

2 A. Yes but I would make the point I didn't simply go to  
3 these experts and say, "What's your conclusion", and  
4 they would tell me and I would say, "Thank you very  
5 much". I asked every single one of them to demonstrate  
6 and in each case I found their demonstration persuasive.  
7 So it wasn't simply relying on their assurance. In  
8 every case I wanted them to demonstrate to me why they  
9 were sure.

10 Q. But yet I think you do accept that there was the  
11 additional factor with those who --

12 A. Yes.

13 MISS GALBRAITH: Thank you.

14 THE CHAIRMAN: Thank you very much.  
15 Miss Graham?

16 MISS GRAHAME: Yes, thank you. I wish to ask some questions  
17 which relate to a matter that was put by my learned  
18 friend, Mr Moynihan, suggesting that there was a  
19 difference between the public position adopted by Crown  
20 Office and the private position.

21 THE CHAIRMAN: Yes.

22 MISS GRAHAME: I'm obliged.

23 **Cross-examined by MISS GRAHAME**

24 Q. Sheriff Gilchrist, I wonder if I could ask you to look  
25 again at two documents you have already been referred to

1 and if we could have them both on the screen at one  
2 time, CO4078 and CO4079.

3 Perhaps you will recollect looking at these earlier  
4 today, Sheriff Gilchrist.

5 A. Yes.

6 Q. Do you see on the left-hand side there's a letter from  
7 yourself, Deputy Crown Agent, to Mr McKie dated  
8 9th May 2002?

9 A. Yes.

10 Q. On the right-hand side of the screen was a minute by you  
11 to the Lord Advocate.

12 A. Yes.

13 Q. At the bottom the date it's received is 24th May 2002;  
14 that would be the date it was received by the law  
15 officers?

16 A. Yes.

17 Q. Perhaps we can look at page 2 of that document, please.  
18 We see it's dated 24th May 2002.

19 A. Yes.

20 Q. I don't intend to go through these in detail again but  
21 is it fair to say that at that time you were considering  
22 the issue regarding the four SCRO experts and whether  
23 they would be used again in evidence?

24 A. Yes.

25 Q. And that the Crown position was at that time, I think we

1 can see on the right-hand side of the document CO4079 in  
2 the final paragraph you have written:

3 "I do not think it would be appropriate for a  
4 decision to be taken on whether or not to accept reports  
5 from the four experts until the civil proceedings have  
6 been concluded."

7 A. Yes.

8 Q. As I understand it, that was your position at the time  
9 and that's what you were recommending to the  
10 Lord Advocate?

11 A. Yes.

12 Q. We can see from the handwritten note at the top of that  
13 that the Lord Advocate at the time agreed with your  
14 recommendation.

15 A. Yes.

16 Q. Could I ask you to look now please at CO4081. This is  
17 the letter from Harry Bell to you dated 31st May 2002.

18 A. Yes.

19 Q. If we look at the start of the fourth paragraph it says:

20 "I would therefore suggest that you may wish to  
21 consider the following.

22 "The Crown is aware that the officers are involved  
23 in a return to work strategy. In light of the ongoing  
24 civil litigation and the other relevant circumstances,  
25 it is considered that it would be inappropriate to make

1 any direct comment on this matter at this time."

2 A. Yes.

3 Q. That was a suggestion put to you by Mr Bell?

4 A. Yes.

5 Q. What was your reply to this suggestion? There's no  
6 correspondence I can put to you.

7 A. In which case I simply don't remember.

8 Q. Insofar as it's been suggested that there was a  
9 suggestion by Mr Bell that Crown Office adopt a contrary  
10 position to that expressed by you in the previous  
11 correspondence, was that ever agreed to by you?

12 A. No. The Crown Office position was that we should await  
13 the outcome of the civil proceedings. I have no  
14 recollection whatsoever of being party to any suggestion  
15 that that should not be the public stance that we were  
16 awaiting the outcome of the civil proceedings. I just  
17 have no recollection of that. I can't see why I would  
18 have been party to any suggestion it should not be the  
19 public stance. That was the reason. That's what we  
20 were doing: we were waiting for the outcome of the civil  
21 proceedings and I'm quite sure that that's what we said  
22 and kept saying to everyone.

23 Q. Do you agree with the suggestion that Crown Office  
24 adopted a public position that differed from the  
25 position sent out by you in your correspondence?

1 A. No. I'd have to be directed to any evidence that the  
2 public position was different. I mean, I noted at  
3 lunchtime when I looked at these papers again there  
4 is -- and I'm afraid my documents don't have a reference  
5 number -- but there's a draft -- it's obviously a draft  
6 minute, July 2003, which would have been prepared by my  
7 legal assistant, Rachel Weir and it was a minute from me  
8 to the Justice Department in which I have written in to  
9 the draft so that it's quite clear to the  
10 Justice Department who are dealing with the  
11 correspondence and are dealing with Parliamentary  
12 questions and I wrote in:

13 "The Crown's position has been that while civil  
14 proceedings are pending it would not be appropriate to  
15 use the four experts as experts in criminal  
16 proceedings."

17 So I was making it quite clear to the  
18 Justice Department who were dealing with -- I think it  
19 was the Justice Department were mostly dealing with  
20 correspondence and Parliamentary questions. I was  
21 making it quite clear that they understood the Crown's  
22 position.

23 Q. So would you accept that any suggestion that Crown  
24 Office adopted two different positions, a private and a  
25 public position, is quite simply wrong?

1 A. Yes. I mean, that would certainly be my recollection  
2 and understanding, and I can't see why we would.

3 Q. Very briefly, I would like to refer you to some other  
4 correspondence. First of all, CO4086.

5 Do you see that this is another letter from Harry  
6 Bell, dated 12th February 2004?

7 A. Yes.

8 Q. In the first paragraph he refers to a meeting which he  
9 had with you on 16th July 2002?

10 A. Yes.

11 Q. Which would appear to be six weeks/two months after his  
12 letter dated 31st May 2002?

13 A. Yes.

14 Q. Do we see that in paragraph 2 it says:

15 "That meeting followed on a letter of response to  
16 Mr McKie, advising that the Crown's position regarding  
17 the future use of the four experts would be kept under  
18 review in light of developments in the civil case  
19 involving Ms McKie and the Asbury appeal."

