Chapter 6

The Liverpool Hearings

Introduction

6.1 The abuse of process applications were heard by Mr. Justice Grigson at the Crown Court at Liverpool. The proceedings began in early September 2002 and concluded on 25th November 2002, on which date the prosecution offered no evidence against any of the defendants and verdicts of not guilty were entered in respect of each of them. In those circumstances the trial judge did not give judgment and there has accordingly been no determination of the issues raised in the application. I have considered the transcript of the 35 day hearing and all the documents presented to the court. I have also interviewed a number of counsel for both the prosecution and defence, solicitors acting for HMCE and for one of the defendants and indeed the judge himself. Notwithstanding the material available to me and the great assistance I have received from all those involved, it would not be appropriate for me to reach findings on all the issues raised at the hearing.

6.2 First, I did not myself hear the evidence. A transcript is no substitute for the real thing. Second, the proceedings ended part-way through the evidence of the first witness called on behalf of the prosecution. It had been intended that a large number of further witnesses should be called, including Customs officials and prosecuting counsel in the various trials. Only a partial picture was presented to the court. Third, some of the issues are themselves the subject of investigation by the police to consider whether there is evidence of criminal offences having been committed.

6.3 I accordingly restrict myself to identifying the issues as disclosed by the skeleton arguments submitted on behalf of the defendants and the prosecution, rehearsing in outline the evidence adduced in the course of the hearing where it is not summarised elsewhere in this Review and offering my views in respect of some of the issues where I am able to do so.

The Issues Raised in the Application

6.4 It is important to remember that the task of Mr Justice Grigson was not to examine all the London City Bond cases that had been before the courts. He, and the parties before him, was focussing on the specific circumstances surrounding four criminal prosecutions. In two of those prosecutions convictions had been recorded but set aside by the CACD; in one prosecution an application to stay the proceedings as an abuse had failed, but was now renewed; and in the final case no hearing had taken place. Part of the hearing before Grigson J concentrated on detailed evidence specific to those cases and is not relevant for my purposes.

6.5 In support of their applications that the proceedings should be stayed as an abuse of process, the defendants alleged manipulation or misuse of the process of the court so as to deprive them of a fair trial and further asserted that it would be unfair to try them by reason of delay. As to the second limb, that of delay, having considered all the relevant circumstances I am firmly of the view that it is most unlikely that Mr Justice Grigson would have stayed the proceedings on that ground alone. I make no further reference to delay. As to the assertion of manipulation or misuse of the powers of the court the defendants relied on a number of specific heads. There follows a table of the principal heads put forward in skeleton arguments prepared in advance of the hearing, with the prosecution's response.

Principal Grounds on which a Stay of the Proceedings was sought

	Defence Submission	Prosecution Response
1	Alf Allingon and Ed Allington were both participating informants. Customs failed to register them as such and failed to maintain reliable records of their activities and the nature and extent of the information given by them.	Alf Allington was not an informant at all in Operations Paleface and Escapade. In Manpower and Chamfer he gave more information than obliged to under the regulations. The failure to re-categorise resulted from a failure of judgment and not from any improper motive. The initial approach in relation to Alf Allington and Ed Allington was proper. The Guidelines failed to take into account the statutory obligation placed on the warehousekeeper.
2	The prosecution failed to disclose the true status of Alf Allington and Ed Allington to the courts and to the defence.	Whether Ed Allington and Alf Allington ever became participating informants was unclear. The prosecution had therefore made clear to the trial judges the actual role that both had played in events when seeking PII and asking to continue to present Alf Allington as a trade source.
3	Customs granted immunity to LCB from liability for the Bond's guarantee to the Commissioners.	The prosecution accepted that there was an implied indemnity that LCB would not be assessed in relation to diverted loads where they had given assistance to the NIS. That was sometimes necessary in order to observe the fraudulent movement of goods with the co-operation of warehousekeepers.
4	Customs permitted Alf Allington and Ed Allington to facilitate the fraud and encouraged them to do so.	The NIS played no active part in the day-to-day operations at LCB: the decision whether to open a new account or to trade was one for the Bond to take on usual business considerations.
5	Customs themselves participated in the frauds through the activities of Alf Allington and Ed Allington.	Even if everything Alf Allington and Ed Allington alleged in their witness statements were correct, there was no evidence that any Customs officer had committed any offence, or

		acted dishonestly in relation to the Commissioners or did not believe they had the right to act as they did.
6	Senior Customs officers failed to monitor the actions of Alf Allington and Ed Allington, failed to ensure they acted within legal limits and Customs' own guidelines and failed to stop fraud once there was sufficient evidence to prosecute.	The NIS were entitled to adopt a method of investigation which allowed suspect loads to move from warehouses sometimes under observation and be diverted so that enough evidence was gathered to secure a successful prosecution.
7	Customs so managed and controlled LCB as to entrap the defendants.	There was no evidence that Customs encouraged crime which would not otherwise have been committed.
8	If the evidence of Gordon Smith was accepted, there was a criminal conspiracy involving Customs officers at a high level to cover up and conceal the true role of the Allington brothers.	The prosecution rejected any suggestion of impropriety: the recollection of Gordon Smith was flawed. The sequence of events and contemporaneous documents demonstrated there had been no cover up.
9	The prosecution failed to disclose lies told by Alf Allington in his evidence to the defence.	Customs owed a duty to Alf Allington not to disclose the extent of his assistance without his consent. They were thus under a duty to seek PII rulings withholding his true status. To disclose the lies would reveal his true relationship with Customs. Trial judges were made fully aware of the situation.
10	The prosecution used evidence about AADs produced to support the prosecution which was misleading and flawed.	The allegation that Alf Allington could not properly produce AADs because they were intercepted by Customs officers before they were seen by him or entered into LCB records was completely unfounded.
11	The prosecution had failed and continued to fail to comply with their obligation under CPIA to make proper disclosure to the defence.	The prosecution had at all times properly carried out its responsibilities in relation to disclosure. The new prosecution team had carried out a complete review and the court and defence could be confident that all relevant non-sensitive material had been disclosed.

Effect of Earlier Rulings

6.6 At the outset of the abuse application the judge considered the evidential status of the findings of fact made by the CACD in *Villiers*, the findings of fact made by HHJ Harris QC in the abuse application relating to Operation Manpower, the admissions made by the prosecution in the appeals relating to Operations Fusion, Fallover and Fajita, and the findings of fact made in those appeals.

6.7 Counsel for the defendants submitted that the findings of the Court in the *Villiers* appeal should be adopted by Mr. Justice Grigson as the starting point: the Court of Appeal had heard a substantial body of evidence and the Court's findings were, it was submitted, final and determinative of the issues arising in that appeal. It would not be fair to allow the prosecution to go behind those decisions and

wrong in principle for Mr. Justice Grigson, an inferior court, to allow the prosecution to reopen the issues there determined.

6.8 The judge rejected that submission. He held that the proceedings before him were not the re-hearing of the appeal and the prosecution were not precluded from calling evidence in relation to any relevant issues whether or not that issue had been the subject of a finding by the Court of Appeal. The judge further held that the admissions made by the prosecution in the Fusion, Fajita and Fallover appeals and the findings of fact made by the CACD in those appeals were inadmissible in the proceedings before him. As to the conclusions reached by HHJ Harris QC in the abuse of process argument relating to Operation Manpower, the judge pointed out that no evidence had been called and he was not in any sense bound by those conclusions. The Court moved to receive evidence on the abuse application.

Evidence on behalf of the Defendants

6.9 The first witness was **Gordon Smith.** He gave evidence over 11 days, from 17th September to 1st October 2002. He is a solicitor, admitted in 1979, and thereafter was employed as a prosecuting solicitor in Manchester, initially for the Police and latterly for the CPS. In 1991 he transferred to the Solicitor's Office of HMCE based in the Manchester office. He continued to work in that capacity and at that location until he took early retirement on the grounds of ill health on 12th June 2000.

6.10 The first London City Bond prosecutions in which Gordon Smith was involved were Operations Paleface and Escapade, allocated to him in 1997. In 1998 Operation Manpower was allocated to Gordon Smith. In 1999 Operation Chamfer was added to Operation Manpower and the two Operations were joined on the same indictment. Gordon Smith remained in charge of the prosecution of all four operations until his retirement.

