

Friday, 9th October 2009

1

2 (Afternoon session)

3 (1.55 pm)

4 JOHN NEIL MACLEOD (continued)

5 Further examined by MR MOYNIHAN

6 Q. Good afternoon, Mr MacLeod?

7 A. Good afternoon.

8 Q. What I want to do is just to complete three points that  
9 you have highlighted on the mark Q12 that we have not  
10 covered.

11 In relation to Q12, if I start again with a fresh  
12 image, your Q12 is FI0163A and if I bring it up twice.  
13 These are points that you have highlighted on the mark  
14 that you are indicating have no -- points on the mark  
15 that have no corresponding position in the print?

16 A. Yes.

17 Q. I will give us both and reverse them on this occasion.

18 The three that I have not yet discussed are 7, 8 and  
19 10. I can take these relatively briefly. In relation  
20 to point number 7, what I understand would be the  
21 response to your contribution in relation to point 7 is  
22 that point number 7 -- well, first of all, Q12 occurs in  
23 an area where there is evidence of other interference,  
24 either by other fingerprints or by smears or whatever,  
25 Q12 in general?

1 A. Yes.

2 Q. In particular, as one goes out from the core, there is

3 increasingly a risk of getting into an area that's

4 lacking in dependability because of the background

5 noise.

6 A. Yes.

7 Q. The point that I mentioned to you this morning that my

8 eye fastens on in Q12 and no-one else's eye seems to

9 fasten on is what I describe as the hook?

10 A. Yes.

11 Q. Just simply for the record, I will mark where the hook

12 is **(indicated)**. No-one seems to accept the suggestion

13 from me that that is a correct fingerprint feature. It

14 seems to be an artefact of some description; is that

15 correct?

16 A. Yes. If you were to follow the ridge above the hook

17 which goes more or less horizontal, if you follow it

18 round to the left it would match up with a different

19 impression which is between 8 and 9, the core of what --

20 well, between 8 and 9 there is a separate impression on

21 the same photograph. That ridge would appear to match

22 up with the ridges below, between 8 and 7. So that

23 could be part of another impression.

24 Q. I am grateful to you for that because then what I wonder

25 is what is the reliability of the feature that you have

1 as number 7, which is further out from the core of Q12  
2 and into the area that may be affected by just  
3 contamination by a number of other factors?

4 A. It could be but the ridge appears to go downward at more  
5 or less in a vertical slope to 6.00 as is similar to the  
6 ridges on either side. I feel it is part of the mark  
7 actually.

8 Q. I will leave it really there because what I was wanting  
9 to do was simply to get your comment. If in a position  
10 intermediate between the core to the upper right and the  
11 point number 7 one finds an area that's unreliable,  
12 perhaps, showing a superimposition of another print, the  
13 only point was to suggest that it has not then  
14 dependable or reliable to take other features in that  
15 vicinity into account?

16 A. It could be.

17 Q. Mark number 8: again, I understand that those who have  
18 commented from SCRO on your charting would have some  
19 hesitation about the reliability of point number 8,  
20 again, because it is verging to an area where the mark  
21 Q12 is becoming unreliable. I just put that for your  
22 comment.

23 A. It appears to me that the point I've marked 8 is a ridge  
24 ending or part of -- there's a gap between the point  
25 marked 8 and the ridge above it, slightly to the right.

1            If you take the mark on the left, the ridge on the left  
2            of point 8, it appears to either -- it appears to  
3            bifurcate with a ridge on the right and it appears to  
4            flow as if it would join up with the ridges at 12.00 up  
5            from the core.

6        Q.    So you are reasonably comfortable with that as a point?

7        A.    Either where the point 8 is marked or just above that  
8            bifurcation. It's not particularly clear and, again,  
9            the second ridge from the left would appear to continue  
10           or perhaps bifurcate with a ridge between the bridge on  
11           the right.

12       Q.    The final point again is the same sort of point, is  
13           point number 10 which you have above the core.