20 A. Yes.

21 Q. So, again, the Crown Office position at that stage would  
22 appear to be consistent.

23 A. Well, it would certainly be my recollection the Crown  
24 Office's position was consistent throughout.

25 Q. Could we now look please at CO4087, which is a letter

1 from you to Mr Bell dated 23rd February 2004, which is  
2 reply to the previous letter we looked at?

3 A. Yes.

4 Q. Again, in the third line of that letter you, again, talk  
5 about the civil action being unresolved.

6 A. Yes.

7 Q. And that at that time you were awaiting a report from an  
8 expert.

9 A. Well, the Justice Department were waiting for a report  
10 from an expert.

11 Q. Sorry, the Justice Department.

12 Can we now look at CO4088. This is a letter from  
13 yourself to James -- to the Justice Department on  
14 9th March 2004.

15 A. Yes.

16 Q. Again, if you could take a moment to read through that.

17 A. Yes.

18 Q. Again, does it appear to be that you're awaiting the  
19 outcome of the civil action?

20 A. Yes, yes -- the very last line.

21 Q. Turning to CO4089, this is a minute by you to the  
22 Lord Advocate, dated 10th March 2004.

23 A. Yes.

24 Q. If we look at the recommendation section, which is at  
25 the bottom of page 1, number 5, and, again, it's stated:

1                    "Our position to date has been that we would prefer  
2                    to await the outcome of the civil action before reaching  
3                    a decision on whether or not to use these experts as  
4                    Crown witnesses."

5        A.    Yes.

6        Q.    Turning to CO4090, this is an e-mail from the  
7                    Lord Advocate's PA, Chris Orman, to yourself where the  
8                    Lord Advocate agreed with your suggestion?

9        A.    Yes.

10       Q.    CO4091, a letter from you to Mr Harry Bell dated  
11                    12th March 2004.

12       A.    Yes.

13       Q.    Again, it refers to a recent meeting regarding whether  
14                    the Crown would be prepared to accept reports from the  
15                    four fingerprint experts and in paragraph 2 you express  
16                    the view that:

17                    "The Crown have some concerns about the experts  
18                    being questioned should they be required to give  
19                    evidence. The fact that civil proceedings are still  
20                    pending is a further complicating factor."

21       A.    Yes.

22       Q.    CO4092. This seems to be a reminder e-mail from  
23                    yourself to Fiona Robertson and it's in relation to the  
24                    same matter.

25       A.    Yes.

1 Q. Can you tell us who Fiona Robertson was at that time?

2 A. I think she would be in the Solicitor's Office. I think  
3 she was probably involved in the civil case.

4 Q. In paragraph 2 it says:

5 "I have indicated that the Crown is not in a  
6 position to say whether we would use any of the four  
7 experts to give evidence in criminal proceedings. I  
8 have indicated however that I would hope to be in a  
9 position to do so as a result of developments in the  
10 McKie civil action."

11 A. Yes.

12 Q. So again you mention the pending civil action?

13 A. Yes.

14 Q. There are two more I want to ask you about, Sheriff  
15 Gilchrist. The first is CO4093. This is a letter dated  
16 13th December 2005 from John McLean, who was the  
17 Director of SCRO.

18 A. Yes.

19 Q. He took over from Mr Bell, as I understand it?

20 A. Yes.

21 Q. And it was addressed to Mr Brisbane who, by that time,  
22 was Deputy Crown Agent?

23 A. Yes.

24 Q. And he had taken over from you?

25 A. Yes.

1 Q. He writes:

2 "You are aware following on from the Shirley McKie  
3 case, four experts based at the Glasgow Bureau ... have  
4 been removed from the list of those authorised to give  
5 fingerprint evidence in Scottish courts.

6 "I understand that my predecessor, Harry Bell,  
7 previously wrote to your predecessor as Deputy Crown  
8 Agent enquiring whether or not the four experts  
9 concerned could be readmitted to the list of authorised  
10 fingerprint experts.

11 "My purpose in writing at this time is simply to ask  
12 if this situation still pertains and if there is any  
13 intention to review it at some time in the future."

14 Would you look please at CO4094. This is two  
15 e-mails, the first which is towards the bottom of that  
16 page dated 22nd December 2005 and it's from Mr Brisbane  
17 to yourself at that time Lothian & Borders Area Fiscal?

18 A. Yes.

19 Q. It says:

20 "John McLean has written to me concerning the four  
21 experts who are at the centre of the McKie case raising  
22 questions as to whether or not there is any intention to  
23 review their position as suitable experts as they are  
24 currently not on the authorised list. Can you remind me  
25 how this was left? Was it to be reappraised at the

1 conclusion of the civil proceedings?"

2 Would you turn back to the first page, please.

3 Do we then see your reply to Mr Brisbane dated  
4 23rd December 2009? I wonder perhaps if you could read  
5 out the first paragraph?

6 A. "Our position has always been that we should await the  
7 outcome of the civil proceedings. It was not envisaged,  
8 of course that, those proceedings should take as long as  
9 they have to come to a conclusion. For my part, I would  
10 be prepared to accept reports from these experts. They  
11 are fully qualified and there are sufficient safeguards  
12 within the system. In any event, as I never tire of  
13 pointing out, if the defence have any concerns about the  
14 quality of the evidence, they can instruct their own  
15 expert. The real concern is that the defence may try to  
16 muddy the waters with the jury. However, in the  
17 post-bonomy world, fingerprint evidence should be agreed  
18 and if the defence will not agree it, that should only  
19 happen where they have contrary opinion from another  
20 expert."

21 Do you want me to read the rest?

22 THE CHAIRMAN: No, I don't think we need to trouble you.

23 Thank you very much.

24 MISS GRAHAME: May I just clarify one further thing with  
25 you, Sheriff Gilchrist. If the suggestion by Mr Bell to

1           you in his letter -- which is CO4081 -- and you'll  
2           recall the suggestion that he was putting, "the Crown is  
3           aware that the officers are involved", that paragraph --  
4           if his suggestion was that the Crown position be  
5           described that way and if that is different from your  
6           position, do you accept that insofar as there is any  
7           difference that that does not correctly reflect Crown  
8           Office position?

9       A.   Well, it's putting it a way that I've obviously not been  
10       putting it. I don't think it contradicts the Crown's  
11       position. It's perfectly correct that the Crown was  
12       aware that the officers were involved in a return to  
13       work strategy and it refers to the fact that it would be  
14       inappropriate to make any comment while the civil  
15       litigation is proceeding.