6.11 As such he attended a number of meetings with Customs officers and lawyers from the Solicitor's Office in London during 1999 at which the status and conduct of Alf and Ed Allington were considered and the ongoing difficulties arising successively out of the trials of Operation Fallover, Fusion and Fajita were discussed. In the course of the meetings he was told that Alf Allington was the warehousekeeper at London City Bond and as such was a trade source. On occasions he had given rather more information than would be expected from such a source and had thus sometimes become more akin to an informant.

6.12 However, Gordon Smith gave evidence that in February 2000 he came to the view that Alf Allington was in fact a participating informant running London City Bond on a fraudulent basis. He

further considered that senior Customs officers had conspired to conceal the true status of Alf Allington from the courts. Gordon Smith's evidence was based in part on his recollection of what had occurred at meetings he attended but in large measure on his interpretation of documents relating to events to which he was not a party.

6.13 What then of Gordon Smith's serious allegations that there was in effect a conspiracy to pervert the course of justice? His evidence occupied many days of court time and his accusations were pivotal in reopening the abuse of process application determined by HHJ Harris QC in Operation Manpower. It is obviously desirable that such assertions should be resolved by me if I were able so to do. I am not.

6.14 First, to do so would inevitably prejudice the ongoing police enquiry for reasons already sufficiently expressed elsewhere. Second, even if it was possible to avoid prejudice it would be impossible to resolve the issues fairly. If the proceedings before Mr Justice Grigson had continued it was the intention of the prosecution to call a number of witnesses all of whom, it was anticipated, would have given evidence that contradicted Gordon Smith's account. As the prosecution decided to offer no evidence almost at the outset of its case, those potential witnesses have been denied the opportunity to give their accounts. It would be as unfair to condemn them unheard as it would be unfair to reject Gordon Smith's allegations on the basis of written statements made by those who challenge his account of events. Thus I expressly make no findings on the issue.

6.15 For those reasons, the determination of the issues raised by Gordon Smith cannot be addressed in this Review and must remain unresolved, at least until such time as the criminal investigation conducted by the Metropolitan Police has concluded, if then. However, I am satisfied from all that I have seen and read that the allegations made by Gordon Smith and the evidence he gave in the course of the abuse application played no part in the decision of the prosecution to offer no evidence.

6.16 **Ed Allington** and **Ray Buckledee**, the two employees of London City Bond who had given evidence in the Court of Appeal hearing of *Villiers*, repeated that evidence in the abuse hearing. Much of the factual detail they gave was by now either common ground or self-evidently correct: it has been rehearsed in Chapter Five. Ed Allington said that when he signed the AADs he knew that the load he was signing for was going to be diverted but HMCE let him do it. He was effectively authorised by them to create the paperwork to enable the fraudsters to remove the goods duty suspended from the Bond. The guarantee was never called in: London City Bond had the backing of HMCE. It was Ed Allington's evidence that the fraud would not have taken place unless HMCE had told London City

Bond to let it happen. His view was that HMCE could have avoided any major loss by telling London City Bond not to open accounts or by arresting and prosecuting the diversion after the first load had gone. However, Ed Allington accepted that he did not know who the individuals were behind the frauds nor did he know who was financing any particular fraud or profiting from it. Further, he was not asked by any of the fraudsters to assist them in the frauds.

6.17 Ed Allington examined the contact sheets completed by Bernie Small. He explained that the content of the sheets reflected the sort of things that he and Bernie Small would talk about but there was a lot more contact between them than had been recorded. That assertion was challenged by the prosecution, who maintained that the combination of Bernie Small's contact sheets and his daybook recorded the extent of the contact there had been between Ed Allington and Bernie Small.

6.18 According to Ed Allington, he was told by Bernie Small to stop opening certain envelopes containing returned AADs. Instead of the documents going into the system at the Bond, from the spring of 1997 it was a weekly occurrence for them to be taken away in their sealed envelopes by Bernie Small. In consequence it was not possible to reconcile and balance the books at London City Bond. An audit of the accounts by HMCE revealed that there were about 1900 missing AADs but there was no way of knowing whether they had actually been returned and gone through the system and then removed by HMCE, or had been given to Bernie Small in an unopened envelope, or had never been returned at all. When Ed Allington gave evidence in a number of trials it was not in fact possible for him to identify whether he had actually processed the AADs he produced. This account was challenged by the prosecution. It was suggested to Ed Allington that he was mistaken, that when Bernie Small took documents they were photocopies and that in the main the originals were left on the premises. Ed Allington insisted that it was mainly original documents that Bernie Small took, originals given to him in boxes which he put into Bernie Small's car himself.

6.19 Mr Buckledee confirmed much of Ed Allington's evidence. There was, he said, wholesale fraud going on at London City Bond and indeed that was why the Long Reach Road site was set up. London City Bond could not have continued trading in this way if there had been any question of the Bond having to pay the duty on the diverted loads. It was only on the authority of HMCE that they continued to trade in the way they did. It was, he said, "absolutely blindingly obvious" that HMCE were assisting in running the fraud. However, he was not aware from anything that he had seen that he, Alf Allington or Ed Allington took a dishonest part in any diversion fraud.

6.20 As to returned AADs, he noticed that Ed Allington often put them to one side to await collection by Bernie Small. Mr Buckledee had himself made a number of statements producing receipted AADs for the purpose of the criminal proceedings. When he made those statements he could not in fact identify the AADs which had come from the London City Bond files. He would not have known if they had ever been in the files or whether they had been removed before ever reaching the files. Indeed he could not say whether the AADs that he produced in his statements had ever been in the possession of London City Bond at all.

6.21 A number of HMCE witnesses gave evidence in the course of the defence case. This was in effect a procedural device. The defence had asked that the prosecution should call a large number of witnesses so that they might be cross-examined by the defence. The prosecution declined to call or tender the witnesses, but agreed to ensure their voluntary attendance so that the defence could call them. That was what happened. The witnesses were called formally on behalf of one defendant and cross-examined on behalf of other defendants and by the prosecution.

6.22 **Janice Wanstall** from the IMPEX initiative also gave evidence. Jan Wanstall worked for HMCE from May 1977. From 1996 onwards she was involved with the IMPEX initiative, tasked to detect and disrupt illicit activity in excise products by means other than criminal prosecutions. In that capacity she learned of the increasing scale of loss of revenue arising out of diversion fraud. She became concerned about the policy of allowing loads to run in order to identify the principals behind the frauds. In her view the resulting revenue loss was not acceptable. There was a clash between the investigative process and the disruptive process. Those at IMPEX took the view that they should have been allowed greater involvement at London City Bond than the NIS permitted. Jan Wanstall objected to warehouse staff being instructed by the NIS not to divulge information which she and her staff were entitled to have. Further, in consequence of the arrangements at London City Bond there were times when access was restricted for both the Excise Warehousing Team and the IMPEX Team.

6.23 The tension between Collections and the NIS was raised at a meeting held at Custom House on 13th August 1996 attended by Cedric Andrew and Bernie Small from NIS and from the Collection side by Mr Gordon, Lesley Dearing, John Pratt and herself. It was Jan Wanstall's recollection that in the course of the meeting Bernie Small said that he encouraged the warehousekeeper at London City Bond to take on suspect accounts so that he knew where the suspect traders were. That recollection was challenged by the prosecution: she accepted she had no note of it. However, her account resonates with Bernie Small's own letter of 26th July 1996 written 18 days

earlier (See Chapter Three Para 35) and is in substance confirmed by it.

6.24 Jan Wanstall's perception was that London City Bond were facilitating the diversion frauds by storing goods that were going to be diverted in their warehouse, loading the goods onto the lorries that were going to divert the goods onto the domestic market and providing the necessary paperwork to hide the activities of the fraudsters, in particular by raising AADs. In her view the NIS were allowing the frauds to take place. That was all common knowledge in the IMPEX team and it was common knowledge that no assessment was to be raised against London City Bond because they had an immunity from the NIS.