14       A.    Yes.

15       Q.    In this particular instance, I have another image that  
16           will help. On the left-hand side if I bring up on the  
17           left FI2409.02. The computer started to misbehave  
18           yesterday and it is actually not behaving itself. It  
19           may not get some days off next week like the rest of us.

20                    It has been brought up as FI2409.01. What I am  
21            going to do is highlight one part of this charting for a  
22            reason that will become evident just in a second. What  
23            I have brought up is a charting done by Mr Wertheim. If  
24            I show you there is a line going across the image from  
25            left to right just in the vicinity of your point number

1           10, a straight line, a white line. Do you see that?

2    A.    Yes, I see it.

3    Q.    With rather peculiar arched white lines either side of  
4           your number 10?

5    A.    Yes, I've seen that.

6    Q.    We have since seen that beneath these markings on the  
7           tin there's a picture of a Victorian carriage and this  
8           is part of the metalwork of the Victorian carriage. The  
9           only reason I mention that is it enables us with a  
10          degree of confidence to compare what you are  
11          highlighting as point 10 with what Mr Wertheim has drawn  
12          on his image.

13                 So on Mr Wertheim's image, if I show you, the area  
14                 that you are referring to for point 10 is roughly where  
15                 I've put now the red circle (**indicated**)?

16   A.    Yes.

17   Q.    The significance of the -- it must be magenta, which was  
18          Mr Wertheim's only colour -- the magenta oval which is  
19          there is that Mr Wertheim used the magenta oval to  
20          depict the area he regarded as sufficiently clear to be  
21          dependable in the mark Q12?

22   A.    Yes.

23   Q.    You will see that he has correspondingly sought to draw  
24          in the ridges that he can see.

25   A.    Yes.

1 Q. It would follow from that that Mr Wertheim's image would  
2 suggest -- and I put this only for your comment -- that  
3 your point 10, since it must be somewhere within the red  
4 circle, is in an area that, again, because of reasons of  
5 contamination, background noise and whatever else, is in  
6 an area where one is beginning to doubt the reliability  
7 of what may be observed.

8 A. Yes.

9 Q. You can see that point?

10 A. Yes.

11 Q. I am grateful to you, Mr MacLeod.

12 If we save that image.

13 MISS BAHRAMI: That's saved as FI0910.12.

14 MR MOYNIHAN: Thank you, sir.

15 Thank you, Mr MacLeod. I have no further questions.

16 THE CHAIRMAN: Yes. Are there any applications?

17 MR SMITH: No, thank you, sir, not from me.

18 THE CHAIRMAN: Miss Grahame?

19 MISS GRAHAME: No, thank you, sir.

20 THE CHAIRMAN: Mr Holmes?

21 MR HOLMES: Sir, I do have an application. I am pleased to  
22 advise that it has been considerably curtailed as a  
23 result of discussions I have had with my learned friend,  
24 Mr Moynihan, so I have only four areas to cover with  
25 Mr MacLeod. Those are: firstly, the issue of a single

1 as opposed to a double touch in Y7; secondly, his theory  
2 as to the deposition of Y7; thirdly, his opinion on the  
3 sufficiency of Y7 in his reports in 2004/2005; and,  
4 fourthly, the preparation of those reports.

5 THE CHAIRMAN: Yes, very good.

6 **Cross-examined by MR HOLMES**

7 Q. Mr MacLeod, I start off asking you about the opinion  
8 that you have given on whether Y7 is a single or a  
9 double touch.

10 You say that it's in two distinct parts; is that  
11 correct?

12 A. Yes, that's how I feel about it but it was probably made  
13 at the same time within just the movement.

14 Q. Yes, I understand. What you are saying is that you can  
15 see that it is clearly in two different parts and that  
16 those parts are facing in different directions; is that  
17 correct?

18 A. Yes.

19 Q. Would, in your view, any examination that proceeded on  
20 the basis that the mark was in a single part therefore  
21 be flawed?