16                 So it's not contradictory, it's putting it in a way  
17       that I seem to always put it more directly, that we want  
18       to await the outcome of civil proceedings.

19   MISS GRAHAME:   Thank you very much. I have no further  
20       questions.

21   THE CHAIRMAN:   Mr Macpherson?

22   MR MACPHERSON:   No thank you, sir.

23   THE CHAIRMAN:   Do you have any application, Mr Holmes?

24   MR HOLMES:   I do, sir. There are a number of pieces of  
25       correspondence.

1 THE CHAIRMAN: It's just whether we take the break now. I  
2 am obviously anxious to conclude this witness's evidence  
3 but, in view of matters, we will sit again at 3.05.

4 **(2.55 pm)**

5 **(A short break)**

6 **(3.07 pm)**

7 THE CHAIRMAN: Now, Mr Holmes, what are the issues you want  
8 to raise?

9 MR HOLMES: Thank you, sir. There are six or seven pieces  
10 of correspondence that I want to put to this witness.  
11 They cover, obviously, a broad age of topics but what  
12 I'm interested in is the instruction to the experts,  
13 particularly the Durham experts, in relation to the  
14 report that was prepared by this witness.

15 There are a couple of matters that were put to him  
16 in cross, there are some matters which were put to him  
17 in-chief by my learned friend, Mr Moynihan, and there's  
18 a brief part dealing with treatment of the SCRO experts.

19 THE CHAIRMAN: Yes, if it's correspondence we have seen  
20 already, don't feel you need to look at it yet again. I  
21 am sure we can identify it sufficiently. But I leave it  
22 to you to do it as swiftly as you can.

23 MR HOLMES: I'm obliged, sir.

24 **Cross-examined by MR HOLMES**

25 Q. Sheriff, there are a couple of matters that were put to

1           you in cross-examination, first of all, that I would  
2           like to cover with you. The relevant part for the first  
3           question is at page 106 of LiveNote and it's at line 3.  
4           There you are asked a question whether your view was  
5           reinforced, so the question is:

6                       "Similarly, Mr Mackenzie said or indicated great  
7           concern about the conclusions of the independent experts  
8           in Durham" --

9   MR MOYNIHAN:   If I can just intervene, there is no LiveNote  
10           terminal --

11   THE CHAIRMAN:   The witness doesn't have the transcripts so  
12           you will have to go quite slowly if you are asking him  
13           to comment on a passage.

14   MR MOYNIHAN:   Can I also say I personally am having some  
15           difficulty hearing my learned friend. I don't know if  
16           that may be true of others.

17   THE CHAIRMAN:   If you could read it so that Sheriff  
18           Gilchrist can follow.

19   MR HOLMES:   Sheriff, the question was:

20                       "Similarly, Mr Mackenzie said or indicated grave  
21           concern about the conclusions of the independent experts  
22           in Durham and also Mr Wertheim. Again, after hearing  
23           that you didn't then go to speak to these independent  
24           experts, again", to which your answer was no.

25                       You said that at that stage you had already

1 submitted your report in which you concluded there was  
2 no basis for a prosecution.

3 "This was the interview of Mr Mackenzie after that  
4 it simply reinforced the view that I'd already taken."

5 Can we take it from that that the interview with  
6 Mr Mackenzie was reinforcing your view that there was no  
7 basis for a prosecution?

8 A. Yes.

9 Q. Thank you.

10 The other part I would like to ask you about -- for  
11 those using LiveNote it is at page 105 and it is at  
12 line 24 -- you are asked:

13 "We understand that he may have been suspended.  
14 [That's referring to Mr Mackenzie] were you aware of  
15 that", and your response was:

16 "If he had been, I would probably have been aware of  
17 it."

18 Are we to take it then that you are not aware of  
19 Mr Mackenzie having been suspended?

20 A. I don't know. I'm simply saying that if he had been I  
21 would probably have known about it but I don't  
22 specifically remember now whether I knew that he had or  
23 had not been suspended.

24 Q. Mr Mackenzie's own evidence is to the effect that he was  
25 not suspended at that point in time.

1                    Would you have any reason to disagree with him?

2     A.    No, I simply don't remember anything about that.

3     Q.    Turning to the documents that were referred to, if I  
4           could take you to first CO1061 and it is page 2 of that  
5           document.

6                    This is a letter from yourself to Mr Mackay; is that  
7           correct?

8     A.    Yes.

9     Q.    Mr McKay was the officer responsible for the Tayside  
10          investigation; is that right?

11    A.    Yes.

12    Q.    It's a short letter but the main body of it says:

13                    "I do not think there is any point in taking  
14           statements from the Danish experts. As agreed at our  
15           meeting, the experts in Durham should be asked to look  
16           at the fingerprint from the tin with a view not only to  
17           then indicating whether they agree with the Danish  
18           experts but also whether they can offer an explanation  
19           for SCRO having got the identification wrong."

20                    Now, would you agree that, on the face of it, that  
21           letter appears to assume at that stage that the  
22           identification provided by the SCRO experts was, in  
23           fact, wrong?

24    A.    Well, I think the answer is the same to the one that I  
25           gave earlier. I could have put in "allegedly" every

1 time I referred to this issue of whether there had been  
2 a mis-identification. But at this point the Crown have  
3 gone to entirely independent experts with no prior  
4 involvement in the case who said that this was a  
5 mis-identification and the Crown was, if you like,  
6 provisionally accepting that while the matter was under  
7 investigation.

8 Q. Do you recall what the terms of the instructions were to  
9 the Durham experts?

10 A. Well, I think they are in the -- I've seen the document  
11 in which I set out what it was I wanted the Durham  
12 experts to do. I wanted them to look at the same  
13 material that the SCRO officers had looked at and offer  
14 an opinion. So it wasn't just an opinion on whether  
15 this was or was not Shirley McKie's fingerprint, it was  
16 an opinion on the conclusions that had apparently been  
17 reached by the SCRO officers.

18 Q. Indeed, so. Their instructions accord with the terms of  
19 this letter, which is basically asking the Durham  
20 experts whether they thought that the SCRO experts were  
21 wrong and, if so, why?