6.25 She understood from the Excise team that AADs had been removed by Bernie Small and held by him and NIS. It was not possible to establish from the Bond or the warehousekeeper which records had been taken by Bernie Small: no receipts had been given. From April 1998 onwards London City Bond was returned to the care of the local Excise team and no further significant fraud was detected.

6.26 On 19th May 2000 Jan Wanstall received two emails from senior management requesting her urgently to consider the scale of losses arising from diversion frauds and to comment on the figures set out in a DCL (Dear Colleague Letter – a circular letter to Customs staff) issued on 16th May 2000. The request was prompted by the concern of the new chairman of HMCE to know the full picture and by the enquiry then being conducted internally by John Lester. She was instructed to examine the schedule attached to the DCL, to comment on the accuracy of the details provided and to extend the analysis to include all cases since 31st March 1995. One entry on the schedule relating to London City Bond estimated the loss at £579 million against a Note:

> These figures relate to an audit completed by the NIS on diversion cases ex London City Bond with which they are involved….During the period 1996-98 the warehousekeeper has assisted NIS when required.

6.27 Jan Wanstall responded on 22nd May 2000. She submitted a report which set out in detail the basis upon which she reached a total figure of £1,520 million excise duty lost between 1994 and 1998 through London City Bond with a consequential notional loss of VAT of £399 million. The estimated total revenue lost she accordingly put at £1,919 million over a five year period. She pointed out that her figures were not exact but did give, she thought, a more accurate figure than that contained in the schedule for the reasons she gave.

6.28 Her response caused concern within the NIS. The report was criticised by Headquarters and senior managers within the NIS, and described as fundamentally flawed and misleading. Jan Wanstall never saw a copy of this criticism nor were her comments invited on it. Instead, she was informed that the document she had prepared was disclosable and made her a potential defence witness in future London City Bond trials. I am informed that this was on the advice of counsel. It was in recognition of a potential conflict of interest that restrictions were imposed on her by management. She was to have no operational contact with the NIS nor visit London City Bond nor to have any input in any case concerning a London City Bond account holder. HMCE offered to pay for Jan Wanstall to obtain independent legal advice because the Solicitor's Office considered there was a potential conflict of interest if they advised her. All this, be it remembered, because she responded to an urgent request from senior management and provided her honest assessment of the losses arising from diversion frauds at London City Bond.

6.29 The restrictions imposed upon her caused her very considerable difficulties in doing her job effectively. Her health suffered. She judged that there was a lack of trust: her superiors had treated her insensitively and unfairly. She had made a genuine response to a request for information from the department and had been treated badly thereafter in consequence of responding to that request.

6.30 In cross-examination on behalf of the prosecution, counsel acknowledged that Jan Wanstall felt very strongly about the way she had been treated by HMCE, but expressly said he was not going into the details of the matter or the merits of it. No doubt he took that course because he did not consider the events to affect the application to stay the proceedings. The figures she provided, and which she herself accepted were simply her estimates, are not accepted by HMCE and further do not accord with the independent conclusions of the National Audit Office. The estimates are very much higher than any other estimates, including those reached by the specialist independent accountant's report of John Roques. It would be wrong to treat Jan Wanstall's estimates as having any greater claim to accuracy than the figures advanced by others.

6.31 What does have some relevance however is the attitude of HMCE to her views. Obviously a loss of that enormity would make a bad situation much worse. But that was no reason to treat Jan Wanstall in such a way. The episode gives a clear impression of an organisation seeking to bully and sideline a senior employee who expresses an honest view which is unpalatable and embarrassing. Rather than dealing with her figures rationally and explaining to her any errors she may have made, management chose a heavy-handed

and oppressive approach which seems to me to be inappropriate and gives support to those who would read rather more into these events than they warrant. Rightly or wrongly it gives the impression that management were frightened of potential disclosure and the impact on future cases.

6.32 It was the sequence of events described in the preceding paragraphs that led Mr Justice Grigson to observe at the conclusion of the proceedings:

> The treatment of Miss Jan Wanstall by her superiors which has been revealed in the course of this hearing seems to me to be quite simply disgraceful.

6.33 I invited HMCE to offer any observations they wished to make on this aspect of the cases. It was disappointing but not surprising to receive what amounted to an attempt to justify their conduct, though in fairness one person to whom the Review team spoke said that it was a very unhappy story. So it was. Having carefully considered afresh all the material available to me I find myself driven to associate myself with the observation of Mr Justice Grigson.

6.34 Four members of the Romford-based Excise Warehousing Team gave evidence: **John Hobley**, **Lesley Dearing**, **Lesley Blackburn** and **John Pratt**. All four expressed concern and frustration that the NIS had effectively taken over control of London City Bond and prevented them from conducting proper assurance checks. These concerns were made clear to the NIS. The Collection's routine assurance programme was being frustrated in that relevant records were not available because NIS investigators had uplifted them.

6.35 Mr Pratt, as the officer with day-to-day responsibility for supervision of the Bond, was particularly affected. He explained that a very substantial number of AADs were missing from the records of London City Bond. NIS involvement within London City Bond was keeping Mr Pratt and his department in a muddle and in the dark. He was unable to cross-reference AADs to show what had gone and where. It became apparent he was never going to be able to reconcile the documents because the NIS had taken them.

6.36 In August 1997 the audit team granted approval for the opening of the Long Reach Road warehouse. By that time the audit team had identified non-receipted AADs worth about £32 million and falsely receipted AADs representing a further revenue loss of £7 million. They would not normally have given authority to a company to expand in those circumstances. Mrs Blackburn was aware that the Long Reach Road warehouse was opened so that all the fraudulent trading could be put in one place and she approved the opening of Long Reach Road in that knowledge.

6.37 However, after the new warehouse was opened the situation deteriorated still further. Mrs Blackburn was having the gravest difficulty in doing her job of controlling and auditing London City Bond. On 25th September 1997 she wrote a memo explaining that the trader was growing in size dramatically and she was extremely worried about the professional criticism that she may have to answer. She had tried to do her job diligently and certainly by the date of that memo she did not have control of the Bond. On occasions she was turned away from it or told not to attend by the NIS. Visits to the Bond had been blocked ever since she took over the trader in April 1996.

6.38 Mr Pratt and Mrs Blackburn explained that their understanding of the situation at London City Bond in 1997 had been as expressed by them in the letters and emails they sent, but it had since changed. Bernie Small had explained the error into which Mr Pratt had fallen after his email was disclosed to the defence in the course of the *voir dire* in Operation Fallover (See Chapter Four Para 48). Mrs Blackburn said that her perception of the situation at London City Bond also changed. In February 1998 Kathy Davies, an NIS officer conducting an audit of the missing AADs, told her that Alf Allington was never given a brief or told to take anybody on; he took on customers at his own behest. However Mrs Blackburn was not aware of Mrs Davies' previous involvement with Bernie Small in dealing with London City Bond. NIS ultimately took responsibility for the loss of revenue. That explanation for her change of mind puzzled the trial judge, as it puzzles me:

> Grigson J: ….if NIS were not encouraging him, if, as you have described, he was taking customers on and it was his responsibility, can you see any basis why NIS should accept responsibility or why his liabilities should be written off?
>
> A: I think possibly because he was giving them information.

6.39 In my view it is quite clear that some members of the NIS involved in operations concerning London City Bond regarded Alf Allington as an informant from at the latest the summer of 1996. It is equally clear that they were content for him to continue dealing with suspect customers and to allow those customers to despatch goods knowing perfectly well that the goods were to be diverted. They did nothing to discourage him from taking on suspect traders and he must have taken their attitude as at least tacit encouragement to continue to assist the criminal element using his Bond to defraud the Revenue.

6.40 Two Customs officers from the NIS also gave evidence on behalf of the defendants. **John Cuthbert** was employed by HMCE as a Senior Investigation Officer (SIO). He acted as such in Operation Fusion and Operation Fajita until April 1999. Mr Cuthbert was present at a conference held on 2nd February 1999 to discuss Alf

Allington and his status in excise cases where he featured as a witness. The conference was attended by John Flood and Maureen Dunn from the Solicitors Office, Derek Bradon the ACIO in Fusion, Fajita and other London City Bond cases, and another SIO. The discussion centred on whether Alf Allington was to be treated as a trade source or an informant. A trade source, said Mr Cuthbert, is someone within a particular trade who provides information. The note of the meeting records that it was agreed Alf Allington should be regarded as an informant and protected as such. The note continues: "Counsel's view: make role known". There was absolutely no suggestion that anything should be kept back from the Court. There was further discussion about the way forward. It was decided that Alf Allington would be asked if he would agree to the disclosure of his role. If he was not prepared to permit disclosure the position would be considered on a case-by-case basis.