22 A. Well, I would have to really. I feel there's a bit of  
23 movement in the mark which was made by the thumb moving  
24 however slightly. However, that might not detract  
25 necessarily from the position of characteristics either

1 above or below.

2 Q. But in your view what the mark is certainly not is a

3 single touch with a continuous ridge flow; is that

4 correct?

5 A. No, not exactly. Some of the ridges do continue to flow

6 from top to bottom but at an unusual angle.

7 Q. Can I ask about your theory as to the deposition of the

8 mark. Part of the reason you concluded it was a right

9 thumb was because of its position on the right-hand side

10 of the doorframe; is that correct?

11 A. No, not at all. When I looked at the mark I thought

12 it's a right thumb. The first time I saw it I thought

13 it was a right thumb.

14 Q. I'm sorry, but in your report you mention that it could

15 easily have been left by a left thumb?

16 A. It could have been, yes.

17 Q. You demonstrated earlier on some of the ways in which

18 the mark could have been deposited. I wonder if I could

19 ask would it make a difference if the door that you see

20 in the photographs of the hallway and the bathroom had

21 been removed?

22 A. Sorry, I don't understand ...

23 Q. If at the stage at which the mark was deposited would it

24 make a difference to your theory as to how that mark was

25 deposited if the door had already been removed by that

1 point?

2 A. Yes, it would have been much simpler I think to have

3 left that sort of mark at that angle if there was no

4 door there.

5 Q. In relation to the sufficiency of Y7 for examination,

6 you have said that you did not feel it should have been

7 taken to court but is that only on the basis that you

8 could not see 16 points in sequence and agreement in it?

9 A. It's a bit more than that. At that time in Scotland I

10 understood that there was a requirement for 16

11 characteristics and now there's a non-numeric standard

12 which I think applies in Scotland now. I can't see 16.

13 You are quite correct; I can't see 16 clear

14 characteristics.

15 Q. I think you have already given evidence this morning

16 that under the non-numeric system the mark as you see it

17 would be sufficient to speak to in court; is that

18 correct?

19 A. It might be.

20 Q. Is it sufficient to examine?

21 A. It might be, yes.

22 Q. Finally, can I ask you about the preparation of your

23 reports, please. You prepared your first report for the

24 Scottish Executive in, is it, June 2004? Is that

25 correct?

1 A. Yes.

2 Q. I think in that report -- and I will be corrected if I  
3 am wrong -- you identified a relatively small number of  
4 differences between the inked print and the mark Y7. I  
5 believe from recollection there were four identified in  
6 your report.

7 In the report that you prepared in 2005, there were  
8 a significantly larger number of differences identified.

9 What happened in between?

10 A. In between I spoke to the Scottish Executive who gave me  
11 instructions in this matter and by the time I reached  
12 four or five characteristics that I was not at all happy  
13 with, I did a report on that. They then asked me to say  
14 are there any more or words to that effect, "Could you  
15 highlight any more". So I, in the second report,  
16 highlighted a lot more what I would call discrepancies.

17 Q. We have heard a good deal about confirmatory bias. Is  
18 this a concept with which you are familiar?

19 A. Sorry?

20 Q. Confirmation bias or confirmatory bias, it has been  
21 referred to.

22 A. I know what you mean. I don't think it affects me.

23 Q. Do you not feel that that is something that could affect  
24 a practitioner who has provided a report highlighting a  
25 number of differences in a mark if he is asked whether

1           there are, in fact, more differences that he can  
2           discover within that mark?

3    A.   Well, I knew there were differences. I just didn't  
4           mention them in the first report. I didn't think it was  
5           necessary.

6    Q.   Why not?

7    A.   Well, if you are comparing a mark from a scene with a  
8           known mark and you get one discrepancy that cannot be  
9           explained, that is enough to disqualify it from being an  
10          ident.

11   Q.   The reason that you have given for there being a larger  
12          number of discrepancies highlighted in the 2005 report  
13          is that you were instructed to go away and see if there  
14          were any more?