22 A. Yes.

23 Q. Why is it that you say in that letter that you don't see  
24 any need to take statements from the Danish experts?

25 A. Well, we had a report from the Danish experts and the

1 focus at this stage was on what the SCRO officers had  
2 done and not on the question of whether or not this was  
3 Shirley McKie's fingerprint.

4 Q. The Durham experts were instructed by reference to the  
5 Danish reports; is that correct?

6 A. Yes.

7 Q. I think the letter says that they would be asked  
8 whether --

9 A. Yes, that's right, yes.

10 Q. That is in relation to all the fingerprints or is that  
11 in relation to Y7 only?

12 A. Sorry, we're getting slightly confused here. The Danish  
13 experts only examined Q12. It was Zeelenberg and Rudrud  
14 who had examined Y7.

15 Q. Sorry, that's correct. The Danish experts examined Q12.  
16 Did they not also at some stage examine QD2?

17 A. Yes, probably, yes.

18 Q. Because they originally expressed doubts on QD2; is that  
19 correct?

20 A. Yes. That was before -- that inquiry had been  
21 instructed by my predecessor as Deputy Crown Agent, now  
22 Sheriff Crowe.

23 Q. Were you aware --

24 A. I was aware of the result, yes.

25 Q. You were aware of the fact that two Danish experts that

1 had been instructed had originally expressed some doubts  
2 as to QD2?

3 A. I have a vague recollection of that.

4 Q. Were you aware that that opinion was later retracted?

5 A. Again, I have a vague recollection of that.

6 Q. You don't recall when exactly in the time-frame all of  
7 that fits?

8 A. No.

9 Q. Perhaps I will ask Sheriff Crowe about that.

10 Are you aware of the reason that was given for that  
11 opinion having been reversed?

12 A. No. I mean, I may have been but at this point in time  
13 I've no recollection of that.

14 Q. The next document I would like you to look at please is  
15 CO0007. This is a letter from yourself to Mr Crowe who  
16 was at the time Deputy Crown Agent -- sorry --

17 A. Yes, he was, yes.

18 Q. It summarises the findings of the Mackay Report?

19 A. Yes.

20 Q. It says that neither yourself nor the Mackay team found  
21 any evidence of collusion?

22 A. Yes.

23 Q. That there is no evidence of conspiracy to provide false  
24 evidence against Ms McKie or Mr Asbury?

25 A. Yes.

1 Q. You then go on to say that those responsible for  
2 identifying the Y7 and QI2 were guilty of either gross  
3 incompetence or intentionally presenting false evidence.

4 On the face of it, those two things don't square up,  
5 do they?

6 A. Which? The no conspiracy? I think what I meant there  
7 was there was no evidence other than the fingerprint  
8 experts' opinions, the contrary opinions. There was no  
9 other evidence of a conspiracy. There was no evidence  
10 about exchange of e-mails or secret meetings or no  
11 confessions. There was nothing. All we have are these  
12 contrary opinions that these are mis-identifications and  
13 they are very bad mis-identifications. You don't  
14 necessarily have to have had a conspiracy. It would be  
15 very difficult to see how they could each independently  
16 have been guilty of intentionally presenting false  
17 evidence without there having been a conspiracy. Yes, I  
18 accept that.

19 Q. If we move on to the next paragraph ... on page 2  
20 please, the top paragraph on that you say that:

21 "Unfortunately, Peter Swann still insists that he  
22 was correct to identify QI2 as being an impression made  
23 by Marion Ross. Malcolm Graham's position is that QI2  
24 is Marion Ross' fingerprint and that Y7 is Shirley  
25 McKie's ..."

1                    Firstly, I'd like to ask about the use of the word  
2                    "unfortunately"?

3        A.        Well, unfortunate in the sense that I found the fact  
4                    that I could not find agreement amongst all fingerprint  
5                    experts to be very unfortunate.

6        Q.        Unfortunate for whom?

7        A.        Unfortunate for my investigation and for the case as a  
8                    whole. I mean, from the very start with the facilitated  
9                    meeting at Tulliallan it had been hoped there could be a  
10                   reconciliation, an understanding of how these  
11                   differences had arisen and it wasn't obtained at  
12                   Tulliallan and my investigation and the Tayside  
13                   investigation, essentially, just failed to resolve the  
14                   conflicts between the two camps.

15        Q.        So equally unfortunate then that the experts who  
16                   contradict Mr Swann and Mr Graham and, indeed, the SCRO  
17                   experts adhered to their views then?

18        A.        Well, it was just unfortunate that agreement could not  
19                   be reached. The sentence though is actually wrong, I  
20                   mean, because it's clearly a mistake because Peter Swann  
21                   is talking about Y7, his evidence about Y7 and not Q12.  
22                   So the entire sentence is just a mistake.

23        Q.        I wanted to ask you about that because you have said  
24                   earlier in your evidence that the reference to Q12 in  
25                   relation to Peter Swann is a mistake but the sentence

1 goes on to say that Q12 is identified as the impression  
2 made by Marion Ross. If it was referring to Q12 that  
3 would be correct?

4 A. Yes, but that's in relation to Malcolm Graham.

5 Q. The sentence relating to Peter Swann makes mention of  
6 Marion Ross?

7 A. Oh, yes. The sentence is simply wrong but I see in the  
8 bottom paragraph that I revert to talking about Malcolm  
9 Graham and the crime scene mark made by Marion Ross.  
10 It's just a mistake. The top sentence is a mistake but,  
11 I mean, it's not a mistake that was repeated in the  
12 report itself.

13 Q. If we can look at paragraph -- sorry, the second  
14 paragraph on that page says that you:

15 "... have not been able to interview Robert  
16 Mackenzie or Alan Dunbar from SCRO as they have received  
17 legal advice advising them not to see me. Their  
18 solicitor is reconsidering that advice and their  
19 position may change."

20 Do you have any specific recollection of that?

21 A. No.

22 Q. So if it's the position of Mr Mackenzie that he extended  
23 full co-operation and that no legal advice had been  
24 received preventing him from seeing you, that may be the  
25 case?

1 A. Well, no, I doubt it. I mean, I simply don't remember  
2 but I wouldn't have put that in unless I had some basis  
3 for believing that they had received legal advice  
4 advising them not to see me. I mean, I would not have  
5 put that in unless that was the case. I mean, it's too  
6 specific. Their solicitor is reconsidering that advice  
7 and their position may change. I got that from  
8 somewhere.