6.41 **Rodney Bowie** has been a Customs Officer for about 15 years. In 1997 he was working as an Investigation Officer and in that capacity was appointed the case officer for Operation Fusion. He was also responsible for disclosure in that investigation. His investigation of the case was based on an intelligence package provided by Bernie Small in May 1997. Mr Bowie described in considerable detail the investigative process and the inquiries he made to try to establish who was behind the diversion frauds. Mobile surveillance on Operation Fusion took place two or three times a week and later perhaps every day. The arrests were finally carried out at the end of September 1997. Mr Bowie waited until then because it was judged that by that time there was a good amount of evidence against everyone. The frauds were allowed to run purely to gain evidence which could be used to mount a prosecution, not to allow it to build up. In the event the majority of the evidence against the principals involved in the fraud was identified during investigations following the initial arrests.

6.42 In the course of the investigation Mr Bowie knew that Ed Allington was a registered informant to the NIS handled by Bernie Small. He understood that Alf Allington was the managing director, the Bonded warehousekeeper, and as such had a duty to assist the Commissioners through Bernie Small with information relevant to the protection of the revenue. He knew that Alf Allington was not a registered informant. HMCE were trying to keep Alf Allington's position secret, protecting him as a source of information. Initially he was seen as a trade source. However, by the time Operation Fusion came to trial, and in conjunction with solicitors and counsel it had become apparent that his role had gone beyond that. In fact he was an informant, although not registered as such. It never occurred to Mr Bowie that the role of Ed Allington might be that of a participating informant.

6.43 Mr Bowie did not believe that there was facilitation of the fraud by anyone at London City Bond. He considered that whereas Alf Allington must have been suspicious that frauds were taking place, those at London City Bond were innocent dupes in what was actually going on and nobody there was doing anything to assist or facilitate what was occurring. The NIS did not encourage the fraud in any way.

6.44 The AADs exhibited and used in the prosecution were produced by Alf Allington through a witness statement taken by Bernie Small. The documents were handed to Mr Bowie in one big bag sealed and marked "Allington 1". That included all the AADs, all the consignment notes, and all the instructional faxes from the relevant companies. As to disclosure, after the knock Mr Bowie's team sought to identify every officer that had had any involvement in the operation and put out an email to them asking for copy notebooks and statements.

6.45 Mr Bowie gave evidence in the Operation Fusion *voir dire* at Southwark Crown Court. In the course of that evidence he did not try to misrepresent the position so far as Alf Allington was concerned. He was however aware that the status of the Allingtons had to be protected. Had he disclosed in his evidence the full position it would have tended to show that Bernie Small had a constant contact in London City Bond and was aware from an intelligence point of view of what had been going on on a daily basis. In evidence at Liverpool he accepted that the answers he gave in the *voir dire* at Southwark were not the whole truth but to give a fuller answer would have jeopardised the position of the informant. In addition, Mr Bowie has told the Review that he felt that giving a fuller answer would have trespassed on the Judge's ruling of PII in relation to the Allingtons.

The Prosecution Evidence

6.46 **Bernie Small** was the first (and, it was to transpire, the only) witness called on behalf of the prosecution. His evidence-in-chief occupied four days. He was cross-examined by Mr Clegg QC on behalf of Michael Villiers for a further three days. That cross-examination was not complete when the prosecution offered no evidence on 25th November 2002. What follows is a summary of what he told the court.

6.47 In giving his evidence Bernie Small said that he received no training on informant handling. He knew there were guidelines and he was aware of their contents. He also knew of and understood his duty as to disclosure. He was aware that there were regulations about Bonded warehouses but received no training relating to the legislation governing them. His understanding was that under Regulation 24 the warehousekeeper was obliged to furnish to the Customs officer such information as the officer required. His job was to gather intelligence relating to excise frauds specifically within Bonded warehouses and he expected the authorised warehousekeeper to facilitate that intelligence gathering in any way he required. When he received information from warehousekeepers he regarded them as a source of trade information.

6.48 He reported regularly to his senior officers, first Bob Snuggs and then Tim Connolly. He kept his senior officers informed about all he was doing at London City Bond and kept no secrets from them. Bob Snuggs knew all that Bernie Small was doing at the Bond and Bernie Small would expect Bob Snuggs to keep Cedric Andrew, the ACIO, fully abreast of matters. He appreciated the importance of keeping records.

6.49 Bernie Small described his recruitment in 1995 of Ed Allington as a confidential informant and the payment to him of the single sum of £500 as reward. He did not consider that his status changed at any

time from that which he had when he was first registered. At no stage did he ask Ed Allington to undertake tasks which would make him a participating informant. Bernie Small did not receive any advice from his superiors about his status. Some time later Bernie Small began to receive information from Alf Allington. At no stage was Alf Allington registered as an informant of any kind nor did he ever receive any payment for the information he provided. (I should emphasise that there is not a shred of evidence to suggest either that Ed Allington ever received more than £500 or that Alf Allington was ever paid anything by HMCE.)

6.50 Initially Bernie Small did not believe Alf Allington was giving information that necessitated him being registered and regarded him as someone who was providing information under a statutory duty: it was not information that was confidential. Latterly it was made clear to him by Bob Snuggs that he was to be treated as a trade source. As the relationship developed over the years he did not consider whether that status had changed and never received any advice from his superiors about Alf Allington's position. However, he did not ask him to undertake tasks which in his view involved the possibility that he might be involved in any particular fraud.

6.51 When Bernie Small started to receive information from Alf Allington it was very general. It was Ed Allington who was giving the details of any actual transactions taking place. When in 1996 Ed Allington moved from the warehouse into the offices he had more contact with the books and records of the warehouse and the files on their customers and he was then able to give information about the principals involved as opposed to the haulage companies. He continued as a registered informant and was still so registered when Bernie Small ceased to have dealings with London City Bond in February 1998.

6.52 Bernie Small's relationship with Alf Allington developed over time. Fraudulent trading increased quickly from 1995. From 1997 Alf Allington routinely passed information to Bernie Small about all new prospective customers irrespective of whether they were suspected of being involved in fraud. Bernie Small examined the details provided and decided whether it would be worthwhile making further enquiries about them. Ed Allington was used to provide details about specifics where Bernie Small believed fraud was taking place. He was using Alf Allington to get a more global picture of the workings of the warehouse and the companies trading from the Bond. Bernie Small did not at the time consider there was any risk in putting forward Alf Allington as a witness: he had been giving information as a trade source and that in no way gave rise to a duty of care by HMCE to him. He had no reservations about putting Alf Allington into the firing line.

6.53 Bernie Small was aware of the exchange of correspondence in October 1996 between Alf Allington and Mr Snuggs in connection with an indemnity. He knew that HMCE had the power to call upon the Bond's guarantee to account for lost duty and recognised that HMCE could have broken the Bond at any time by levying upon it a claim for the duty and VAT that had been evaded. However, he simply did not know if there was an implied understanding that London City Bond would not be assessed for lost duty.

6.54 The documents used by Bernie Small to record his activities were informant contact sheets, his personal daybook, departmental notebooks and his personal diaries. The diaries in fact contained little information relevant to London City Bond and were simply a record of his place and hours of work. The notebooks contained entries of an evidential nature in relation to various different operations. Bernie Small actually brought them with him on his first day as a witness in Liverpool, to the surprise of the defence, the discomfiture of the prosecution and the annoyance of the judge. Whilst they had been included in the unused material schedules in individual prosecutions they had not all previously been disclosed to all parties in the abuse of process hearing. There was nothing in them of any positive assistance to the defence, but the absence of any entries did underline the paucity of the records kept by Bernie Small. Referring to the late disclosure the judge observed:

> I want to make my position clear. An officer's notebook is a fundamental part of the investigative material, whether he is an intelligence officer or an investigative officer. In this case the defence have made continual allegations of non-disclosure; it is part of the fundamental abuse argument. Both Mr Clegg and others have made accusations of non-disclosure, and here we are at the beginning of November and suddenly out of the hat come documents which are so obviously discloseable, and someone should have had a grip on it. How can the Court and indeed the defence have any confidence that other officers are not sitting on other notebooks which may or may not contain material entries?