15   A.   That's right.

16   MR HOLMES: Thank you, Mr MacLeod. I don't propose to ask  
17          any more questions.

18   THE CHAIRMAN: Do you have anything further, Mr Moynihan?

19   MR MOYNIHAN: I have no further questions, sir, thank you.

20   THE CHAIRMAN: Thank you very much for giving us your time.  
21          I appreciate it is a long time ago that you had to carry  
22          out this examination. Thank you for coming back for us  
23          today. Thank you very much.

24   THE WITNESS: Thank you very much, sir, may I be excused?

25   THE CHAIRMAN: Yes, indeed.

1 MR MOYNIHAN: If you do not go too far because I will have a  
2 word with you.

3 There is one point, sir, before we adjourn I should  
4 have corrected a long time ago. I interrupted Mr Holmes  
5 when he was questioning Mr Mackenzie in relation to a  
6 matter concerning Mr Swann's chartings and Mr Wertheim.

7 I have been asked to clarify that my intervention  
8 was, in fact, incorrect. I said then we had received an  
9 e-mail from Mr Wertheim in which he said there had been  
10 an error in his evidence. That is incorrect. I did  
11 receive an e-mail from Mr Wertheim in which Mr Wertheim  
12 asked to look again at charts M for Michael and N for  
13 Nicholas. In fact, that was the limit of what  
14 Mr Wertheim had said.

15 When I went further and said that he had made a  
16 mistake, that was me confusing two different matters. I  
17 am glad to put the record straight and, therefore, the  
18 question of Mr Swann's charts M and N remains to be  
19 dealt with in the evidence in due course. I am sorry  
20 for the error that has been introduced.

21 THE CHAIRMAN: You do not by any chance have the reference  
22 in the transcript?

23 MR MOYNIHAN: I will find it, sir. I think it was Tuesday  
24 afternoon. I will find it, sir.

25 THE CHAIRMAN: Very good. At least it is on the record now

1           wherever it occurred before.

2                   Now we continue on Thursday. Is that right? There  
3           is no further witness today.

4   MR MOYNIHAN:   I am sorry, sir, there is no further witness  
5           today. The next scheduled witness is Mr McKie for  
6           Thursday of next week, Thursday, Friday and, as matters  
7           currently stand, subject to any change that anyone may  
8           suggest, Mr McKie is the witness for Thursday and Friday  
9           of next week, the only witness for Thursday and Friday  
10          of next week.

11                   I am open to suggestions if people feel that they  
12          need to call another witness perhaps next week but he is  
13          the only one we have arranged.

14   THE CHAIRMAN:   I imagine that Mr McKie's statement is a  
15          fairly long one.

16   MR MOYNIHAN:   There are two parts. There is a first part  
17          which is available to the legal representatives just  
18          now. There is an unresolved question -- which I needn't  
19          take up with you -- before that is made available even,  
20          I think, to clients of the legal teams here. That same  
21          question would then affect its publication on the  
22          website on Monday. So that is part 1.

23                   Part 2, I understand, is being completed and  
24          Mr McKie's not in the hall today, the object being that  
25          he will complete part 2 in the course of today. I hope,

1 but it is no more than a hope, to be in a position to  
2 release that to legal representatives before close of  
3 play today but I cannot guarantee that. It is not  
4 within my control.

5 Then we will take matters from there. I do not  
6 myself know the content of part 2 but that is the  
7 position we are making. We have requested part 2 by  
8 close of play today with a view to transmitting it  
9 probably either by e-mail or, if it is too large, in  
10 paper form as soon as we receive it.

11 I do appreciate with Mr McKie giving evidence on  
12 Thursday of next week that it places others under a  
13 considerable burden of preparation if it is not  
14 available by close of play today.

15 THE CHAIRMAN: Very good then. Thursday at 10.00.

16 **(2.23 pm)**

17 **(Adjourned until 10.00 am on Thursday, 15th October 2009)**

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