9 Q. You are not able to confirm now whether that view was  
10 correct or not?

11 A. I have no recollection beyond what is stated there.

12 Q. If we turn to paragraph 6 of that same page, the one  
13 that begins, "If Crown Counsel ..." It says:

14 "If Crown counsel instruct no proceedings in  
15 relation to SCRO officers, I will arrange to see Iain  
16 McKie and/or Shirley McKie to explain the Crown's  
17 position."

18 Was it common in 1999 to discuss the decision to  
19 prosecute or not with someone who had made a complaint?

20 A. It was not common but it would not be unheard of.

21 Q. It's not something you could have done in every case  
22 because you would have spent your life in meetings with  
23 alleged victims of offences.

24 A. Yes.

25 Q. Was Ms McKie's case treated with kid gloves, perhaps,

1           because of the fervour with which her complaint was  
2           being approached?

3       A.    No. I would be interested in any examples of the way in  
4           which it was thought to have been conducted with kid  
5           gloves.

6       Q.    Well, the decision to meet with either Mr McKie or  
7           Ms McKie you have said is not unheard of. It is  
8           certainly not common.

9                    Do you recall why, for example, that decision was  
10           taken?

11     A.    I have met with complainers in other cases.

12     Q.    But you don't recall in this case why the decision was  
13           made?

14     A.    Well, my investigation started with a meeting with  
15           Mr McKie and Shirley McKie's uncle. I see nothing odd  
16           in the fact that at conclusion of the investigation I  
17           was going to speak to Iain McKie and Shirley McKie and,  
18           as I say, I have in other cases seen complainers at the  
19           conclusion of investigations to explain why, to the  
20           extent that I am able to explain, but to tell them what  
21           decision has been taken as regards proceedings.

22     Q.    I understand, but you are aware that there has been a  
23           very large amount of publicity associated with this  
24           case.

25                    Is that something that the Crown were wary of?

1 A. Sorry, did you say the Crown were "aware" of or "wary"  
2 of?

3 Q. Wary.

4 A. Wary of. Well, the Crown would always have an interest  
5 in not being the subject of adverse publicity but it  
6 didn't affect anything that I did in the investigation  
7 of this complaint.

8 Q. The next document I would like to look at, Sheriff, is  
9 CO0008, please.

10 Again, that's another letter from yourself to  
11 Mr Crowe indicating that you wished to interview  
12 Mr Mackenzie, Mr Dunbar, Mr Graham and Mr Swann.

13 Paragraph 2 makes clear your intention, which is to  
14 put the Durham report to them and to try to persuade  
15 them to change their position.

16 A. Sorry, to see whether this persuades them to change  
17 their position, yes. Throughout this investigation I  
18 was hoping that the experts would agree and they never  
19 did.

20 Q. It seems from this letter and the one that we looked at  
21 previously that the hope was that those supportive of  
22 the identification would change their position, not  
23 those who had been instructed subsequently?

24 A. I can only repeat that throughout the investigation my  
25 hope had been that a consensus could be arrived at but a

1 consensus was never reached. But if you're trying to  
2 suggest that I was trying to ensure that there would be  
3 a prosecution, I reject that totally. I most certainly  
4 was not.

5 Q. No, not at all but it appears that the prevailing view  
6 at the time was that Mr Swann, Mr Graham and the SCRO  
7 experts were the experts who ought to change their view.

8 A. It doesn't say "ought to"; it says, "to see whether this  
9 persuades them to change their position".

10 There is no doubt that I was placing weight and the  
11 greatest weight on the opinions of the independent  
12 experts and, as this records, I was wishing to speak to  
13 those who were giving a contrary view to see whether the  
14 views of these independent experts changed their  
15 position. That's what I was doing.

16 But I wasn't anxious to persuade them to change  
17 their position. I certainly hoped that there would be  
18 a consensus but it wasn't my job and I certainly didn't  
19 set out to try and persuade anyone to change their  
20 position. It's perhaps unfortunate that the word  
21 appears there, but it's not me that's persuading, it's  
22 just to see what this independent expert evidence, what  
23 effect it has on them and whether it makes them change  
24 their position.

25 Q. Indeed, it's perhaps unfortunate that word "persuade"

1 has been used but it's also perhaps unfortunate that the  
2 only references to anyone changing their view are in the  
3 preceding letter to Mr Swann and Mr Graham and, in this  
4 letter, to Mr Mackenzie and Mr Dunbar?

5 A. I was doing what the letter sets out. I wanted to judge  
6 their reaction to what would essentially be the  
7 prosecution case. I was attempting to assess whether  
8 there were reasonable prospects of persuading a jury  
9 that there had been a mis-identification and that the  
10 only explanation could have been that it was wilful.

11 Q. In doing so, you have said that you attached some  
12 significant weight to the opinion of the independent  
13 experts.

14 A. Yes.

15 Q. Very much because they were independent experts; they'd  
16 not been previously instructed and had not expressed a  
17 view?

18 A. Yes.

19 Q. But the terms of the instruction of those experts were  
20 to the effect that they ought to look at the marks to  
21 see whether SCRO had mis-identified, in particular, Y7  
22 and, if so, why.

23 A. Yes, because the Crown had obtained or it was HMCIC, I  
24 think, who obtained the independent report from Rudrud  
25 and Zeelenberg saying that they got it wrong. I was now

1 going to further independent experts and asking them to  
2 assess the SCRO evidence in the light of this other  
3 independent expert evidence that they had got it wrong.

4 Q. So the starting point for these independent experts is  
5 that SCRO experts are wrong, let's find out why?

6 A. That other independent experts say they are wrong and  
7 asking for them to comment. I'm asking for them to  
8 assess the SCRO evidence in the light of this  
9 independent -- the starting point wasn't I went to  
10 Durham and said, "I think the SCRO officers may have got  
11 it wrong. Will you have a look at it and see what you  
12 think". The starting point was that independent experts  
13 from Denmark -- sorry, the other two had said that this  
14 was a mis-identification. That was the starting point.  
15 For me I then go to further independent experts and  
16 said, in effect, "What do you make of this".

17 Q. The starting point for Durham then is that there has  
18 been a mis-identification. Before they begin to examine  
19 the materials, the starting point is that there has been  
20 a mis-identification; is that not right?