6.55 In the light of the judge's intervention the Crown indicated they proposed to make enquiry of all Customs officers concerned in London City Bond operations whether they had any further material which should be disclosed. The exercise had already been carried out but it would be repeated. Mr Justice Grigson made it clear that he thought that any notebook which contained references to AADs being uplifted was of relevance because one of the questions he would have to consider is whether there could be a fair trial in circumstances where there was no proper recording of any of the upliftings.

6.56 Whilst the exercise was taking place the evidence of Bernie Small continued. In examination-in-chief he asserted that the contact sheets (or informant logs – the terms are interchangeable) containing

details of his exchanges with Ed Allington were a distillation of those contacts. They did not comprise a complete and comprehensive record of every single piece of information that was passed to him but no important matters had been omitted. In his daybook Bernie Small recorded information that was passed to him not only by Ed Allington but by others. There was a gap in the entries in the contact sheets between August 1995 and November 1996. There had been no contact between those dates which Bernie Small would normally have put on the informant logs.

6.57 However, in cross-examination on this topic a different picture emerged. Bernie Small accepted that his records were significantly incomplete. The notes in relation to contact with Ed Allington during the 15 month gap in the informant sheets were kept in his daybook. On analysis there were a total of only eight contacts recorded. In detailed cross-examination about what had been going on during those months Bernie Small plainly had no independent memory of what information he had received and what information he gave to others arising out of his contacts with Ed Allington. He accepted that because of the deficiencies in his record-keeping it was impossible for anyone to know what Ed Allington told him. There were further important gaps in later months. In the absence of records Bernie Small was unable to say when he had visited London City Bond and did not know, if he did, what he had discussed. There was considerably more contact between him and Ed Allington than any written record made by Bernie Small disclosed.

6.58 Although the Long Reach Road site opened in August 1997 and thereafter fraud was rife there were no contact sheets for September 1997 or for the first three weeks of October. That was because Bernie Small failed to keep any contact sheets and kept no record of his visits to London City Bond during that period. There was, for example, no note made by Bernie Small of the occasion when Alf Allington provided him with the security videotape showing £100,000 being handed over. The departmental notebooks that covered the last 6 months of 1997 recorded what Bernie Small was doing on only three days. Bernie Small accepted that there were no accurate or reliable records of what he was doing during that period.

6.59 Bernie Small further accepted that he did not tell the judges at any PII hearing that he had not kept a log of any kind for long periods. Nor had he ever told any lawyer employed by HMCE or any barrister retained to prosecute on behalf of HMCE that his contact sheets were deficient in the sense that they failed to record every meeting with Ed Allington. To the best of his knowledge Bob Snuggs and Tim Connelly did not tell anyone of the deficiency in the sheets either. When Mr Villier's appeal was heard Bernie Small did not ensure that the lawyers representing the prosecution were told that his logs in respect of Ed Allington were deficient. He knew that the defence had been shown the informant logs in

connection with the Court of Appeal proceedings. The lawyers representing the appellants and the judges hearing the appeals would be entitled to assume that Bernie Small had kept an accurate and complete log of his dealings with Ed Allington but such an assumption would have been incorrect.

6.60 Some of the more important entries in the informant logs were examined in detail through Bernie Small's evidence. The purpose was to determine the extent to which, if at all, the Allingtons could be seen to know of the frauds and participate in them. Further the entries were of potential importance on the issue of whether HMCE encouraged the frauds. The substance of the entries has already been described in Chapter Three Paras 51 and 52.

6.61 The daybook, which Bernie Small kept on his desk in the office, he used as an *aide memoire*. It detailed, he said, virtually every piece of work that he was involved in and he used it to note the details people gave him on the phone about a whole range of subjects. It was not a document that was submitted to his HEO or SIO at any stage. The earliest date in it is 6th January 1995 and the last date is 16th December 1998. The last time Bernie Small had any dealings with London City Bond was on the day of the knock for Operations Manpower and Fajita, the end of February 1998. Bernie Small was asked to comment on every entry relating to London City Bond. The substance of the relevant entries I have already summarised in Chapter Three.

6.62 Bernie Small also dealt with the tension between EXCIRT, IMPEX and the local Audit Team. The Audit Team had concerns that they were not being able to do their job due to the involvement of the NIS at London City Bond. Bernie Small's concern was that the presence of the local staff would hinder the observations or the activities planned by the investigation officers. The local Team was not told anything about the relationship between the Allingtons and Bernie Small and his team so far as Bernie Small was concerned. Bernie Small did not wish Ed Allington's activities as a registered informant to become common knowledge. Asked about the memos from Mr Pratt and Mrs Blackburn in July 1997, Bernie Small said he never gave Alf Allington any encouragement to take on suspect customers and despatch goods to dodgy destinations. The reverse was the truth: he positively discouraged him from taking on such trade.

6.63 The NIS were investigating all notified examples of suspected fraud. The reason why the quantities of revenue remained outstanding was because the NIS did not yet, in their opinion, have enough evidence to mount a prosecution. The reference in the memo to the trader working for the NIS was not a correct representation of the situation. Alf Allington was fulfilling his role as an authorised

warehousekeeper under the terms of the regulations in force at the time.

6.64 Bernie Small played no part in any discussion or decision to open the new warehouses at Long Reach Road nor did he have any discussion in relation to the customers and the business that would be put through those premises. The Long Reach Road site was much larger than the original site and the incidence of fraud going through that site was much larger, but there was still fraud going out from the original site. Bernie Small was not aware of any decision being taken by anybody to channel suspected fraudulent customers through Long Reach Road and it was never raised by either Ed or Alf Allington. Bernie Small had attended a meeting in 1996 attended by Jan Wanstall and members of the IMPEX team. However there was no discussion of NIS operational matters and in particular no discussion about informants.

6.65 He had given evidence in a number of cases, in PII applications before the judge in the absence of the defence, on other occasions in a *voir dire* in the absence of the jury, and in the presence of juries. The Operations in which he gave evidence were Fallover, Fusion and Fajita. He did not lie in the course of any of the evidence he gave. Alf Allington himself gave evidence in connection with Operations Fallover and Fusion. Bernie Small did not know what he had said and it was not reported to him. He first became aware of the nature of the evidence that Alf Allington had given after reading the witness statement he made in October 2000. If Alf Allington did tell lies Bernie Small was not aware of it at the time.

6.66 Taken to other entries in his daybook Bernie Small conceded that Alf Allington was performing a role as a gatherer of intelligence, but that was with the benefit of hindsight. He accepted that looking back it would have been more proper to have registered him as a participating informant from the beginning but he acted on instructions from management. It was after he had reflected on the decision of the Court of Appeal in *Villiers* that Bernie Small decided that Alf Allington was indeed a participating informant. However, he never conveyed that insight to any of the prosecuting lawyers. The last statement Bernie Small had made was on 29th October 2002 in which he had written himself:

> Throughout the relevant period up to 1998 I considered Alf's status to be that of a trade source. I do not consider that his status changed.

However, he did not think to record his change of mind in the statement.

6.67 It was Bernie Small's belief that the NIS, in their dealings with Alf Allington, made an error. They should have registered him but

failed to do so because Bernie Small had instructions from Bob Snuggs to treat him as a trade source. Bernie Small did not accept that he had lied to Courts in order to cover up the role of Alf Allington as an unregistered participating informant.

6.68 There were occasions when Bernie Small advised Alf Allington not to trade when he had grounds that there was going to be a fraud, but in other cases when he knew there was fraud going on he did not give any such advice if there was an operation running at the time. Bernie Small would knowingly gather intelligence from both Alf Allington and Ed Allington while they continued to trade with a customer that at least Bernie Small knew and believed to be fraudulent. Ed Allington and Alf Allington would certainly be suspicious of the company with which they were dealing and continuing to trade.