21 A. Yes, that the Danish experts say there has been a  
22 mis-identification.

23 Q. Indeed. The only reason that I'm going down this line  
24 is that much has been made earlier in this Inquiry about  
25 the influence that can be exerted on experts who are

1 expressing their opinion.

2 There is, in relation to other matters in the case,  
3 a form which has been filled out in a way which is  
4 perhaps or which has been suggested, suggests a possible  
5 outcome to the experts who are examining the fingerprint  
6 material.

7 Now, are the Durham experts not in the same  
8 position? They are having an outcome suggested to them  
9 and they are working from that starting point?

10 A. No.

11 Q. They were aware of the allegation it was a  
12 mis-identification, were they not?

13 A. Yes, but that's what they were helping me investigate.

14 I mean, this is an entirely different scenario from  
15 experts who are looking at a mark and there is no  
16 dispute, they are simply being asked for a view. It's  
17 perfectly sensible they should not be aware of other  
18 views when they do that but this isn't where we were.  
19 This was a dispute as to whether this was or was not a  
20 mis-identification. That was my starting point and the  
21 Durham experts were there to help me assess this. They  
22 weren't there to offer yet another assessment of Y7 or  
23 Q12. That had already been done by other independent  
24 experts. They were there to help me answer the  
25 questions that I was posing, which is: how could this

1           be? If it is, how could this be?

2       Q.    Can we have a look at CO1061, please. If we move on to  
3           the next page, please. That is the letter that we were  
4           looking at some moments ago, I think. It says:

5                 "I do not think that there is any point in taking  
6           statements from the Danish experts. As agreed at our  
7           meeting, the experts in Durham should be asked to look  
8           at the fingerprint from the tin with a view not only to  
9           them indicating whether they agree with the Danish  
10          experts but also whether they can offer an explanation  
11          for SCRO having got the identification wrong."

12                So, as you say, you're not asking for their view on  
13          QI2 and on Y7; you're not even asking if the SCRO  
14          experts are wrong; you are asking why they are wrong.  
15          Is that not the case?

16       A.    Whether they agree. It's with a view not only to them  
17           indicating whether they agree with the Danish experts.  
18           So I was asking them. I mean, I was asking them to  
19           offer a view on that and, if they did agree, whether  
20           they could offer an explanation for SCRO having got the  
21           identification wrong. It would have been wrong if they  
22           agreed with the Danish experts.

23                I mean, again, perhaps the wording could have been  
24           improved but I think this is a level of nit-picking. I  
25           was going to the Durham experts to get them to help me

1 carry out the investigation that I had been tasked to  
2 undertake and I was asking them whether they agreed with  
3 the Danish experts and, if so, whether there was an  
4 explanation as to how SCRO would have got it wrong. I  
5 mean, I just can't even begin to understand why anyone  
6 would think that that is not an appropriate approach in  
7 the circumstances that confronted me.

8 THE CHAIRMAN: Had you not asked them whether they agreed  
9 with the Danish experts then the point would be fair  
10 enough but where you asked them whether they agreed that  
11 means they've got to form their own opinion first?

12 A. Yes and the reference to an explanation for SCRO having  
13 got the identification wrong, they only reach if they  
14 agree with the Danish experts.

15 MR HOLMES: I make no criticism of your approach but what is  
16 being done is that a proposition is being put to them  
17 and they are asking whether they agree with it. They  
18 are not being asked, as of new, to look at Y7 or Q12.

19 A. Well, in effect, they are. But knowing -- knowing --  
20 what conclusions others have reached. But, I mean, I  
21 was in no doubt that they had to be aware of the  
22 full background. They had to be aware of the dispute  
23 because they were there to assist me in trying to work  
24 out why there was this dispute.

25 Q. Absolutely, and I say again I make no criticism of your

1 own approach, but what will happen in due course, I  
2 expect, is that my clients may be criticised by others  
3 because their instructions, in looking at a particular  
4 mark, are in the form of a proposition that is being put  
5 to them and I want to be in a similar position when it  
6 comes to examining the other experts, so you will  
7 appreciate my reason for asking. The Durham experts  
8 were aware of what the position was before they looked  
9 at the marks.

10 A. Yes.

11 THE CHAIRMAN: We have already had the response to that  
12 issue. Sheriff Gilchrist draws a distinction between  
13 your clients looking at it and the situation in which  
14 the Durham experts found themselves.

15 MR HOLMES: If we can move on to CO0006, please.

16 Again, that's another letter from yourself to  
17 Mr Crowe. The first page and a half of that would  
18 appear to be notes of a meeting between yourself and  
19 Mr Mackenzie; is that correct?

20 A. Yes.

21 Q. You agree that Mr Mackenzie seems to have explained the  
22 reason for his own opinion to you in some detail?

23 A. Yes.

24 Q. I am interested in the penultimate paragraph on page 2  
25 which says you cannot even get unanimity on that

1 point -- the point you were referring to there was  
2 whether or not the fingerprints had been correctly  
3 identified -- let alone establish that, even if there  
4 was a mis-identification, it was made wilfully.

5 A. Where are we in this page?

6 Q. The penultimate paragraph.

7 So there is at 19th July 2001 no agreement amongst  
8 the experts that you've consulted as to whether the SCRO  
9 officers are correct or not?

10 A. Yes.

11 Q. You say last on page 2, and this is a passage to which  
12 you have already referred by my learned friend  
13 Miss Galbraith:

14 "Although I tend to be unduly swayed by the last  
15 expert to whom I have spoken ..."

16 Firstly, as I read that letter, who was the last  
17 expert to whom --

18 A. It would be Robert Mackenzie.

19 Q. Mr Mackenzie. Why unduly influenced?

20 A. I have already made the point that I concluded that  
21 every expert I spoke to was genuine and was trying to be  
22 honest. So not having any doubts about their  
23 credibility, I invariably found their technical  
24 explanation for their view persuasive. Unduly: well  
25 perhaps I shouldn't have said "unduly", perhaps I should

1           have just have said I tend to be swayed by the last  
2           expert.

3       Q.    Thank you. Can we move on to CO4076, please. That  
4           seems to be a letter from Mr McKie to yourself of  
5           May 2002; is that correct?

6       A.    Yes.

7       Q.    It refers to the opinions of 129 world fingerprint  
8           experts.

9       A.    Yes.

10      Q.    Perhaps something of a facetious question but did you  
11           see opinions of any of these 129 world experts?