6.69 Bernie Small was invited to comment on a number of letters written to him by Alf Allington about traders in which the warehousekeeper was making his suspicions very clear and asking for Bernie Small's advice about what he should do. In each case the suspicions were well-founded and in no case did Bernie Small advise Alf Allington not to continue trading. These all related to ongoing operations. In answer to the judge, Bernie Small agreed that if the warehousekeeper suspects that a transaction is fraudulent his duty would be not to complete it.

6.70 Mr Clegg suggested that Bernie Small knew, Alf Allington knew, and Ed Allington knew that the loads were going to be diverted and Bernie Small permitted them to leave the Bond with that knowledge. He agreed that when an operation was underway he did nothing to compromise it, by which he meant stopping fraudulent loads leaving the Bond. However, he insisted that in all cases it was a matter for Alf Allington's commercial judgment as to whether he allowed trade to continue. That assertion flies in the face of reality.

6.71 The evidence turned to the question of documents removed from London City Bond. Bernie Small agreed that he removed many original AADs and at no time did he give receipts. On some occasions Bernie Small took sealed envelopes containing AADs and nobody at the Bond would know to what loads the AADs inside the sealed envelopes related. Bernie Small himself would often not open that sealed envelope and would pass it on to the Case officer. Thus he himself would not know to which loads the AADs related. When he uplifted sealed envelopes he never made any note of that fact. Bernie Small agreed that as a general principle where a law enforcement officer uplifts original documentation from a potential witness that should be contemporaneously recorded. However, he regarded himself as having the legal right to uplift the documentation and for that reason was not obliged to record what he had done.

6.72 By now the prosecution had completed their further disclosure exercise focusing on any contact by or to Bernie Small from other officers involved in the operations. Where there had been any entry in a daybook or notebook or diary that had been disclosed to the defence. The further efforts had resulted in the production by a Customs officer, Maria Scanlon, of entries made by her in her own daybook relating to her communication with Bernie Small. Those entries showed that on 17th January 1997 Bernie Small provided information to her which he had obtained from his sources at London City Bond. There was no corresponding entry in any of Bernie Small's documents, and he had no recollection of the matter.

6.73 An entry in Maria Scanlon's daybook for 11th March 1997 reads: "Bernie got boxes from London City Bond." Bernie Small had no recollection of whether he did get boxes from London City Bond or whether he told Maria Scanlon about it. The note continues: "Has details of 400 AADs". Asked about the entry, Bernie Small did not recall having those details or the events giving rise to the note. He himself had no note or receipt of uplifting either boxes or 400 AADs from London City Bond. Contrary to the evidence of Ed Allington he did not recall ever taking boxes of AADs from London City Bond.

The Final Straw

6.74 On 19th November the prosecution applied for an adjournment. Still further documents had come to light, in particular a memorandum written by Bernie Small to his then SIO Tim Connolly dated 17th July 1997. Mr Connolly had found it in his loft. It was written at about the time concern was being expressed by the Local Audit team about missing documents, and confirmed that Bernie Small had taken large numbers of AADs from London City Bond, contrary to the case advanced by the prosecution in the CACD and put in cross-examination to Ed Allington.

6.75 The memorandum demonstrated that it was Bernie Small's practice to uplift original AADs from London City Bond without keeping any record. Some of the AADs he had passed to case officers; others he had retained for intelligence purposes. The note acknowledged that he had taken possession of AADs accounting for substantially more than £32 million in duty and that he would be in difficulty identifying them accurately for the local excise team. The note was clearly relevant and should have been disclosed at a much earlier stage.

6.76 No evidence was called that day. The hearing was adjourned to 25th November to allow time for the prosecution to consider these developments.

6.77 Over the next few days the prosecution team considered the situation as it then stood in relation to the abuse applications and the subsequent trials if the proceedings were not stayed. Consultations took place at a high level within HMCE and the Attorney General was involved in the discussions. In the event the Crown determined not to proceed further with the prosecutions against any of the Defendants. On 25th November 2002 Mr. Lawson-Rogers QC explained why.

6.78 After outlining the circumstances surrounding the recent disclosure of the new Connolly material, he adverted to the background of a history of disclosure problems, the so-called creeping disclosure which had dogged the London City Bond prosecutions historically and which was a significant part of the defence case of abuse. He also had in mind disclosure made during the course of the abuse hearing itself. He continued by dealing with the gaps in informant records, something of which the prosecution were completely unaware until admitted by Bernie Small in evidence:

> Most recently there has been disclosure of…further material from case officers involved in the various operations which arose from trading through London City Bond…. Consideration of its content revealed that the omissions from the informant records were considerable when judged against the Case officers' entries. However, it was also clear from the evidence that Small additionally failed to make proper records in relation to communications which he had received and used solely for intelligence purposes. He admitted he was aware of the guideline requirements to make full records and accepted culpability in that regard. Questioning of Small further revealed, not surprisingly, that he had no recollection of the number or content of communications which were not recorded by him.
>
> We must accept, as does Mr. Small, that these material omissions from the records were never brought to the attention of judges who conducted PII hearings in various trials, nor to the Prosecution Counsel in those cases; and that we cannot say what the omissions are or judge their materiality to any defence. It follows that these developments raise the question as to whether the Prosecution remains in a position reasonably to contend that the Defendants have not been or will not be prejudiced by reason of these material omissions from the informant records; and/or that these Defendants can have a fair trial or that it would be fair to try them.

6.79 Mr Lawson-Rogers turned to deal with the question of the integrity of the London City Bond documentation. He reminded the court of the position:

> In this context, Edward Allington's evidence, challenged by the Prosecution in cross-examination on the basis of Mr. Small's witness statement, was that Small regularly took away boxes of original documents without any or any record sufficient to identify them. The disclosures of last week included material which supports the boxes claim, and I refer to Maria Scanlon's day book, and also the wholesale uplifting of original documents, both for operational and intelligence purposes, and I refer to Mr. Small's memorandum of 17th July 1997.
>
> In his witness statement, Mr. Small claimed that original documents were only taken in connection with knocks of operations and that in other cases copies only were taken. A Small memorandum reveals this to be an inaccurate claim. What is clear is that Small never made any record of these occasions to identify documents taken for intelligence purposes, justifying this with the unconvincing logic that there was no need in his view to make a record because the documents were taken in the exercise of the regulatory power. It has to be accepted that the evidence before you on this aspect of the LCB records has added considerable weight to the defence contention as to the integrity of those records, in response to which it is difficult to see a cogent argument.

6.80 Counsel went on to explain that prosecuting counsel in the conjoined cases had given careful consideration to the effect of the developments in the course of the abuse application, first on the ability to resist the application itself and second as to whether the Prosecution could present evidence to a jury with a reasonable prospect of conviction. He continued:

> We have tendered advice to those who instruct us and in accordance with our professional duty, to the effect that the Prosecution is no longer in a position properly and legitimately to resist the abuse of process application in so far as it relies upon the failures
> (1) to make full and proper timely disclosure;
> (2) properly to handle and record the dealings with the informants Edward and Alfred Allington so as to provide a full picture of their communications and involvement; and
> (3) to deal appropriately with and provide evidence as to the integrity and continuity of the LCB documentation on which any prosecution would have to be able to rely in order to prove its case.
>
> My Lord, we have further advised that these failures and the evidence of Small as it now stands mean that, putting to one side considerations as to abuse, there is no longer a realistic prospect of securing convictions in these cases.

6.81 Mr Lawson-Rogers went on to offer no evidence against any of the defendants, making it plain that the prosecution did not concede the existence of any bad faith or conspiracy within HMCE.

The Collapse of the Liverpool Hearings – a Commentary

6.82 The power to stay proceedings is a discretionary remedy. Even if grounds are established entitling the court to exercise that power, it remains for the court to decide whether in all the circumstances it is appropriate so to do. Further it must be remembered that the Liverpool hearings were not a public enquiry or a review of all London City Bond prosecutions: they were concerned only with determining the question as to whether the criminal proceedings should be stayed against some or all of 15 defendants.

The Prosecution concessions

6.83 The prosecution identified three areas which in combination persuaded them that they could no longer resist applications to stay the proceedings as an abuse. Those areas were:

a. The failure to maintain reliable records of the activities of Ed Allington and Alf Allington and the nature and extent of the information passed on by them (Ground 1).

b. The inability of the prosecution to establish the provenance of the AADs relied on to establish the fraud (Ground 10).

c. The failure to comply with their obligation under the CPIA to make proper disclosure to the defence (Ground 11).

6.84 In truth the prosecution was in a very vulnerable position before ever the Liverpool proceedings began. Whilst objectively it could be said that they were starting with a clean sheet and might therefore hope to displace some of the adverse findings made against them in earlier proceedings, the reality was very different. The prosecution were on the back foot from the outset, not helped by the need to make late disclosure of important documents as the proceedings began and despite assurances given earlier that full disclosure had been effected.

6.85 As one of those involved in the Liverpool hearings graphically described the position to the Review team, the prosecution was teetering on the edge of a precipice at the start: one little push and it was finished. When Bernie Small conceded in cross-examination that there were large gaps in his records relating to his contact with his own informants, gaps of which the prosecution were totally unaware, the prosecution was gravely damaged. After still further late disclosure of highly relevant documents which in turn demonstrated that Bernie Small had been unreliable in important aspects of the evidence he had given and on which the prosecution had relied, the prosecution had lost all integrity. Whatever additional evidence the prosecution had called, there was by then no way back for them: set against the history of the proceedings the judge would

inevitably have stayed the proceedings on the grounds identified by counsel for the Crown.

Other grounds on which a stay might have been granted

6.86 What of other grounds? If the prosecution had not capitulated what if any additional grounds for a stay might have been established? As the judge himself observed, the evidence was incomplete and in expressing my views about other aspects of the case I recognise the limitations that imposes.

6.87 First, in my view the judge would have made findings which broadly coincided with the account of diversion fraud set out in Chapter two. He would certainly have concluded that Ed Allington and Alf Allington were participating informants in relation to at least some of the frauds, despite the reluctance of the prosecution to make that concession. It would hardly have been a novel conclusion. It was a view first expressed by HHJ Maher in February 2000 during the PII hearings for the trial of Operation Fajita and accepted at the time by counsel for the prosecution in those proceedings. It was a conclusion reached by HHJ Harris QC in the abuse application in Operation Manpower, by the CACD in the appeal of *Villiers*, an admission made by the prosecution for the purposes of the appeals in Operations Fallover, Fusion and Fajita, and finally a view expressed by Bernie Small, the NIS officer most closely involved in the activities of the Allingtons, in his evidence at Liverpool. In those circumstances it would have been almost perverse for the judge to reach any other conclusion.

6.88 Such a finding would in turn have led the judge to conclude that the prosecution failed to disclose the true status of Alf Allington and Ed Allington to the court and to the defence in the trials of Operation Escapade and Paleface, and in the early stages of the abuse application in Operation Manpower. Ground 2 would have been established. It is further probable that the judge would have concluded that HMCE permitted Alf Allington and Ed Allington to facilitate the frauds, did nothing to discourage such conduct and by granting an implied indemnity to the Bond, positively enlisted their co-operation and assistance. In my view the judge would have rejected the evidence of Bernie Small that the decision to open a new account with a suspect trader or to carry on business with such a trader was a matter for the commercial judgment of the Bond. That conclusion would establish Ground 4. In addition the evidence clearly supported the proposition that senior Customs officers failed to monitor and supervise the activities of Alf Allington and Ed Allington, a part of Ground 6.

6.89 That being said, I observe that all the probable conclusions set out in the preceding paragraphs were findings made by the CACD in *Villiers* and admitted by the prosecution in the appeals of *Early & Ors.* Those findings were self-evidently not fatal to a prosecution,

for had that been the case the CACD would not have ordered re-trials. It was the fresh, unexpected and highly significant developments in the course of the Liverpool hearing itself which compelled the prosecution to abandon further opposition to the applications.

Entrapment

6.90 One ground on which the judge was to be invited to stay the proceedings was that of entrapment. The basis of it is summarised in Grounds 5, 6 and 7. The right to a fair trial under Article 6 of the European Convention of Human Rights will be violated where investigators, or those acting as their agents, have stepped beyond an essentially passive investigation of a suspect's criminal activities and have exercised an influence so as to incite the commission of the offence. The courts recognise that in such circumstances it is right that the proceedings should be stayed as an abuse of the process. The suggestion that such was indeed the situation at London City Bond has received widespread publicity and it is right therefore that I should comment on the possibility.

6.91 The ground of entrapment is not generic but is case-specific. Of the 15 defendants in the Liverpool proceedings, only five raised the issue. The remaining defendants, including all the defendants who had been convicted or pleaded guilty in the trials of Operation Paleface and Operation Escapade, did not contend that it was even open to the judge to conclude that there had been entrapment in their cases.

6.92 The argument advanced on behalf of those who raised the assertion was, as I understand it, not that they themselves had been entrapped (for they all contended that they had no idea they were involved in diversion fraud in any way) but that those from whom they had obtained goods which turned out to be diverted must have been entrapped: it was a form of vicarious entrapment. By way of illustration there follows an extract from the skeleton argument on behalf of Shakeel Awan, a defendant in Operation Manpower, adopted by others, and recited here red in tooth and claw:

> Customs effectively ran London City Bond through the NIS with Alf Allington as their puppet front man. What developed was a virtual sting operation instigated by Bernie Small and others of the EXCIRT unit. It provided what was in effect an excise duty evasion service, suspending vetting procedures, turning a blind eye to diversion and providing false documentation including forged foreign Bond stamps. This set-up became known about through the grapevine and enticed individuals, whether dishonestly inclined or not, to make use of such an inviting service. Those who sourced goods from London City Bond which ended up in Shakeel Awan's distribution outlets must have been incited into committing diversion fraud by the honey pot of London City Bond.

6.93 I have read and re-read all the evidence adduced before Mr Justice Grigson and considered with care all the documents available to him. There is in my view no evidence to support the thrust of what seem to me to be extravagant assertions. There is no evidence from the interviews of defendants or the content of the daybooks or informant logs or even the statement of Alf Allington himself that HMCE or Alf Allington incited crime which would otherwise not have been committed. There is no evidence whatsoever that Alf Allington or anyone else at London City Bond provided any forged foreign stamps. There is no evidence that London City Bond provided an "excise duty evasion service". Bernie Small was a regular visitor at the Bond but there is no evidence that either he or anyone else at the NIS was running it. Alf Allington was always in charge and was in no sense the puppet of the NIS.

6.94 I repeat my view that Mr Justice Grigson would have reached findings of fact in broad agreement with those set out in Chapter three of this Review. It is against those findings that I consider a more moderate approach to the question of entrapment.

6.95 A key approach taken by HMCE in seeking to protect the Revenue from loss through diversion frauds was to identify the principals behind the frauds and collect sufficient evidence to secure their convictions. One method of achieving this was identifying suspect consignments and allowing fraudsters to move goods from Bonded warehouses whilst under observation, the technique of "letting loads run". Selected consignments would be followed under surveillance and when sufficient evidence had been obtained the perpetrators would be arrested. An unavoidable consequence of this method was that arrears of duty would build up during the course of the investigation. The NIS considered that "letting loads run" was justifiable if it led to successful prosecutions: the intention was that any arrears of duty should be recovered from the fraudsters through confiscation orders from the court.

6.96 I should, however, make clear that not all investigations were carried out using this method. A number of operations, including Operations Paleface and Escapade, were retrospective investigations into frauds which had already taken place without the knowledge of intelligence officers or investigators.

6.97 However, where fraud was to be investigated by letting suspect loads run, HMCE needed the complete co-operation of the Bonded warehouse. In order to secure that co-operation it was necessary to indemnify the warehouse from any claim for recovery of the duty that the warehouse would otherwise would have been required to pay on the diverted goods. Whilst no express indemnity was ever given to London City Bond an implied indemnity plainly was, as the prosecution accepted. The consequence of the grant of that

indemnity was to make the perpetration of the fraud easier; checks and enquiries which could have otherwise been carried out by London City Bond were not made. It is likely that word would have got out to the criminal community and might have encouraged others to participate in fraud.