12      A.    Well, no is the answer to that. I saw the opinions of  
13           the experts whose reports or conclusions I referred to  
14           in my report. Whether they are amongst the 129, I don't  
15           know.

16      Q.    If there are 129 and they are all to express a view on  
17           Y7, Q12 and the other marks we may be here for quite  
18           some time.

19                    Can we have a look at page 2, please. The last  
20           paragraph of that says:

21                    "I would appreciate your comments and early  
22           confirmation that you do not intend to accept any SCRO  
23           experts as expert witnesses, given that organisation's  
24           intransigence and failure to co-operate in establishing  
25           the truth."

1                   It doesn't appear that Mr McKie is going to give up  
2                   very easily by that last paragraph, does it?

3     A.    No.

4     Q.    Had you already met with him by that stage to explain  
5           why you weren't prosecuting the SCRO experts?

6     A.    Well, could you remind me the date of the letter?

7     Q.    The letter is 2002, 2nd May?

8     A.    Oh, I think so. The decision to take no proceedings was  
9           taken August 2001. I would have met Mr McKie shortly  
10          after, so it would have been months before this letter.

11    Q.    Months before?

12    A.    Well, that would be my recollection. I don't recall  
13          there being any delay between the decision to take no  
14          proceedings and my meeting with Mr McKie. But I don't  
15          actually remember when I met with him.

16    Q.    In May 2002 you are still in correspondence which makes  
17          it fairly clear he's not terribly happy about the  
18          prospect of the SCRO experts giving evidence again?

19    A.    Yes.

20    Q.    Again, were you concerned about Mr McKie's reaction?

21    A.    I understood his reaction. He clearly believes that  
22          there was a very serious error made and more, that it's  
23          not simply an error, there's criminality. In the light  
24          of that I can understand the position that he is  
25          adopting in that letter.

1 Q. Standing the level of publicity that this case has  
2 received throughout the years, were you concerned about  
3 anything else?

4 A. Sorry?

5 Q. Were you concerned about the level of publicity that  
6 this case had received and the possible effect that that  
7 might have on any future evidence from SCRO experts?

8 A. That was a potential source of concern but I'm not  
9 actually aware of any case. I mean, obviously, the  
10 McKie case has been bubbling away for several years and  
11 I'm not actually aware of any case suffering as a result  
12 of the adverse publicity that it has attracted.

13 Q. I'm asking was there any concern that that might happen  
14 around about the time of this letter?

15 A. Not that I can recall.

16 Q. The final couple of items that I would like to refer you  
17 to are, firstly, CO4081. That's the letter from Mr Bell  
18 to you on 31st May 2002.

19 Again, this letter makes reference to the response  
20 to Mr McKie. So it is clear there was some ongoing  
21 dialogue at that time. Would that be fair?

22 A. Yes.

23 Q. This letter appears to be about how to avoid  
24 a constructive dismissal claim; is that correct?

25 A. Yes.

1 Q. Is it clear from the fact that the SCRO are taking  
2 advice about constructive dismissal in May 2002 that the  
3 intention is that these officers will never give  
4 evidence again?

5 A. They were waiting for a decision from Crown Office.  
6 They may have anticipated that that decision would be  
7 negative.

8 Q. So it appears that SCRO's position is that these  
9 officers will not be able to give evidence again and  
10 they are looking for confirmation Crown Office share  
11 that view; is that fair?

12 A. They are looking for a decision. I mean, I think he is  
13 letting me know what the possible consequences of a  
14 decision are and it's certainly my recollection  
15 throughout this that SCRO were keen to have the Crown  
16 make up it's mind one way or t'other and the Crown's  
17 position was we wanted to await the outcome of the civil  
18 proceedings. SCRO were keen that we make a decision and  
19 clearly he is making me aware of what implications that  
20 a decision not to use them might have on their  
21 employment status.

22 Q. You were asked earlier about information from Crown  
23 Office to SCRO that the possibility was that if SCRO  
24 opted to use these officers again, the Crown Office, as  
25 the customer, effectively, might object to their use.

1 A. Yes.

2 Q. Do you recall when that was done?

3 A. Sorry, when the ...?

4 Q. Do you recall when that intimation took place?

5 A. No, not the reference to the specific document.

6 Q. So far as the letter of 31st May 2002 is concerned, the  
7 one we're looking at right now, that had no effect on  
8 the Crown's position, they were merely being asked for a  
9 view; is that right?

10 A. We weren't asked for views, no.

11 Q. You were being asked for a view but it had no particular  
12 affect on your position?

13 A. Sorry, are we being asked for our views? I don't think  
14 we are. He is offering a suggestion as to a response to  
15 Mr McKie.

16 THE CHAIRMAN: The third paragraph seems to be, as it were,  
17 warning the Crown --

18 A. Yes.

19 THE CHAIRMAN: -- it could get involved in this if it  
20 maintains its attitude.

21 A. I mean, it's really just an update being given by SCRO  
22 as to the advice that they have received from an  
23 employment specialist; so he's just drawing it to my  
24 attention and the possible implications of that advice.

25 MR HOLMES: Yes, it relates to a constructive dismissal

1 claim.

2 A. Yes.

3 Q. In fact, you will be aware that one of the officers did  
4 end up taking SCRO to the employment tribunal.

5 A. Yes.

6 Q. And was successful on an unfair dismissal claim.

7 A. Yes, I'm aware of that from press reports.

8 Q. Can we briefly look at CO4086, please.

9 Again that is a letter from Mr Bell to you, this  
10 time on 12th February 2004. So nearly two years later  
11 it's still being debated whether these officers were to  
12 return to giving evidence.

13 A. Yes.

14 Q. Mr Bell reports that Mr Innes' recommendation is they do  
15 return to giving evidence?

16 A. Yes.

17 Q. But, so far as you recollect, they never did so?

18 A. That is my understanding, yes.

19 Q. It is clear also from the final paragraph that the  
20 officers expected to return to giving evidence?

21 A. Yes.

22 Q. And with individuals who had taken quite some  
23 considerable time to qualify and many years of  
24 experience behind them, that's only to be expected;  
25 isn't that fair?

1 A. Yes, yes, and I think it is regrettable that it took so  
2 long to resolve the matter. I think we started out with  
3 very good -- well, I think the reasons were very good  
4 from the very beginning that the civil proceedings  
5 created the possibility of a judicial determination that  
6 could have resolved the matter one way or t'other and we  
7 were waiting for those. It's just unfortunate that the  
8 civil proceedings never provided that outcome and they  
9 took an interminable time.

10 THE CHAIRMAN: Much longer than one might have anticipated  
11 because there were complications.

12 A. Yes.

13 MR HOLMES: Can I ask, does that final paragraph suggest to  
14 you that the Crown Office position, that nothing would  
15 be done until after the outcome of the civil trial, had  
16 been communicated to these officers or not?

17 A. I don't know what was said to the officers about the  
18 Crown's position. SCRO clearly knew what the Crown's  
19 position was and they refer to it in the second  
20 paragraph.

21 Q. It's made clear that the position would be kept under  
22 review in the light of developments in the civil case.

23 A. Yes.

24 Q. You agree that it's unfortunate that the decision took  
25 some considerable time --

1 A. Oh absolutely. Absolutely.

2 Q. And you agree that it was unfortunate that the decision  
3 was not made despite the fact that the officers  
4 themselves went through what has been referred to as a  
5 "return to work matrix" and I think what you referred to  
6 in your own evidence as a "re-education programme"?

7 A. Yes.

8 Q. But, to your knowledge, none of these officers ever  
9 returned to giving evidence after this case?

10 A. To my knowledge, they didn't, no.

11 MR HOLMES: Thank you very much.

12 THE CHAIRMAN: Have you any questions?

13 MR MOYNIHAN: Yes, sir. I think with an apology to all, I  
14 am about to confess I made a completely elementary  
15 mistake that Sheriff Gilchrist pointed out to me. I  
16 forgot to ask him to adopt his statement, but there was  
17 more of a reason. There is one particular part of it he  
18 wishes to correct; so if I could give him the  
19 opportunity to correct that and then release him for  
20 other matters.

21 A. It is paragraph 28 which records that I wish to speak to  
22 the four experts Peter Swann, Malcolm Graham, Robert  
23 Mackenzie and Alan Dunbar. The next sentence then goes  
24 on to suggest that they agreed with the identifications  
25 of Y7 and Q12.

1                   Now, of course, it really should say "they agreed  
2                   with the identifications of Q12 and/or Y7" because at  
3                   that stage Robert Mackenzie, although he subsequently  
4                   agreed with the identification of Q12, had not actually  
5                   looked at it. I'm not really sure what Alan Dunbar's  
6                   position was but I presume it would be similar to Robert  
7                   Mackenzie's. Of course, Peter Swann had examined Y7.

8                   So it's just that it's slightly misleading. It  
9                   rather suggests -- well, it does suggest that I expect  
10                  that I thought they agreed with the identifications of  
11                  both when what I really meant to say was that to the  
12                  extent that they had examined any of the questioned  
13                  marks, they agreed with the identifications of SCRO.

14                  So I think it could be corrected by in the third  
15                  sentence in paragraph 28, it should read:

16                  "They agreed with the identifications of Q12 and/or  
17                  Y7."

18                  Sorry, I hope that's clear.

19       THE CHAIRMAN:   That's fine.

20       MR MOYNIHAN:    I have no other questions.

21       THE CHAIRMAN:    Could I just detain you for a moment and get  
22                          one matter clear in my mind. On the issue of any of the  
23                          four witnesses of whom it was known publicly had  
24                          formed an opinion which was disputed, if any of them  
25                          were called to give evidence by the Crown, your concern

1           was they would be cross-examined about that and that  
2           would, as it were, detract from the essence of the  
3           prosecution, a question which had nothing to do with the  
4           subject at all?

5       A.    Had the potential to do that.

6       THE CHAIRMAN:   Yes, and defence counsel would be likely to  
7           take the opportunity, if they wanted to attempt in some  
8           way to discredit them. So as long as there was what I  
9           might call a cloud hanging over it, until it was  
10          dispelled it was better to keep those witnesses from  
11          being put in that position?

12      A.    Yes.

13      THE CHAIRMAN:   So far as other people who had expressed a  
14          view, that's within Scottish Criminal Records Office,  
15          that wouldn't necessarily be known and there would be,  
16          as I would have thought, no obligation to disclose the  
17          fact because it would be irrelevant to the prosecution  
18          that was being undertaken.

19      A.    Yes. I don't think it would be exculpatory evidence  
20          that had to be disclosed and it would be my  
21          understanding that the involvement of the other SCRO  
22          officers would not be widely or publicly known and  
23          therefore the likelihood of the matter being raised by  
24          defence counsel was negligible.

25      THE CHAIRMAN:   So really, dealing with your first concern,

1 that didn't arise as far as they were concerned or only  
2 to a very limited, marginal extent?

3 A. Yes and also that even if it had been known, their  
4 involvement was so much less, almost peripheral -- well,  
5 perhaps not peripheral, but it was so much less, that  
6 the scope for defence counsel making mischief would be  
7 much reduced.

8 THE CHAIRMAN: Thank you very much. Thank you for your help  
9 and I hope we haven't disrupted your own list too much  
10 by keeping you here so long.

11 A. Thank you.

12 **(The witness withdrew)**

13 THE CHAIRMAN: What do you want to do?

14 MR MOYNIHAN: Sir, we are currently making an enquiry. The  
15 next witness would have been Sheriff Murphy but I know  
16 he had other professional commitments tomorrow and  
17 Miss Alan is making an enquiry with him whether he would  
18 prefer to start even tomorrow morning or if I could hold  
19 him back to next week.

20 THE CHAIRMAN: I leave it to you to accommodate him because  
21 obviously he has other duties.

22 MR MOYNIHAN: I suspect that starting this afternoon would  
23 make no difference either way to him coming back.

24 THE CHAIRMAN: Well, I think we shouldn't prolong too long  
25 after the time we are sitting if we are not going to get

1           anywhere.

2       MR MOYNIHAN:   What I was thinking, sir, it 3.55. I think we  
3           are probably is as well to adjourn just now because I  
4           don't think to give Sheriff Murphy ten minutes this  
5           afternoon would make a jot of difference really to the  
6           question of his availability.

7       THE CHAIRMAN:   I leave it to you to arrange as best we can  
8           what is convenient to him. Thank you very much. We  
9           will sit again at 10.15 in the morning.

10       **(3.55 pm)**

11           **(Adjourned until 10.15 am the following morning)**

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