6.98 The amount of duty lost in consequence of allowing frauds to run was in the event very considerable. The arrears of duty ordered to be recovered by the court, let alone actually recovered through such orders, was only a small proportion of the revenue lost. Further there was an absence of informant logs and records to indicate what was going on in detail between the NIS officers and the Bond. The question therefore arises as to whether this sort of operation can properly be undertaken without leading to successful applications to stay subsequent criminal proceedings on the grounds of abuse of process.

6.99 The covert involvement of Customs officers or those acting under their direction in the commission of crime may amount to entrapment. Entrapment does not provide a substantive defence to the crime charged. That is so because the fact that an accused was entrapped is not inconsistent with his having committed the offence with any necessary guilty intent. However, it may lead to the criminal proceedings being brought to an end on the ground that it would be unfair to try the accused at all given the involvement of state agents in the commission of the offence.

6.100 The difficulty in any specific case is to identify what amounts to unacceptable conduct by state agents, and thus to entrapment. The appeal courts have considered the problem in a number of recent decisions. The line which must not be crossed is that running between "legitimate crime detection and unacceptable crime creation": see Lord Hoffmann in *R v Looseley; Att-Gen's Ref (No. 3 of 2000) [2002]* 1 Cr App R 29 para 50. The test of unacceptable conduct is whether the conduct would render it an affront to public conscience to prosecute (Lord Steyn in *R v Latif; R v Shahzad* [1996] 2 Cr App R 92 cited with approval in *Looseley*) or put another way whether the state agent's conduct was "so seriously improper as to bring the administration of justice into disrepute" (Lord Nicholls in *Looseley*) or put another way: "deeply offensive to ordinary notions of fairness" (Lord Bingham CJ in *Nottingham City Council v Amin* [2000] 1 Cr App R 426). If the conduct in question falls within that area the balance between the public interest in ensuring those who are charged with serious crime should be tried and the competing public interest in not conveying the impression that the end justified any means will come down in favour of a stay.

6.101 The headline test must be viewed against the general considerations rendering entrapment unacceptable conduct. In broad terms, entrapment is unacceptable because it involves the state through its

agents luring, inciting or enticing citizens into committing acts forbidden by the law and then seeking to prosecute them for doing so. That is unacceptable because the administration of justice would be brought into disrepute if the processes of the court are being used to prosecute an offence that was "artificially created by the misconduct of law enforcement authorities" (per McHugh J in *Ridgeway v The Queen* (1995) 184 ALR 19 at 92 cited in *Looseley* by Lord Hutton).

6.102 Each case must be considered on its own facts. In *Loosely* the House of Lords identified a number of factors in an attempt to provide guidance as to the distinguishing features of entrapment. But they are factors, not formulae. As Lord Hoffmann said in *Looseley:*

> one cannot isolate a single factor or devise any formula that will always produce the correct answer. One can certainly identify a cluster of relevant factors but in the end their relative weight and importance depends upon the particular facts of the case.

6.103 The "cluster of relevant factors" are broadly summarised as follows.

a. There is a distinction between causing the commission of an offence and merely providing an opportunity for an accused to commit it.

b. The distinction between causing the commission of the crime and merely providing the opportunity ultimately serves to identify the degree to which the state agent incited, instigated or pressurised the accused into committing the crime. The greater the inducement held out and the more forceful or persistent the overtures the more readily may a court conclude that the state agent overstepped the boundary.

c. The nature of the offence is relevant. There are some categories of crime in which pro-active techniques would be more needed than others.

d. The reason for the particular operation and in particular whether a reasonable suspicion of commission of crime exists is relevant. A *bona fide* investigation is likely to be a pre-condition to acceptable conduct in this area. A greater degree of pro-action by state agents is likely to be justified if there exist reasonable grounds for suspecting the commission of an offence. The existence of such a suspicion indicates that the operation is not some malicious vendetta against an individual; and that the case is not one in which state agents are merely attempting to persuade someone who was not breaking the law to start doing so.

6.104 Applying those principles to the facts as they emerge in the London City Bond cases I am of the view that there was no unacceptable

entrapment disclosed by the evidence adduced before Mr. Justice Grigson or indeed any other tribunal concerned with these events. The offences concerned, diversion duty frauds, are in a category of case in which covert operations have frequently been used in the past. They are of a kind requiring pro-active techniques, particularly in order to identify the principals. There were reasonable grounds for suspecting that diversion fraud was being carried out at London City Bond. The first diversion fraud, Operation Fluke, was detected in consequence of the NIS investigation at a time when those at London City Bond did not appreciate any fraud was taking place. Thus the later covert operations were not those in which the state simply set out to tempt the public into committing crime.

6.105 The records of contact between HMCE and the informants at the Bond were inadequate but on a fair consideration of the whole of the evidence what was happening at London City Bond was not in any real sense an undercover operation. There was no direct incitement or persuasion or counselling and procuring of traders to commit fraud at London City Bond either by officers of HMCE or, importantly, by any employee of the Bonded warehouse. London City Bond was by no means the only Bonded warehouse from which outward diversion fraud was taking place. Further, London City Bond had a large number of customers, the vast majority of whom were perfectly legitimate and law-abiding traders. It was only a handful who sought to involve themselves in fraud. In relation to that fraction of the whole there is no evidence that employees at the Bond were talking to the traders and pushing them to participate in the frauds.

6.106 No defendant charged in any London City Bond diversion fraud has ever asserted that he was involved in the fraud but acted as he did because he was unable to resist the temptation held out to him by employees at the Bond. Such a claim has not been made on behalf of any defendant pleading not guilty, nor has it been advanced in mitigation of sentence on behalf of those who pleaded guilty. The essential complaint by the defendants on the issue of entrapment was that by failing to maintain a vigilant and determined regime to protect the revenue, when those at the Bond knew that fraud was taking place, the defendants were in some way lulled into a sense of false security into thinking that they could get away with fraud.

6.107 It is obviously possible to think of circumstances in which it could properly be said that activities at a Bonded warehouse did amount to entrapment. On the evidence available in this case I am satisfied that such a conclusion was not justified at London City Bond. Faced with a massive and concerted attack on the revenue, HMCE made a deliberate policy decision to let loads run from London City Bond thus enabling them to identify not simply the front men, the hauliers and the foot soldiers, but those who were operating the

frauds and making the massive profits. In that endeavour they enjoyed considerable success, though at very great cost.

6.108 The policy itself has been the subject of considerable criticism in the Roques Report and elsewhere, and with the benefit of hindsight no doubt rightly so. However, as a policy it did not begin to amount to state sponsored crime and in my view it would be wrong so to describe it. For those reasons I conclude that the NIS were entitled to adopt a method of investigation which allowed suspect loads to move from warehouses sometimes under observation and be diverted so that enough evidence was gathered to secure a successful prosecution. That conclusion finds a resonance with the views of the National Audit Office who, reporting on the revenue losses in their Report of 2001 concluded:

> Even with the benefit of hindsight, it is difficult to determine whether a policy of greater disruption of alcohol diversion frauds between 1995 and 1998 would have led to a lower level of revenue losses. Customs investigators at the time found that where suspect consignments were intercepted at an early stage to disrupt fraudulent operations, fraudsters just moved to another warehouse to commit further frauds. And if a consignment under surveillance was stored for a period within the time limits for export, Customs did not have any legal powers to disrupt the activity.

6.109 Expressly setting aside the allegations of Gordon Smith, I have seen no evidence that HMCE or Alf Allington encouraged crime which would not otherwise have been committed. Equally, and applying the same proviso, accepting all the evidence adduced by the defence before Mr Justice Grigson and drawing every reasonable inference based on that evidence against HMCE, there is still no basis for concluding that any Customs officer committed any offence, or acted dishonestly, in relation to the Commissioners or did not believe they had the right to act as they did.

Conspiracy to conceal and cover up the role of the Allingtons

6.110 For the reasons set out elsewhere in this Review, it is neither appropriate nor possible for me to express any view on the remaining grounds advanced, for they relate directly or indirectly to allegations that Customs officers sought to cover up and conceal the true role of the Allington brothers. That is a matter presently the subject of a police enquiry.